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The International Comparative Legal Guide to:

International Arbitration 2018

15th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

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Published by
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London SE1 3PL, UK
Tel: +44 20 7367 0720
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2018

ISBN 978-1-912509-24-9
ISSN 1741-4970

Strategic Partners

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PREFACE

We are privileged to have been invited to preface the 2018 edition of *The International Comparative Legal Guide to: International Arbitration*, one of the most comprehensive comparative guides to the practice of international arbitration available today. The Guide is in its fifteenth edition, which is itself a testament to its value to practitioners and clients alike. Wilmer Cutler Pickering Hale and Dorr LLP is delighted to serve as the Guide's Editor.

As the international business community continues to embrace international arbitration as a means of resolving international commercial disputes, it is critical to maintain an accurate and up-to-date guide regarding relevant practices and legislation in a variety of jurisdictions. The 2018 edition of this Guide accomplishes that objective by providing global businesses leaders, in-house counsel, and international legal practitioners with ready access to important information regarding the legislative frameworks for international arbitration in over 49 individual states. It also surveys national and regional practices concerning international arbitration from the perspective of leading and experienced practitioners in these jurisdictions.

This fifteenth edition of the Guide will serve as a valuable, authoritative source of reference material for lawyers in industry and private practice seeking information regarding the procedural laws and practice of international arbitration, provided by experienced practitioners from around the world.

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Summary Disposition Procedures in International Arbitration

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1. National courts in a number of jurisdictions routinely adopt summary disposition procedures which allow them to make dispositive rulings on clearly meritorious or unmeritorious cases, often based on a more limited hearing of the evidence.[1] A number of international tribunals, including the European Court of Human Rights, are also empowered to summarily dispose of manifestly unfounded claims.[2]

2. By contrast, claims and defences in international arbitration – no matter how manifestly deserving or undeserving – often proceed on the same track without differentiation based on merit. Expedited arbitration procedures can speed up arbitral proceedings, but these mechanisms tend to be limited in scope to disputes below a particular size or to circumstances where parties agree to their application, and are not sensitive to the relative merits of claims and defences.[3] Although arbitral tribunals have broad case management powers, it is not clear whether, in the absence of express provisions, tribunals are permitted to adopt summary disposition procedures similar to those used by national courts.[4] Thus, in many cases, an obviously unmeritorious arbitration claim is likely to be subject to the same procedural timetable as other claims and will go through the full evidentiary process of written submissions, document production, witness evidence, expert evidence and hearings.[5]

3. This can be frustrating for parties faced with a frivolous arbitration claim or defence. Parties in particular industries, particularly the financial services industry, have cited the absence of summary disposition procedures in arbitration as a reason for preferring to litigate their disputes.[6] In recent years, arbitral institutions have increasingly paid attention to these issues and introduced a number of innovations. This chapter focuses on these developments and covers:

a. the features of summary disposition procedures used by national courts and international tribunals;

b. the availability of summary disposition procedures in international arbitration in the absence of express provisions;

c. recent developments in international arbitration rules; and

d. due process concerns and their impact on setting-aside and enforcement proceedings.

A. Summary Disposition Procedures Used by National Courts and International Tribunals

1. National Courts

4. The defining characteristic of summary disposition procedures in the litigation context is that they allow the fast-track disposition of claims, defences or even entire cases, without a full hearing or evidential process. There are two types of summary disposition procedures: early dismissal procedures; and summary judgment procedures.

5. Early dismissal procedures allow parties to apply to dismiss a claim or defence at an early stage in proceedings, usually on the grounds of an obvious and fatal defect in a claim or defence. One example is the motion to dismiss procedure under the U.S. Federal Rules of Procedure ("Federal Rules").[7] Parties typically file motions to dismiss at the outset of U.S. court litigation, usually before discovery, and can do so on several grounds, including lack of jurisdiction, insufficient service of process or a "failure to state a claim on which relief can be granted".[8] The bar is set very high: U.S. courts will construe assertions of facts in the light most favourable to the party advancing the claim, and only dismiss a claim where such party cannot "raise a right to relief above the speculative level".[9]

6. Another example of an early dismissal procedure is the striking-out procedure under the English Civil Procedure Rules ("CPR").[10] Under the striking-out procedure, a court may strike out, either on its own initiative or on the application of a party, a party's statement of case (or part thereof).[11] Grounds for striking out include where the statement of case: discloses no reasonable grounds for bringing or defending the claim; is an abuse of the court's process; or is otherwise likely to obstruct the just disposal of proceedings.[12] English courts have held that striking out is a remedy of last resort and is only appropriate in clear and obvious cases.[13]

7. Summary judgment procedures can take place at a later stage in proceedings and allow parties to obtain judgment on the whole of their claims or on particular issues, without having to conduct a full trial. One example is the summary judgment procedure under the U.S. Federal Rules.[14] Parties typically file motions for summary judgment in U.S. federal courts after discovery and shortly before a case is scheduled to go on trial.[15] To obtain summary judgment, a party needs to show, on the basis of the pleadings and the affidavits filed, that there is no genuine dispute as to any material fact, and that it is entitled to judgment as a matter of law.[16]

8. The summary judgment procedure under the English CPR is similar.[17] English courts can allow summary judgment against a party on the whole of a claim or on a particular issue if it considers that that the party has no real prospect of succeeding on or defending that claim or issue, or there is no other compelling reason why the case or issue should be disposed of at a trial.[18] This is a high threshold: English courts have held that summary judgment is only available where it is clear as a matter of law that, even if a party were to succeed in proving all the facts he offers to prove he will not be entitled to the remedy sought, or where the factual basis for the claim is "entirely without substance".[19]

B. Summary Disposition Procedures Used by International Courts and Tribunals

9. International courts and tribunals have also adopted a number of summary disposition procedures to deal with manifestly unfounded claims. One example is the European Court of Human Rights, whose constituent treaty, the European Convention on Human Rights, provides for the Court to "declare inadmissible" any application that is "incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application".[20] This is a claims-filtering mechanism that is intended to sift out the weakest cases that come before the Court.[21]

10. Similarly, courts or tribunals with compulsory jurisdiction under the United Nations Convention on the Law of the Sea ("UNCLOS") can decide, either at the request of a party or on its own initiative, whether a claim "constitutes an abuse of legal process" or whether "*prima facie* it is unfounded".[22] This mechanism covers claims that are unfounded as to merits or jurisdiction,[23] and is intended to filter out the "most blatant cases of abuse and the most evident cases of unfoundedness".[24]

C. Availability of Summary Disposition Procedures in International Arbitration in the Absence of Express Provisions

11. There are few arbitration rules that expressly address the availability of summary disposition procedures. The question thus arises whether summary disposition procedures are available in these circumstances.

12. On one view, arbitrators enjoy broad case management powers expressly conferred upon them by provisions in arbitration rules and applicable arbitration legislation, which would, in appropriate cases, include the power to employ summary disposition. A number of these provisions make specific reference to the conduct of the arbitration in an "expeditious" manner and the avoidance of "unnecessary delay or expense".[25] Commentators have noted that such provisions may provide the basis for an arbitral tribunal to use summary disposition procedures.[26]

13. Moreover, it is well-established that arbitral tribunals have the power to bifurcate the issues in dispute and make more than one award, and can thereby make an early determination of certain issues that might be dispositive of the case or avoid the need to determine other issues.[27] Such case management powers, combined with provisions that permit a tribunal to decide a case without holding an oral hearing,[28] could arguably justify, in certain circumstances, the adoption of summary disposition procedures.

14. On the other hand, a number of commentators and arbitrators have expressed reservations about the availability of summary disposition procedures absent an express manifestation of the parties' intentions for such procedures to apply.[29] Indeed, despite their advantages, parties and tribunals have only very infrequently in practice adopted summary disposition procedures in the absence of express provisions allowing their use.[30]

15. This risk aversion is sometimes justified on the view that summary disposition procedures are incompatible with international arbitration; for example, a 2007 ICC Task Force Report stated that it was "likely a summary judgment vehicle would not work in the ICC context and culture".[31] Some commentators have likewise noted that summary disposition procedures are "arguably incompatible with the right of parties to have their case heard and to deal with the case against them".[32]

16. These reservations find some support in provisions of arbitration rules that require tribunals to hold a hearing if parties so request,[33] which might explain the reluctance by arbitrators to adopt procedures that would summarily dispose of the case without holding a hearing. This is linked to another reason for such reluctance; namely, the potential for due process objections in post-award setting aside or enforcement proceedings, which are addressed in greater detail below.[34] Others regard the use of summary disposition procedures as generally inappropriate in international arbitration because arbitrators' decisions are not subject to appellate review, unlike first instance court decisions.[35]

17. Despite these reservations, summary disposition procedures have been used in two reported arbitral decisions:

a. In ICC Case No. 11413, an arbitration seated in London where the substantive issues were governed by New York law, the respondent included a motion to dismiss with its answer, on the basis that the claim was "utterly without any legal basis" and "should be dismissed as a matter of law".[36] The tribunal noted that neither the ICC Rules nor the English Arbitration Act specifically permitted such motions. However, it held that it was empowered to adopt such a procedure "if it [was] reasonable in the circumstances of a case", and that such motions were compatible with the tribunal's general powers under Article 15 of the ICC Rules and Section 33 of the Arbitration Act to adopt procedures suitable to the resolution of the case before it.[37]

b. In ICC Case No. 12297, an arbitration seated in Geneva where the substantive issues were governed by Canadian law, the respondent filed an "application to dismiss" the claimant's claims as a matter of law.[38] Noting that the ICC Rules were silent in relation to this question, the tribunal held that it could decide the procedure in accordance with Article 15 of the ICC Rules. The tribunal then noted that the parties had chosen to subject their contractual relationship to Canadian law and thus proceeded to consider the application to dismiss "by way of analogy … to Canadian practice" regarding summary disposition procedures.[39]

18. In both cases, the tribunals ultimately held that the standards for summary disposition under the applicable rules were not met, and therefore did not summarily dispose of any of the claims. However, these cases confirm that, although rare, some arbitral tribunals are willing to adopt and consider summary disposition procedures notwithstanding the absence of express provisions in arbitration rules or the parties' arbitration agreement.

D. Recent Developments in International Arbitration Rules

19. Until recently, there were no international arbitration rules that provided expressly for the use of summary disposition procedures.[40] However, this has changed in recent years, as a number of international arbitral institutions have introduced express summary disposition procedures, while others have published guidelines clarifying that summary disposition procedures are available under their existing rules. Generally, these procedures require an initial application by the parties – they do not expressly empower the tribunal to take a proactive decision to summarily determine an issue or dispute.

1. The ICSID Rules

20. In 2006, ICSID revised its Rules to include a new Rule 41(5) which provided for the early dismissal of a claim where it was "manifestly without legal merit".[41] An application for a claim had to be made "no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal".[42] This was intended to

address a gap under the previous ICSID Rules, under which a recurrent complaint by respondent states was that there was no procedure to dismiss "patently unmeritorious claims" at an early stage.[43]

21. Since 2006, there has been considerable use of the early dismissal procedure under ICSID Rule 41(5) by respondent states, and a relatively stable jurisprudence has developed regarding its interpretation. Although ICSID Rule 41(5) refers to the manifest lack of "legal merit", ICSID tribunals have consistently held that objections under Rule 41(5) may be brought as to either jurisdiction or the merits.[44]

22. The threshold for early dismissal under ICSID Rule 41(5) is set very high: in order to obtain early dismissal, the respondent needs to establish its objection "clearly and obviously, with relative ease and dispatch".[45] Applications for early dismissal rarely succeed. According to ICSID statistics, as of 2017, parties had sought an early dismissal under Rule 41(5) in 25 cases, out of which three have resulted in a complete summary dismissal of the claims and three have resulted in a partial summary dismissal of some claims.[46]

2. The SIAC Rules

23. After 2006, revisions to international commercial arbitration rules did not follow ICSID and incorporate summary disposition provisions.[47] This changed only in 2016, when the SIAC published revised arbitration rules with a new Rule 29, which is a summary disposition procedure modelled after ICSID Rule 41(5). The first of its kind amongst rules for international commercial arbitration, Rule 29 has been regarded as a "game-changer".[48]

24. The use of language similar to ICSID Rule 41(5) is intended to allow parties and tribunals to take into consideration existing ICSID jurisprudence.[49] At the same time, Rule 29 expands upon ICSID Rule 41(5) in several ways:

a. It specifies that the grounds for early dismissal include both the manifest lack of jurisdiction and the manifest lack of merits.[50]

b. It permits the early dismissal of both "claims" and "defences".[51] It remains to be seen, however, how SIAC tribunals will interpret the reference to "defences" in Rule 29, and in particular whether they will limit its application to affirmative "defences" or whether they will apply it to potentially all issues raised by the respondent in a statement of defence.

c. It does not impose any time limit on an application for early dismissal of claims or defences.[52] An application can be filed, in theory, after the exchange of written submissions or after document production. Thus, although styled as an "early dismissal" provision, Rule 29 is in practice capable of broader application as either an early dismissal or summary judgment procedure.

25. Rule 29.3 also provides that the arbitral tribunal has complete discretion in deciding whether or not to allow the early dismissal application to proceed.[53] Thus, the tribunal is empowered to prevent abuse of the summary disposition procedure. Any such abuse can also be sanctioned by adverse costs orders.[54]

26. In circumstances where the tribunal decides to proceed with an application, it has to give the parties an opportunity to be heard, before deciding whether to grant, in whole or in part, the application.[55] The tribunal has to make an order or award with reasons, which may be in summary form, within 60 days of the date of the filing of the application, unless the Registrar grants an extension.[56]

3. The 2017 SCC Rules

27. The 2017 SCC Rules also introduced a "summary procedure" for the disposition of issues of fact of law. Article 39 of the SCC Rules permits a party to request that the arbitral tribunal decide "one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration".[57] Unlike the ICSID or SIAC Rules, Article 39 of the SCC Rules does not specify the form the SCC summary procedure will take, leaving tribunals to adopt the procedure they deem appropriate in each case.[58]

28. Article 39 can apply to "issues of jurisdiction, admissibility or the merits".[59] Article 39(2) contains a number of examples of "assertions" that parties could make under the procedure, namely that:

a. an allegation of fact or law material to the outcome of the case is manifestly unsustainable;

b. even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or

c. any issue of fact or law material to the outcome of the case is, for any other reasons, suitable for summary determination.[60]

29. These examples illustrate that Article 39 is broad enough to encompass both early dismissal and summary judgment procedures. It does not set out any specific timeline within which the tribunal has to make its order or award. Article 39(6) of the SCC Rules merely provides that the arbitral tribunal "shall seek to determine the issues in an efficient and expeditious manner, while giving each party a reasonable opportunity to present its case".[61]

4. The 2017 SIAC Investment Arbitration Rules

30. In 2017, SIAC released new Investment Arbitration Rules (the "SIAC IA Rules") which are intended to be a specialised set of rules for investment disputes involving states, state-controlled entities or intergovernmental organisations. The SIAC IA Rules incorporate a summary disposition procedure at Rule 26. It is substantially similar to the early dismissal provision at Rule 29 of the 2016 SIAC Rules, with only two differences: "manifestly inadmissibility" is an additional ground for early dismissal; and, if the application is allowed to proceed, tribunals are required to decide on early dismissal within 90 rather than 60 days from the date of application.

5. The 2017 CIETAC Investment Arbitration Rules

31. CIETAC also released new Investment Arbitration Rules ("CIETAC IA Rules") in 2017. Article 26 of the CIETAC IA Rules allows the parties to "apply to the arbitration tribunal for early dismissal of claims or counterclaims in whole or in part on the basis that such a claim or a counterclaim is manifestly without legal merit, or is manifestly outside the jurisdiction of the arbitral tribunal".[62]

32. Article 26 is modelled closely after ICSID Rule 41(5). It does not follow the SIAC Rules or the SIAC IA Rules in extending the early dismissal procedure to "defences". It specifies that an early dismissal application should be made "as early as possible" and "no later than the submission of the Statement of Defences or the Counterclaim".[63] Article 26 also states that tribunals have to decide on the application within 90 days.[64]

33. Article 26 has also adopted a similar mechanism to the SIAC Rules for preventing abuse of the summary disposition procedure. Article 26(4) grants tribunals the full discretion to decide "whether to accept and consider an application for early dismissal".

6. The ICC Practice Note

34. On 30 October 2017, the ICC published a "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the

ICC Rules of Arbitration" (the "ICC Practice Note") that affirmed the availability of summary disposition procedures as part of the tribunal's case management powers under Article 22. This appears to be a significant shift from the position taken in the 2007 ICC Task Force Report, which stated that summary disposition procedures "would not work in the ICC context and culture".[65]

35. In its Practice Note, the ICC explained how an application for the "expeditious determination of manifestly unmeritorious claims or defences" may be dealt with "within the broad scope of Article 22".[66] It set out a procedure for applying for such "expeditious determination" on the grounds that "such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction".[67] This appears similar to Rule 29 of the 2016 SIAC Rules.

36. The ICC expeditious determination procedure also follows the SIAC Rules in affirming that the tribunal has "full discretion to decide whether to allow the application to proceed".[68] Unlike the SIAC Rules, however, and somewhat similar to the SCC summary procedure, the ICC expeditious determination procedure does not fix a timeline for decision on the arbitral tribunal, which merely has to decide the application "as promptly as possible".[69] The ICC Practice Note also does not prescribe the consequences that flow from determining that particular claims or defences are "manifestly devoid of merit" or "manifestly outside the arbitral tribunal's jurisdiction", and states only that the tribunal "shall promptly adopt the procedural measures it considers appropriate".[70]

37. ICC Practice Note also states that the ICC Court will scrutinise any award made on an application for expeditious determination; in principle, within one week of receipt by the ICC Secretariat.[71] This provision for expeditious scrutiny is not found in any of the other arbitration rules that have addressed summary disposition.

E. Due Process Concerns and Their Impact on Setting Aside and Enforcement Proceedings

38. Summary disposition procedures involve, by definition, some trade-off between efficiency and a party's right to a full evidentiary process or hearing. One of the key questions that parties and arbitrators must therefore consider is whether the adoption of summary disposition procedures might make an award liable to be set aside or unenforceable.

39. Tribunals are generally under a duty to act fairly and impartially towards the parties, and to ensure that each party has a reasonable opportunity to present its case or to deal with its opponent's case.[72] The failure to provide parties with a reasonable opportunity to present their case is, under most arbitration legislation, a ground for setting aside the award or refusing enforcement.[73]

40. Thus, the summary determination of a disputed issue, without allowing parties to put forward evidence or arguments at a hearing, could invite attempts before national courts to set aside the award or resist enforcement. There are, however, a number of reasons why the use of summary disposition procedures should not generally give rise to justifiable grounds for setting aside an award or refusing enforcement:

a. First, the experience of national courts and international tribunals in using summary disposition procedures suggests that the mere fact that such procedures are used should not automatically raise due process concerns.

b. Second, it is well-established that the party attempting to annul an award or refuse enforcement bears the burden of proof, and national courts have required a high threshold of proof for attempts to set aside an award or refuse enforcement on the basis that a party was unable to present its case.[74]

c. Third, national courts frequently adopt a deferential posture towards procedural and evidentiary decisions by arbitrators and tend to avoid substituting their views or procedural preferences for those of the arbitrators.[75] The adoption of summary disposition procedures is arguably a procedural decision entitled to deference.

d. Fourth, under most arbitration legislation, the party seeking to annul an award or resist enforcement has to prove an element of prejudice or injustice, which is usually by showing that the outcome would have been different if the due process issue did not exist. It is difficult to see how this would be the case where summary disposition procedures are used to dispose of patently unmeritorious claims or defences; for example, where a case can be decided on a legal basis against one party – even assuming all of its factual assertions in its favour.

41. In practice, tribunals will tend to exercise caution in applying summary disposition procedures to dispose of a claim, defence or case. Thus, in the rare case where an award is in fact rendered pursuant to summary disposition procedures, some independent and sufficiently compelling showing of procedural unfairness will likely be required for the award to be successfully challenged.

42. This also depends, of course, on the seat of the arbitration and where enforcement proceedings are sited. In the U.S., courts have consistently upheld the validity of the summary disposition of cases by arbitrators in domestic arbitrations under the Federal Arbitration Act.[76] The U.S. courts are therefore likely to dismiss a challenge to an award if it is based on the mere fact that the arbitrators applied a summary disposition procedure.

43. English courts have indicated *obiter* that the use of summary judgment procedures can be consistent with giving each party a fair opportunity to present its case. In *Travis Coal Restructuring Holdings LLC v Essar Global Fund Limited*,[77] the tribunal granted the claimant's application for summary judgment, but also adopted a hybrid procedure involving short oral hearings. The respondent applied to set aside the award before the New York Courts and the claimant sought to enforce the award in England. Although the English court did not have to decide whether to enforce the award pending the setting aside proceedings in New York, it also observed that the tribunal's use of a hybrid summary judgment procedure did not violate the parties' right to a fair opportunity to present its case.[78] This provides some indication of how English courts will treat the use of summary disposition procedures by an arbitral tribunal.[79]

44. There remains a significant amount of uncertainty regarding how national courts other than U.S. or English courts would decide. It is possible that national courts in other common law jurisdictions where summary disposition procedures are frequently deployed, such as Canada or Singapore, will take a similar attitude. It is too early to tell, however, whether there is an emerging consensus. It is even more unclear what approach courts in other civil law jurisdictions, such as Brazil or China, would take with regard to this issue.

45. In light of these uncertainties, it is important for parties who are looking to use summary disposition procedures in their international arbitrations to consider carefully their choice of seat and governing law, as well as the wording of their arbitration agreement and their choice of arbitration rules. The existence of express summary disposition provisions can materially reduce any enforceability and setting aside risks, given that national courts tend to defer to parties' agreed arbitral procedures in assessing questions of procedural unfairness.[80]

F. Conclusion

46. The potential benefits summary disposition procedures can bring to parties in reducing time and costs are significant. At the same time, arbitrators are understandably risk-adverse and

cautious about the use of such procedures in the absence of express authorisation by the parties. Recent developments in the revision of international arbitration rules are encouraging. In the investment arbitration context, ICSID has had summary disposition provisions for some time, and this trend looks set to continue in the SIAC IA Rules and the CIETAC IA Rules. The use of summary disposition procedures looks set to pick up in commercial arbitration as well, with express provisions permitting such procedures in ICC, SCC and SIAC arbitrations. The HKIAC is also considering similar provisions in its ongoing rules revision.[81] Uncertainties remain in terms of how national courts in setting aside and enforcement proceedings will treat the use of summary disposition procedures – but clarity is likely to emerge as the use of such procedures grows and becomes more familiar to parties and arbitrators.

Endnotes

1. *See* J. Gill, *Applications for the Early Disposition of Claims*, in A. J. van den Berg (ed.), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, Vol. 14, 2009, at p. 516; A. Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28(3) Arb. Intl. (2012), at pp. 487–489; J. Waincymer, *Procedure and Evidence in International Arbitration*, 2012, at p. 676.
2. *See* M. Potesta and M. Sobat, *Frivolous Claims in International Adjudication: A Study Of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunal to Dismiss Claims Summarily*, 3 J. Int. Disp. Settl. 137 (2012), at p. 139.
3. *See* Y. Banifatemi, *Chapter 1: Expedited Proceedings in International Arbitration*, in L. Levy and M. Polkinghorne (eds.), *Expedited Procedures in International Arbitration Dossier of the ICC Institute of World Business Law*, Vol. 16, 2017, at pp. 9–13.
4. *See below* at paragraphs 12–20.
5. *See* A. Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28(3) Arb. Intl. (2012), at p. 488. ("[T]he more meritless a case, the more likely that submitting it to arbitration will dispose of it less efficiently than resolving it in court".)
6. *See* ICC Commission Report, "Financial Institutions and International Arbitration", 2016, at para. 59; J. Gill, *Applications for the Early Disposition of Claims*, in A. J. van den Berg (ed.), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, Vol. 14, 2009, at p. 521.
7. *See* U.S. Federal Rules of Civil Procedure ("U.S. FRCP"), at Rule 12(b).
8. U.S. FRCP, at Rule 12(b); G. Born and K. Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, 21(2) ICC Arb. Bull. (2010), at p. 24.
9. G. Born and K. Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, 21(2) ICC Arb. Bull. (2010), at p. 24.
10. *See* English Civil Procedure Rules ("CPR"), at Rule 3.4.
11. *See* CPR, at Rule 3.4.
12. *See* CPR, at Rule 3.4.
13. *See Three Rivers District Council v Bank of England No 3* [2001] UKHL 16, at para. 117.
14. *See* U.S. FRCP, at Rule 56.
15. *See* G. Born and K. Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, 21(2) ICC Arb. Bull. (2010), at p. 25.
16. *See* U.S. FRCP, Rule 56(c); G. Born and K. Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, 21(2) ICC Arb. Bull. (2010), at p. 25.
17. *See* CPR, at Rule 24.
18. *See* CPR, at Rule 24.2.
19. *Three Rivers District Council v Bank of England No 3* [2001] UKHL 16, at para. 995.
20. European Convention of Human Rights, at Article 35(3).
21. *See* P. Leach, *Taking a Case to the European Court of Human Rights*, 2005, at p. 159.
22. United Nations Convention on the Law of the Sea, at Article 294.
23. See M. Potesta and M. Sobat, *Frivolous Claims in International Adjudication: A Study Of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunal to Dismiss Claims Summarily*, 3 J. Int. Disp. Settl. 137 (2012), at p. 143.
24. T. Treves, *Preliminary Proceedings in the Settlement of Disputes under the United Nations Law of the Sea Convention: Some Observations*, in N. Ando *et al.*, eds., *Liber Amicorum Judge Shigeru Oda*, Vol. I, 749, 2002, at p. 752.
25. English Arbitration Act, at Section 33(1)(b) (the tribunal "shall … adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined"); ICC Rules, at Article 22 (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").
26. *See* A. Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28(3) Arb. Intl. (2012), at p. 500; P. Chong and B. Primrose, *Summary Judgment in International Arbitrations Seated in England*, 33(1) Arb. Intl. 63 (2016), at p. 68; J. Gill, *Applications for the Early Disposition of Claims*, in A. J. van den Berg, ed., *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, Vol. 14, 2007, at p. 522; J. Waincymer, *Procedure and Evidence in International Arbitration*, 2012, at p. 676.
27. *See* J. Gill, *Applications for the Early Disposition of Claims*, in A. J. van den Berg, ed., *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, Vol. 14, 2007, at pp. 514–515.
28. *See* A. Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28(3) Arb. Intl. (2012), at pp. 490–491.
29. *See* G. Born and K. Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, 21(2) ICC Arb. Bull. (2010), at pp. 21–22.
30. *See*, *e.g.*, G. Born and K. Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, 21(2) ICC Arb. Bull. (2010), at p. 21.
31. M.S. Kurleka *et al.*, ICC Task Force on Arbitrating Competition Disputes, *Committee Report on Evidence, Procedure, and Burden of Proof*, 2007, at p. 30.
32. J. Gill, *Applications for the Early Disposition of Claims*, in A. J. van den Berg, ed., *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, Vol. 14, 2007, at p. 516.
33. *See*, *e.g.*, ICC Rules, at Articles 25(2), 25(6); A. Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28(3) Arb. Intl. (2012), at p. 500.
34. *See below* at paras. 45–51.

35. *See* A. Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28(3) Arb. Intl. (2012), at p. 500.
36. *See First Interim Award in ICC Case No. 11413* (Dec. 2001), 21 ICC Intl. Ct. Arb. Bull. 34 (2010).
37. *See First Interim Award in ICC Case No. 11413* (Dec. 2001), 21 ICC Intl. Ct. Arb. Bull. 34 (2010), at para. 47.
38. Procedural Order No. 1 in ICC Case No. 12297 (Aug. 22, 2003), published in *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003–2004)*, ICC Arbitration Bulletin, 2010 Special Supplement (2011), at para. 47.
39. Procedural Order No. 1 in ICC Case No. 12297 (Aug. 22, 2003), published in *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003–2004)*, ICC Arbitration Bulletin, 2010 Special Supplement (2011), at para. 58.
40. Historically, only domestic arbitration rules, particularly those in the U.S., contained express summary disposition provisions. *See* JAMS Comprehensive Arbitration Rules & Procedures, at Rule 18.
41. ICSID Rules, at Rule 41(5).
42. ICSID Rules, at Rule 41(5).
43. A. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 22(1) ICSID Rev. 55 (2007), at p. 65.
44. *See Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules 2 February 2009 in ICSID Case No. ARB/08/3, Brandes Investment Partners, LP v Bolivarian Republic of Venezuela*, at para. 52; *Award of 1 December 2010 in ICSID Case No. ARB/07/25, Global Trading Resource Corp. and Globex International, Inc. v Ukraine*, at para. 57.
45. *Award of 2 June 2016 in ICSID Case No. ARB/13/28, Translobal Green Energy, LLC and Transglobal Green Panama, S.A. v Republic of Panama*, at para. 88. *See also Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules of 28 October 2014 in ICSID Case No. ARB/13/33, PNG Sustainable Development Program Ltd. v Independent State of Papua New Guinea*, at para. 89. (ICSID Rule 41(5) is "not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts".)
46. *See* Extract from ICSID website, at "Decisions on Manifest Lack of Legal Merit" (available at: https://icsid.worldbank.org/en/Pages/process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx).
47. For example, the HKIAC Rules were revised in 2008 and 2013, the ICC Rules were revised in 2007 and 2012, the SIAC Rules were revised in 2010 and 2013, and the UNCITRAL Rules were revised in 2010. None of these rules incorporate summary disposition provisions. Commentators observed at the time that there did "not seem to be a strong call for arbitration rules generally to adopt powers similar of national courts enabling summary disposition of issues or claims". *See* J. Gill, *Applications for the Early Disposition of Claims*, in A. J. van den Berg, ed., *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, Vol. 14, 2007, at p. 525.
48. K.C. Lye and S. Leong, "SIAC Arbitration Rules 2016 come into effect", *Norton Rose Fulbright International Arbitration Report*, dated September 2016; E. Attenborough, M. Secomb and A. Sartogo, "A new dawn for summary determination in international arbitration: the revised SIAC Rules", *White & Case Client Alert*, dated 1 August 2016.
49. *See* G. Born, J. Lim and D. Prasad, "2016 SIAC Rules", WilmerHale International Arbitration Alert, dated 29 July 2016.
50. *See* 2016 SIAC Rules, at Rule 29.1.
51. 2016 SIAC Rules, at Rule 29.1.
52. *See* 2016 SIAC Rules, at Rule 29.1.
53. *See* 2016 SIAC Rules, at Rule 29.3.
54. *See* 2016 SIAC Rules, at Rule 37.
55. *See* 2016 SIAC Rules, at Rule 29.3.
56. *See* 2016 SIAC Rules, at Rule 29.4.
57. SCC Rules, at Article 39.
58. *See* SCC Rules, at Article 39(4).
59. SCC Rules, at Article 39(2).
60. *See* SCC Rules, at Article 39(2).
61. SCC Rules, at Article 39(6).
62. CIETAC IA Rules, at Article 26(3).
63. CIETAC IA Rules, at Article 26(1).
64. *See* CIETAC IA Rules, at Article 26(5).
65. M.S. Kurleka *et al.*, ICC Task Force on Arbitrating Competition Disputes, *Committee Report on Evidence, Procedure, and Burden of Proof*, at p. 30.
66. ICC, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", dated 30 October 2018, at para. 59.
67. ICC, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", dated 30 October 2018, at para. 60.
68. ICC, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", dated 30 October 2018, at para. 60.
69. ICC, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", dated 30 October 2018, at para. 63.
70. ICC, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", dated 30 October 2018, at para. 62.
71. *See* ICC, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", dated 30 October 2018, at para. 64.
72. *See*, *e.g.*, ICC Rules, at Article 22(4); UNCITRAL Rules, at Article 17(1); English Arbitration Act, at Section 33(a).
73. For example, under Section 68 of the English Arbitration Act, a tribunal's failure to provide a party a reasonable opportunity to present their case is a "serious irregularity" that could justify setting aside an award. *See* English Arbitration Act, at Section 68. *See also* UNCITRAL Model Law, at Article 34(2)(a)(iii); New York Convention, at Article V(1)(b).
74. *See* G. Born, *International Commercial Arbitration*, 2014, at p. 3229.
75. *See* G. Born, *International Commercial Arbitration*, 2014, at p. 3231.
76. *See* A. Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28(3) Arb. Intl. (2012), at p. 501.
77. *See Travis Coal Restructuring Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510 (Comm), at para. 47.
78. *See Travis Coal Restructuring Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510 (Comm), at para. 50.
79. *See Travis Coal Restructuring Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510 (Comm), at paras. 51–54. The parties subsequently settled before any decision was rendered by the New York Courts.

80. *See* G. Born, *International Commercial Arbitration*, 2014, at p. 3230; G. Born and K. Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, 21(2) ICC Arb. Bull. (2010), at pp. 31–32.

81. *See* HKIAC, "Public Consultation Process on Proposed Amendments to the 2013 HKIAC Administered Arbitration Rules", dated 29 August 2017 (available at: http://www.hkiac.org/news/revision-2013-administered-arbitration-rules).

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Pre-award Interest, and the Difference Between Interest and Investment Returns

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Even in these times of historically low interest rates, it is often the case that a significant part of any award rendered by an arbitral tribunal in favour of a claimant is interest. This is particularly the case where the tribunal only arrives at its award many years after the events that gave rise to the claim, and the tribunal quite rightly has a duty to compensate the claimant for not having had the use of the award monies over the period from the valuation date to the award. Indeed, in some cases the claim for interest can be the single largest element of damages.

The interest rate, and therefore the amount of interest awarded, was traditionally regarded as being something that was simply left to the tribunal to determine, with very little submission by the parties' counsel or by the quantum experts even though, when base rates everywhere were above 5%, interest could have such an enormous impact on the quantum of the award.

However, interest has now become much more a subject of submission and argument. After all, an award for compounded pre-award interest at a rate of 7% will be four times greater than an award at 2% after five years and nearly five times greater after 10 years.

Interest is part of the award in favour of the claimant and, as such, its purpose is to place the claimant in the same position as it would have been absent the breach or expropriatory event that gave rise to the claim. The underlying logic of interest is that "a dollar today is worth more than a dollar in a year's time".

In this article, we consider various approaches to calculating pre-award interest and, in particular, we explain the difference between interest and an award based on investment returns.

Rates of Interest

Various different bases are often put forward for calculating interest. The first is that the rate of interest should be based on the claimant's borrowing rate. This rate is supported by the Chartered Institute of Arbitrators' Guideline on Drafting Arbitral Awards which states:

> "*the amount of interest should be designed purely to compensate a receiving party for being kept out of its money and provide it with a form of commercially realistic restitution without punishing the paying party*".

The basis for using this interest rate is effectively that, if it had received the award at the time it suffered its loss, the claimant would not have had to borrow as much money as it did in fact borrow – it thus assumes a fairly normal scenario in which the claimant company borrows money to invest in its activities.

Thus, the claimant should be compensated with the rate of interest which it actually had to pay as a result of being kept out of its money. This interest rate should be able to be established as a matter of fact by the parties – it may be disclosed in the claimant's accounts or it may be simply a matter of submission by the claimant. A reasonable proxy for this rate of interest may be LIBOR plus a margin of say 2% – which is also a rate of interest commonly awarded in the English High Court in commercial cases. A very large multinational may, in fact, be able to borrow at a lower margin of say LIBOR plus 0.5%, and a smaller company may have to pay LIBOR plus 4% or more to borrow money from a bank.

Alternatively, if the claimant was never in a net borrowing position, and a reasonable assumption is that what it would have done with the award money if it had received it at an earlier date is to have placed the money on deposit, then the rate of interest may be based on the rate of interest it could have earned on a bank deposit.

Investment Rates and Opportunity Cost

Interest is sometimes claimed based on the claimant's Weighted Average Cost of Capital ("WACC") or the investment rate that the claimant states it would have earned on alternative investments to the project on which its claim is based. The WACC reflects the cost to a company of financing its operations with debt and equity, i.e. the return it needs to pay to compensate investors for investing in companies of comparable risk. The WACC, therefore, is a measure of the opportunity cost to a company of investing in one project rather than another.

Stepping back from the legal arguments regarding using a WACC rate, there is one overall reason for claimants to use this rate – it will always lead to a higher and, indeed, a much higher claim. Shareholder equity commands a higher return than debt and while the WACC is a blend of the costs of debt and equity, the lower the gearing of an entity the higher its WACC will be.[1] It is also important to bear in mind that the reason equity has a higher cost than debt is because, from the point of view of the lender/investor, it is riskier.

The WACC is not, however, a measure of interest, and it should not generally be used, in our opinion, as a proxy for pre-award interest. This is because it does not compensate the claimant for the losses which an award of interest should be compensating claimants for.

The reasons why opportunity cost or the WACC should not be used for the calculation of pre-award interest, in our opinion, include the following:

1. It would result in the elimination of investment risk over and above any borrowing cost, and thus would provide the claimant with a guaranteed return equivalent to an investment return. A company may hope to make high investment returns on some of its projects, but it is also likely to make lower returns on other

projects – and it would be wrong to compensate the claimant solely on the basis of its above-average investment returns.

2. It assumes that there are, in fact, alternative projects that would have yielded the WACC that the claimant could have invested in – whereas in reality there may have been all sorts of other limitations on the company's ability to win and carry out work profitably on alternative projects, including the company's failure to win particular tenders simply because competitors won them for whatever reason.
3. It would have the result that a claimant that invests in higher risk ventures, some of which fail, receive a higher interest rate than a well-managed claimant that invests in a portfolio of high and low risk projects, and thus has a lower WACC. Indeed, a company with poor corporate governance and therefore higher risk would receive far greater compensation than a company with good corporate governance.
4. Where a company can borrow money on the capital markets, it over-compensates the claimant for its loss. This is because, if the assumption is that the claimant would have been able to generate profits from its alternative investment, logically it should simply have borrowed money anyway and invested in those projects. Compensating a claimant on the basis of its WACC even though it did not actually borrow money to invest in such potentially profitable projects would be to over-compensate the claimant.
5. There is insufficient causal nexus between the event giving rise to the claim, and the alleged loss of opportunities.

Similar arguments apply to claims for interest based on specific returns that could have been earned on projects, actual returns on projects generally, or other measures of corporate performance such as return on equity or returns on assets.

One rare situation in which we would agree that the WACC or a similar measure might be appropriate as a measure of the pre-award interest rate is where there is some element of guarantee or warranty of returns by the respondent. But clearly this is some way from a claim for interest.

Coerced Loan Theory

The "coerced loan" theory or "forced debtor" approach is an economic approach to interest, based on the concept that the funds subject to delay have not been subject to any risk associated with the claimant's projects; rather the risk to which the funds have been exposed is the default risk of the respondent. According to this theory, the appropriate pre-award interest rate to apply becomes the respondent's unsecured borrowing rate.

There is logic in using a coerced loan theory rate of interest for post-award interest, where the claimant may still be at risk of the respondent's bankruptcy or other inability to pay, and thus arguably should be compensated for this risk. While the economic theory may be attractive, tribunals may baulk at awarding amounts of interest on this basis. Developing countries will have a higher borrowing rate than more developed countries and in investor-state disputes tribunals may prefer to exercise their discretion and use a LIBOR-based interest rate.

There is less logic in using a coerced lender interest rate for pre-award interest. This is because, once the tribunal has reached its award, the risk of the respondent going bankrupt or defaulting is no longer there. The award wipes out this risk and the reality is known, whatever might or might not have happened.

Ultimately, this is a legal issue – if the tribunal intends to compensate the claimant on the basis that the award was a "forced loan" from the claimant from the time of the breach, it may be right for interest to be based on the coerced loan theory.

Other Rates of Interest

Other rates of interest we have seen claimed include a risk-free rate or a statutory rate.

The argument for a risk-free rate is that all the risks to which the claimant is exposed are taken into account by the arbitration itself, so that by the time of the award, the only remaining requirement to be covered by interest is simply the cost suffered by the claimant for not having had its money earlier, and this can be calculated by using the risk-free rate of interest, such as a US Treasury bill rate.

A statutory post-award interest rate may exist, which may be used as the interest rate for a claim, depending on the applicable law and on the jurisdiction. For example, in England, the High Court post-judgment interest rate is currently 8%, whilst in New York it is 9% – which currently is likely to be a far higher rate than any other interest rate the claimant can use. Bank rates have been low since the financial crisis in 2008, whereas these judgment interest rates have not been adjusted to follow the decline in actual interest rates. Clearly, it may benefit a claimant if it is able to claim interest based on a New York statutory interest rate. However, it needs to be recognised that the purpose of these judgment interest rates is different, in that they are high partly to encourage losing respondents to actually pay the award quickly, as a matter of public policy – and thus they should not be used as proxies for pre-award interest.

Compound Interest

There has long been a debate over whether interest should be calculated on a simple basis or a compound basis, with the latter resulting in a higher award. Traditionally, the accepted view was that interest should only be awarded on a simple basis, and this was set down in the law of many countries, and it still remains the statutory basis of interest in a number of jurisdictions.

However in our experience, tribunals generally now award interest on a compound basis, as this more properly reflects the economic interest rate that the claimant would actually have had to pay to its bankers in the real world.

The Impact of Currency

There is a fundamental economic relationship between a currency and the interest rate on loans and deposits in that currency, and this must not be ignored when calculating interest. In simple terms, the value of a currency takes account of the interest rate offered on bank deposits in that currency and anticipated inflation, so that a country with a high interest rate is associated with a depreciating currency.

Consequently, it would be wrong for a tribunal to make an award in US Dollars and then to add interest based on the interest rate in, for example, Venezuela – as this would over-compensate the claimant, and would not take account of the fact that the US Dollar is expected to have appreciated against the Venezuelan Bolivar over the period of the claim.

Other Points

It may be the case that a commercial contract actually specifies an interest rate or interest rate basis in the event of a breach – and in those circumstances, that interest rate may well be the most reliable rate to use in an award based on such a contract.

We have referred to interest commonly being awarded on the basis of LIBOR or EURIBOR plus a premium, which is because these are

the benchmarks most commonly used as the basis for commercial interest rates, rather than other benchmarks such as Base rate in the UK. However, if US Prime rate is used as the basis for commercial interest rates, then logically that could be used for the pre-award interest rate. It is also the case that LIBOR has been tainted by well-known scandals in the last five years, so that some tribunals (for example, the Yukos tribunal) decided to choose a different benchmark simply because of concern that LIBOR may have been manipulated.

Finally, we do accept that interest is one of those aspects of an award that remain clearly within the control of the tribunal, and it may use its discretion on the rate of interest as part of the subjective element of an award, which may be designed to compensate a claimant in a way which the tribunal actually considers is most fair. So, for example, in the Yukos award, the tribunal considered the evidence in favour of compound interest in other awards, but then decided to award interest on a simple interest basis.

Endnote

- Ignoring the implications of optimal gearing.

Acknowledgment

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Arbitrating in New York: The NYIAC Advantage

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New York is one of the world's leading arbitration centres. New York regularly ranks first in North America, and fourth globally, among all arbitral sites for International Chamber of Commerce (ICC) arbitrations, and it is the most important venue for arbitration in the United States. New York is regarded as the site of one-third to one-half of the international commercial arbitrations taking place nationally. Countless hearings also are held in New York each year in cases sited elsewhere but for which the city is a convenient and attractive location.

New York is the home of important arbitration institutions administering thousands of cases, including the American Arbitration Association (AAA), its International Centre for Dispute Resolution (ICDR) and the International Institute for Conflict Prevention and Resolution (CPR). New York is also the base for the ICC's North American operations, conducted by Sicana, Inc. (SICANA), and the location of a large office of the dispute resolution service JAMS.

There is a thick fabric of international arbitration organisations in New York, as well. It is the home of eight law schools, each offering programmes in arbitration. Bar Associations include: the Association of the Bar of the City of New York, which sponsors committees on arbitration and international commercial dispute resolution; the New York County Lawyers' Association; the New York Branch of the Chartered Institute of Arbitrators; and leaders and active members of the international and dispute resolution sections of the New York State Bar Association, the American Bar Association and the International Bar Association. New York's International Arbitration Club, too, links practitioners with experience in the field, who meet monthly to hear presentations and exchange views on timely topics.

Importantly, New York has a comprehensive body of substantive commercial and financial law, so that answers can be found to often intricate issues presented in arbitration or litigation. New York also permits lawyers from anywhere in the world to appear as counsel in arbitrations held locally. For those reasons, New York law is among the most frequently selected worldwide, and New York benefits as an arbitration venue as a result.

The New York International Arbitration Center

Central to New York's appeal as a forum for international arbitration is New York's dedicated international arbitration centre, the New York International Arbitration Center (NYIAC). NYIAC does not administer cases or promulgate a separate set of rules, but instead offers a home for arbitration hearings conducted under the rules of any institution or on an *ad hoc* basis. NYIAC offers state-of-the-art hearing facilities located in the heart of Manhattan, at 150 E. 42nd Street, across the street from Grand Central Terminal.

Founding and Underlying Rationale for NYIAC

NYIAC opened its doors in 2013 as a New York not-for-profit corporation organised to promote and enhance New York as a leading hub for international arbitration and other forms of alternative dispute resolution. Unlike most arbitration centres, NYIAC is not the result of a governmental initiative. It was inspired by former New York State Chief Judge Judith S. Kaye, a leading proponent of arbitration, and others in the New York international arbitration community who saw the need for New York to have its own arbitration centre. NYIAC is supported financially by a consortium of private law firms and the New York State Bar Association, groups that recognise the importance of international arbitration to the legal and financial communities in the city. NYIAC enjoys total independence from any other organisation or authority.

Working with arbitral institutions, practitioners and arbitrators, the judiciary and the academic community, NYIAC facilitates discussion and offers educational programmes on international commercial and investment treaty arbitration. NYIAC also operates a world-class hearing centre that provides a neutral, private and modern space for the conduct of international arbitrations or other dispute resolution proceedings.

Prior to the opening of NYIAC, arbitration hearings in New York often took place in law firm offices or in hotel conference suites. Those sites may offer convenience for some of the participants, but they have significant limitations. With respect to law firm offices, counsel for a party, and their client personnel, may not feel comfortable ceding "home court advantage" to an opposing party by agreeing to hold the hearing on its "turf". Splitting hearing days between two opposing firms' offices may be a solution, but it involves the expense and inconvenience of moving files and equipment back and forth. Hotel conference suites provide a neutral ground, and are available to parties whose counsel does not maintain a large New York office, but they typically are not set up with privacy or technology measures appropriate for private arbitration hearings, and they can be expensive. A purpose-built arbitration hearing facility such as NYIAC thus serves an important need for parties and counsel arbitrating in New York.

NYIAC's Mission and Activities

NYIAC's mission centres on education about international arbitration and the promotion of New York as a site for arbitration

proceedings. NYIAC and the Dispute Resolution Section of the New York State Bar Association recently published a brochure entitled "Why Choose New York for International Arbitration", which sets out in detail the legal and practical advantages of New York as a seat for international arbitration. The brochure is available for download on NYIAC's website.

In addition, each year NYIAC sponsors dozens of programmes about aspects of international arbitration, often in cooperation with law firms and law schools. These include book launches for key works in the field (e.g., *International Commercial Arbitration in New York* (second edition) and *Evidence in International Investment Arbitration*). The most significant of these is NYIAC's annual Grand Central Forum, featuring a speaker of international prominence at its Judith S. Kaye Arbitration Lecture, most recently Director Anna Joubin-Bret of the International Trade Law Division at UNCITRAL in 2018, Secretary-General Meg Kinnear of the International Centre for Settlement of Investment Disputes (ICSID) in 2017, author and professor Gary Born of Wilmer Cutler Pickering Hale and Dorr LLP in 2016, and Mrs. Cherie Blair, CBE, QC in 2015.

Other recent programme topics include the arbitration of disputes involving private and corporate trust entities, how to deal with fraud and corruption allegations in international arbitration, anti-suit and anti-arbitration injunctions in a comparative perspective, "twilight issues" (such as the law of privilege and extension of agreements to non-signatories) in international arbitration, problems and opportunities arising from third-party funding of claims, the interpretation and application of the New York Convention, and technology to support a modern arbitration practice. NYIAC also hosts special receptions for LL.M. students and was the site of the inaugural training for the IBA Arb40 Subcommittee's Toolkit on Arbitral Award Writing.

NYIAC regularly hosts programmes presented by visiting representatives of other arbitral organisations, which have included the Brazilian Chamber of Conciliation, Mediation, and Arbitration, the Lagos Court of Arbitration, the Swiss Arbitration Association, the Arbitration Court of Madrid, the Hong Kong International Arbitration Centre, the Permanent Court of Arbitration in The Hague, and the Singapore International Arbitration Centre. NYIAC also has been granted Observer status for UNCITRAL Working Group II (Arbitration and Conciliation) and III (Investor-State Dispute Settlement Reform) at the United Nations.

In addition to its work hosting and sponsoring arbitration-related programmes, NYIAC has created a public database of New York court decisions on international arbitration – the NYIAC Case Law Library – which showcases New York state and federal courts' decisions involving international arbitration with descriptions and links to full text opinions. When judgments of particular note are handed down, NYIAC offers "Case Law Chronicles" providing context and featuring analysis of the decisions. Recent Chronicles have addressed topics such as the enforcement of annulled awards, the enforcement of arbitral awards against non-signatories, the recovery of fees and costs in international arbitration and the procedure for enforcing ICSID awards in federal courts.

An important part of NYIAC's educational outreach involves the judiciary. Under the leadership of its Founding Chair, former Chief Judge Kaye, NYIAC created a Bench-Bar Dialogue with New York state and federal court judges on topics of mutual interest, including discussion of the American Law Institute's ongoing Restatement of the U.S. Law of International Commercial Arbitration.

Benefits of an International Arbitration Centre

While one of the key functions of an international arbitration centre is to offer convenient facilities for hearings, such centres can provide benefits far beyond that. International arbitration practitioners form a relatively small, albeit growing, group of lawyers. This is sometimes a subject of criticism, but it can be an advantage if the members cohere as a community where knowledge is pooled and respect is shared. Attorneys may be adversaries one day, colleagues on a matter the next day and co-panelists at an arbitration colloquium the following week. Institutions that further that collaboration and respectful competition, particularly on a local level, help knit together such a community. An international arbitration centre with goals and activities such as those of NYIAC is one of the institutions, along with law schools, Bar Associations and local arbitration-administering organisations, that can create that sense of shared goals and efforts.

Having an international arbitration centre also benefits a city's business and legal community more generally. In addition to increased revenues for hotels, restaurants, court reporters and the like, a study prepared for a task force of the New York State Bar Association found that an increase of 10%–20% in the business of dispute resolution in New York could produce approximately $200 to $400 million in incremental revenues annually for law firms in New York.

Challenges of Operating an International Arbitration Centre

Competition with Existing Arbitral Institutions?

But deciding to create and operate an international arbitration centre leads to many challenges. Cities around the world have announced the opening of new international arbitration centres in recent years. In some cases, the centres are intended to operate as new full-service arbitration institutions, with their own rules and administration procedures. This model places the newcomers in competition with other arbitral institutions near and far, almost all of which are better known, can offer track records of experience and have rules and administrative practices that they have refined over years that courts already have interpreted.

Parties deciding what arbitration rules to insert in their contracts and which administering institution to choose typically are attracted to the better known over the untested alternative. There is a time lag, too, between the writing of contracts containing arbitration clauses and the maturing of disputes that arise from some of them. New institutions, therefore, may be facing years or even decades before they can expect to have a significant arbitration case-load to be administered under their new rules.

Cities or countries with a thriving existing arbitration practice may, therefore, conclude that a centre does not require the reinvention of the wheel. As in the case of NYIAC, and also for Maxwell Chambers in Singapore and Arbitration Place in Toronto, a better model has proved to be creating a facility that works with, rather than in competition against, existing arbitral institutions.

Financial Challenges

With or without an ambition to administer cases, an international arbitration centre, of course, requires a financial plan. A centre usually, though not always, will offer arbitration hearing space as one of its principal functions. But hearing revenues inevitably will not be sufficient to fund a centre, at least in its initial years. A centre provides not only space, but personnel to make reservations and attend to the care and (sometimes) the feeding of the hearing participants. Commercial rents are not likely to recover all of the costs.

In the face of these realities, some centres have found support from government funding. Singapore's Maxwell Chambers has benefitted

from generous government sponsorship, and London's Fleet Centre received initial funding from the Corporation of the City of London. Others, such as Atlanta's Center for International Arbitration and Mediation, have affiliated with another institution – in its case, the Georgia State University College of Law – that provides essentially free hearing space.

NYIAC is perhaps unique in building entirely upon the support of the local New York legal community, including its law firms and Bar Associations. The 41 founding organisations each committed to a three-year financial pledge, since renewed by additional pledges, assuring NYIAC of necessary funds. As NYIAC has prospered, revenues from hearing room rentals have reduced the need for continuing support from firms and Bar Associations.

Operational Challenges

Operating an arbitration hearing facility presents unique challenges. A hearing typically requires at least a central hearing room, separate break-out rooms for the lawyers and clients on each side and, ideally, a small break-out room for use of the arbitrators. In order for two hearings to be held simultaneously, a multiple of this configuration may be required. There also is the question of scheduling and cancellations. Counsel ordinarily book facilities well in advance of a planned hearing date, but some cases settle shortly before coming to hearing. Cancellation charges can cover some of the lost revenue for a centre, but a loss will remain; and in the meantime, the space has been blocked so that it could not be available to other users who may have desired the same dates. Sometimes parties will reserve only two or three days for hearings, which could prevent other prospective users from booking a full week during that time.

Also, all 52 weeks of a year are not the same. Hearing space demand can be expected to peak in the late spring and in the fall, with lulls during holidays and summer vacation periods. Thus, a "full" occupancy rate will always be well short of 100%.

NYIAC has addressed these facts of life by establishing working arrangements with the American Arbitration Association, from which NYIAC sub-leases space on East 42nd Street. The AAA operates its own midtown conference centre, and it co-operates with NYIAC in providing overflow space when the situation permits, which creates flexibility for both institutions. NYIAC also has a co-operation agreement with SICANA to make space available for ICC arbitrations in New York.

Finally, no centre worth the name can function at an operational level without an electronic presence. A centre must, at a minimum, create and maintain a useful website. NYIAC's website, found at www.nyiac.org, features information about upcoming programmes, access to NYIAC's Case Law Chronicles and information about booking hearing rooms.

The Importance of Strong Leadership

A centre also needs leaders. Foremost among them is a chief executive or executive director who will be the face of the organisation and takes responsibility for all aspects of the centre's operations. These include overseeing hearing facility management and budgeting, as well as speaking and writing on the centre's behalf in support of its mission of education and promotion of international arbitration at the centre's site. A background of prior experience in the international arbitration world is, of course, valuable.

Finding a person with these multiple talents is not easy, and NYIAC is fortunate to have Rekha Rangachari as its Executive Director. Rekha is a member of the local Bar and served previously as Director of ADR Services for the New York Commercial Division of the AAA and Case Counsel at the ICDR. She travels and writes for scholarly publications, all in support of international arbitration.

Operating a centre is not a one-woman or -man job. A chief executive needs staff to handle day-to-day facility booking and operations, and budgets must provide for this. Interns, who generally are local law students, also can provide person power on a volunteer basis for projects linked to their studies. These may include research and publication of case reports on arbitration in the courts, for example, as they have done at NYIAC.

A centre also needs a supporting board of backers and advisers. NYIAC is fortunate to have the benefit of a board composed of a representative of each of its founding firms and organisations. NYIAC regularly co-sponsors arbitration programmes presented by individual law firms at their offices for their clients and others, often assisting in arranging speakers and publicity. NYIAC's Global Advisory Board consists of leaders from around the world, who offer guidance and are invited to meet with NYIAC members when visiting New York.

A centre may open its doors to individual members, who pay a small fee in return for extra benefits such as publications and private breakfast meetings with visiting and local international arbitration leaders. At NYIAC, recent breakfast speakers have included professor and dean Ingeborg Schwenzer of the Swiss International Law School, Patrick Green QC of Henderson Chambers and Kenyan judge Joyce Aluoch. NYIAC's individual members also regularly have the opportunity to hear from arbitration organisation insiders on their plans and activities.

Relationship to Local Judiciary

Finally, a centre is well advised to liaise closely with the local judiciary. Judges' attitudes toward arbitration, which influence the climate in which the process occurs, are critical to the success of any venue and its international arbitration centre.

If You Build It, Will They Come?

An international arbitration centre must be built on careful planning. Hanging out a shingle and wishing for arbitration cases will not make them appear. There must be a well-developed body of local commercial law used widely in business contracts, adequate funding for a centre to survive its initial years and widespread legal, academic and judicial community support for a new organisation that will work with existing institutions.

Perhaps most important, a centre benefits from openness. NYIAC is used for hearings under the rules of the ICC, ICDR, AAA, UNCITRAL, ICSID, CPR and occasionally others. The parties, counsel, arbitrators and witnesses each year come from dozens of nations. Other New York organisations welcome NYIAC's co-sponsorship of joint events. NYIAC does not compete with arbitration institutions, but rather works with the entire New York legal family to provide a useful set of services and facilities.

This approach has been successful for NYIAC, with a growing number of programmes, sponsors and hearing room usage through its first five and one-half years testifying to its promise.

[James H. Carter is Chair, and John V.H. Pierce is a member, of the Board of Directors of the New York International Arbitration Center.]

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Determining Delay and Quantifying Delay-Related Damages

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Overview of Determining Delays

The quantification of a delay on a construction project, along with the accompanying assignment of responsibility, is often one of the most contentious parts of any construction dispute. The accurate determination of whether or not a delay extended the project's completion date is essential since there can be significant financial issues associated with such an impact. If the delay was Employer- or Owner-caused, there could be an entitlement to the recovery of the costs that flow from that delay, including the prolongation of costs for extended general conditions, escalation costs and additional head office overhead costs. Conversely, if the delay was Contactor-caused, there may be financial compensation due to the Owner, including the recovery of any specified liquidated damages.

A variety of delay analysis methodologies and approaches to analysing delays have developed over time. Delay analysts may employ varying methodologies depending on the specific project that is being considered. Several industry publications, including The Society of Construction Law (SCL) Delay and Disruption Protocol[1] and The Association for the Advancement of Cost Engineering International (AACEI) Recommended Practice 29R-03,[2] have prepared guidelines/recommendations for the commonly used delay analysis methodologies; generally providing information on both how the methods are used as well as indications of the overall advantages and disadvantages of each.

Delay analysis techniques can generally fall under categories such as modelled approaches or observational approaches, and there may be sub-parts and deviations to each of those classifications depending on how they are employed. Commonly cited delay analysis methodologies falling within the general approaches include Impacted As-Planned Analysis, Collapsed As-Built Analysis, Contemporaneous Period Analysis, Windows Analysis, Time Impact Analysis and As-Planned *vs.* As-Built Analysis. There may be variations on the theme of some of these methodologies, and terms such as "Windows Analysis" and "Time Impact Analysis" may mean different things to different analysts and have different definitions in specific contract documents. The selection of a delay analysis methodology is dependent on a number of factors including, but not limited to, what may be specified by contract, previous acceptance, the quality and type of project documentation that is available for use in the analysis, and the size of the dispute. This chapter does not review all of the common delay analysis methodologies; however, the following sections will address key concepts in delay analysis and provide commentary on a prospective Time Impact Analysis approach and an As-Planned *vs.* As-Built approach in determining project delays.

The As-Planned Programme and Subsequent Updates

Most sizable construction projects have an As-Planned or baseline programme, usually developed using Critical Path Method (CPM) network principles on commonly used industry standard software such as Primavera (Oracle) or Microsoft Project. The type of programme and the parameters for programme development may be specified by contract or may be left up to the parties to determine. The programme as developed by the Contractor may also have to be submitted to the Owner for review and acceptance depending on the project requirements. Once a suitable programme is developed, it forms the basis for tracking and monitoring the project performance and can also be used to assess project time impacts and delays.

As the works progress, the programme is usually updated at intervals, typically monthly, and project progress is compared to the previous programme to determine if the project is running "on time", behind or ahead of schedule. Whether or not the programmes have been accurately updated during the project may have a bearing on if they can be relied upon by an analyst for use in a delay analysis. There is often disagreement during the project on the extent of impacts caused by Owner changes and/or Contractor performance. If agreement on delay impacts cannot be reached while the project is ongoing, in many situations the parties involved may decide to work out all delay issues after the works are complete so they can focus on the ongoing construction. In those instances, the contemporaneous monthly programme updates may not be complete or accurately reflect all project impacts, and their use in a forensic delay analysis may be limited.

Types of Delays

A critical delay, or a delay to the critical path of the project, will impact the project's end date. Non-critical delays may consume project float, but do not impact the end date of the project. However, non-critical delays may cause disruption. Critical delays can further be classified as excusable or non-excusable. Excusable delays generally do not fall within the Contractor's control and would entitle the Contractor to an extension of time and possibly additional compensation. Non-excusable delays are generally within the Contractor's control; therefore, the Contractor would not be entitled to a time extension or compensation and the Owner may be entitled to liquidated damages.

Excusable delays may be compensable or non-compensable delays. Excusable and compensable delays entitle the Contractor to time and

compensation, while excusable, but non-compensable delays result in entitlement to a time extension, but no compensation. Although beyond the scope of this chapter, the concept of concurrent delay may come into play in determining entitlement to compensation. The definition of concurrent delay may be stated within the contract documents. If not expressly stated, there are differing theories, definitions and interpretations of concurrent delay, the use of project float and the apportionment of concurrent delays including the "longest path" theory and the "but-for" theory. The determination of delay compensability and apportionment may be affected depending on the definition of concurrency and the analysis approach used.

A Prospective Time Impact Analysis

Time Impact Analysis (TIA) is a modelled analysis technique that is often specified within contract documents as a method to analyse project changes during the course of construction. TIAs can also be performed retrospectively. In general, a prospective TIA models the impact with respect to time by creating a separate programme network for the impact. The programme network for the impact, which is commonly called a "fragnet"[3] is then inserted into the overall programme nearest the impact point and the programme is re-calculated. Fragnets should contain all impacts related to the change and applicable time for non-construction items such as the submission of requests for information, shop drawing submissions and review times, etc. The fragnets can also evolve over time as more information about the change becomes known or as the work is completed.

The revised programme with the impact fragnet inserted is then compared to the programme without the impact to analyse what effect, if any, the change had on the overall project network. If the impact was on the critical path and extended the end date, a time extension would be warranted. That time extension may be compensable depending on the circumstances and specifics of the impact. Multiple impacts can be analysed sequentially as the project progresses.

When TIAs are performed during construction, they are usually prepared by the Contractor and submitted for review and approval by the Owner and/or the Owner's representative. Disagreement can occur regarding which programme to impact. For example, a Contractor may impact an earlier update at the time the change was first discussed, whereas the Owner may not acknowledge that the change exists until a formal change order is given. There can also be contention regarding the projected duration of the works contained within the fragnet, and how the fragnet is linked or tied in to the overall network. A Contractor may submit a fragnet that restrains all subsequent work with a "finish-to-start" relationship, meaning that all successor work cannot start until all the changed work is finished, whereas an Owner may believe that a lagged relationship, indicating that there would be a certain amount of overlap with the performance of the changed work and the existing contract work, would be more appropriate. These differences in the mechanics of the TIA can change the conclusions of the analysis, reducing or even eliminating the criticality and delay projection caused by the change.

The time required to perform TIAs during construction can be excessive. By the time the Contractor prepares the TIA, the Owner reviews it and the process repeats itself as meetings are held to resolve any differences between the parties; many months can pass, even to the point that the prospective work that was being analysed becomes As-Built. The situation can be compounded by having to analyse multiple project impacts that may interact with each other. In addition, if agreement cannot be reached and the TIA is not approved, the Owner may not allow it to be incorporated into the contract programme. As a result, the monthly programme updates may not be reflective of changes that were actually impacting the works.

An As-Planned *vs.* As-Built Analysis

A commonly used retrospective schedule analysis technique is an As-Planned *vs.* As-Built Analysis. If the programme updates on a project are not available or are inaccurate, the As-Planned *vs.* As-Built methodology can still be performed since this analysis can be done in the absence of reliable schedule updates. There can be variations in this delay analysis approach with respect to the contemporaneous or retrospective determination of the project's critical path; however, the methodology generally entails comparing the As-Built programme to the As-Planned programme to determine delays and variances. These comparisons can be divided into "periods" or "windows" based on shifts in the project's critical path or key project milestones such as foundation completed, building enclosure completed, permanent power achieved, etc.[4]

To perform an As-Planned *vs.* As-Built Analysis, in addition to the As-Planned, or baseline programme, an As-Built programme is needed. If updated properly, the last update will be the As-Built programme with an accurate recording of all activity actual start and finish dates. However, the dates recorded during the updating process may not be correct. In certain instances, a detailed As-Built programme may have to be created from other project documents such as meeting minutes, daily progress reports, monthly reports and other contemporaneous project documentation. To determine a retrospective As-Built critical path, schedule analysts will review the project history and apply a "common-sense" approach to the sequence of events that were ongoing during the performance of the works that impacted the ongoing construction. In general, different activity work paths are reviewed to establish the driving critical relationships that delayed the works. Depending on the level and type of implementation, the review technique can address shifts in the project's critical path and any accelerations that were performed on the project, as well as address concurrent delay. The As-Planned *vs.* As-Built method of analysis is based on historical information and can be applied without having updated programmes, but the analyst may face criticisms in the determination of the As-Built critical path depending on the assumptions made during the analysis procedure.

Summary

A variety of delay analysis methodologies have been developed to determine entitlement to time extensions and compensable delays. Common methodologies include the Time Impact Analysis that is often performed during the course of construction and the As-Planned *vs.* As-Built Analysis that is often performed forensically in situations where the monthly programme updates are non-existent or unreliable. Depending on how an analysis is performed and the parameters of the specific project being considered, these analyses can provide the number of days of delay that will form the basis in determining the additional project costs that flowed from those delays including prolongation of general conditions, escalation costs, additional head office overhead costs or applicable liquidated damages.

Overview of Quantifying Delay-Related Damages

The presentation of damages must be clear, concise, consistent with contract requirements and attributable to events that resulted in damages. The following sections describe the basic process for formulating and determining damages, describe types of damages to be considered and provide insight into damages preparation and presentation.[5] This chapter does not address the concepts of loss

of productivity and/or lost profit damages, which parties often also experience as a result of these or similar events.

Contractual Requirements

Oftentimes Contractors identify costs incurred as a result of Employer-caused events that may not be consistent with contract requirements. It is critical that a basic review of contract clauses and requirements be performed to assure that all damages are consistent with costs that are allowed by the contract. Failure to perform this basic review, and including costs (damages) that are specifically excluded by the contract, can impugn the integrity of the damages calculation and presentation.

The contract may contain a "Changes" clause which may describe the types of damages that may be included in a request for equitable adjustment or a change request. Attention should be paid to clauses that state requirements for differing site conditions, delay, suspension of work and cost allowability. It may be beneficial to seek legal guidance regarding the specifics of costs allowed by the contract prior to embarking on the preparation of damages to assure that credibility is maintained.

Causation

Damages typically result from project delays and disruptions due to issues such as unforeseeable physical project conditions. Delays on some projects cause the Contractor to suffer losses of productivity, while in others the reverse may be true. In either case, close coordination with the scheduling expert is required to assure that delay events and/or disrupted activities are not concurrent or Contractor-caused.

Delay damages are often determined in conjunction with the Contractor's schedule analysis, which both measures and demonstrates the causes of the increased contract duration. The increased duration can manifest itself as additional days of performance, idle time or less than fully productive performance.

Once a schedule analysis has been completed, and the additional contract duration days are linked to the Employer's actions, the increased costs to the Contractor can be calculated. The increased costs usually fall into the following categories: extended general conditions; unabsorbed head office overhead; idle equipment; and escalation.

Attention to the schedule analysis and the events that caused project delays will assure a direct link between events and resulting damages.

Damages Compensation

Unless otherwise provided for in the contract, compensation to the Contractor in the event of a breach by the Employer is based upon actual additional cost incurred by the Contractor. Thus, the Contractor's actual costs comprise the foundation of most acceptable damages quantification methodologies for prolongation and disruption.

Damages Due to Prolongation

Extended General Conditions

Direct costs resulting from an extended contract performance period typically include non-labour-related costs (job site trailers, utilities, personnel relocation costs, job site security, etc.) and labour-related costs (project manager, project administrative personnel, field office accountants, etc.). These costs are typically time-related. Care must be taken to assure this is the case when compiling and evaluating these costs.

When quantifying extended general conditions, care must be taken to only include costs that are incurred as a function of the extended performance period. Costs that would have been incurred irrespective of the delays, such as utility hookups and job site trailer mobilisation or delivery, as well as computer or other infrequent purchases, should be removed from the calculation. Once the time-related costs are isolated, a daily rate for the general conditions can be calculated. Additional considerations for the calculation of the general conditions daily rate are initial performance period costs and end of project performance costs. These daily costs can significantly differ from, and are typically less than, the costs for the period of actual delay impact, and should be excluded from the daily rate calculation. To the extent the delay days are isolated to specific time periods, care should be taken to calculate the daily costs for those discrete time periods to best isolate the cause-and-effect relationship.

Non-Labour (Time-Related)

All non-labour general conditions costs should be reviewed to confirm that they are, in fact, time-related. This is critical to ensure the credibility of the non-labour general conditions costs. All costs should be reviewed and tested to determine whether they are recurring costs incurred during the performance period. Those costs that are not considered recurring should be removed from the non-labour calculation. Once the costs have been "scrubbed", a daily rate for non-labour general conditions costs can be developed using the following calculation:

Total Time-Related General Conditions Costs / Total Performance Period Days

The daily rate can then be applied to the delay period determined by the schedule analysis. Care should be taken to memorialise the methodology that was used to determine how the time-related costs were determined as well as the detailed calculation of the damages. It is also beneficial to identify those costs that were determined to be non-time-related in the event the damages are audited.

Labour (Time-Related)

As a project is impacted, additional general conditions labour costs are typically incurred. Additionally, if schedule extensions are not granted, additional staff may be added as the contract completion date has not been revised. These additional labour costs typically can be identified as "Prolongation" and "Staff Thickening" costs. These costs are defined as:

- Prolongation – Labour costs required to manage the project (general conditions) due to an extended performance period.
- Increased Project Staff – Additional staff brought on to the project to manage increased work performed as a result of a lack of a change to the performance period. These staff members augment the staff considered at time of tender.

Care should be taken to review labour costs in relation to the original tender to assure that these are not costs that should have been included in the original tender. It is important to review all general conditions labour costs and to prepare a methodology statement that explains how the review was conducted. Not only does this lend credibility to the analysis, it will facilitate the review in the event of an audit.

Unabsorbed Head Office Overhead Costs

Delays may affect the Contractor's ability to absorb its fixed head office overhead costs as planned. These costs are normally priced

into and recovered through a Contractor's tender amount. When a Contractor experiences a delay or suspension of its work, it is often unable to fully recover its head office overhead through the anticipated level of revenue. Head office overhead includes the costs for the Contractor's corporate management personnel other than direct job site project management, payroll and human resources department costs, engineering support and other head office costs. Care should be taken to exclude any direct project costs or general conditions costs to avoid duplication within the quantum calculation.

There are several well-known and widely accepted formulas used to calculate a Contractor's unabsorbed head office overhead, including the Hudson, Ernstrom, Emden and Eichleay formulas.[6]

The Hudson formula[7] calculates a daily head office overhead and profit rate based on the Contractor's tender amount, and assumes that this rate is applicable throughout the duration of the project. The resulting daily rate is extended by the compensable delay days. When using this formula, the issue of how much of the tender markup consists of overhead *vs.* profit will need to be addressed.

The Ernstrom formula[8] calculates head office overhead in relation to all project labour costs and applies the resulting ratio to the labour costs incurred by the Contractor for the impacted project during the delay period. The next step is to apply the project labour to overhead ratio to the labour costs incurred during the delay period, with the end result being the unabsorbed head office overhead for the delay period.

The Emden formula[9] calculates head office overhead and profit using the relative amount of head office overhead to the total company revenue applied to the planned project revenue on a per-day basis to arrive at the allocable daily overhead rate for the project and the delay. The allocable daily overhead rate is extended by the number of delay days. As with the Hudson formula, an important consideration is that the result includes both head office overhead and profit.

Similar to Emden, the Eichleay formula[10] allocates head office overhead for the contract period to the impacted project, and determines a daily rate that is applied to the number of compensable delay days.

Considerations when calculating unabsorbed head office overhead:

- Was the Contractor able to mitigate its losses by shifting project resources or personnel to other projects and generate revenues that absorbed head office overhead?
- Did the Contractor experience a significant change in revenues and head office overhead unrelated to the delays on the project at issue?
- Did the Contractor absorb any part of its head office overhead through change orders or other claims?

To the extent that events such as the above occurred, an adjustment to the head office overhead calculation should be considered.

Other Prolongation Costs

Other damages that should be considered in view of events that occurred on the project include idle equipment costs, escalation costs and delay mitigation costs.

Idle Equipment Costs

During a period of delay, another impact to the Contractor often results from equipment that is idled as a result of the delay. While the idle equipment does not incur operating costs, such as fuel, it does continue to depreciate during the delay period. Depreciation is one element of a Contractor's equipment ownership costs. For leased or rented equipment, the Contractor may continue to incur rental or lease charges despite not being able to use the equipment in a planned, productive manner. Both ownership and lease or rental costs are components of idle equipment costs. For the pricing of the impact of leased or rented equipment, the Contractor's measure of damages is simply the rental or lease charges incurred during the delay period. For owned equipment, the calculation is more difficult, as the Contractor may not have developed or maintained internal equipment costs or rates. In the absence of an internal equipment cost/rate, there are a variety of equipment manuals that can be used to calculate idle equipment costs. Rate manuals/guides are used to approximate a Contractor's owned equipment costs, and include provisions for calculating idle equipment costs. Care should be used in selecting the proper make and model of the equipment, its age and condition, and the geographic location.

Escalation Costs

As a result of a delay or an extended project performance period, a Contractor often experiences increases in its costs for labour and materials. In order to quantify these cost increases, a comparison of baseline costs or rates to the actual costs or rates incurred during the delayed or extended period is necessary. The cost or rate differential experienced by the Contractor is the resulting measure of damages. It is important to only include the differential in the costs or rates, as the underlying work would have been performed absent the delay or extension.

Delay Mitigation

In addition to the costs a Contractor incurs as a result of delays, there may be costs incurred in order to mitigate delays and maintain the programmed schedule. These mitigation costs may include additional overtime, additional equipment, acceleration through added manpower, increased crew sizes, process modifications and improvements, additional shifts, extended work weeks, additional supervision, quality improvements and productivity improvements. It is important to establish that the need for increased manpower is the result of impact events, and is not the result of Contractor performance issues or under-bidding the project.

Summary

In quantifying damages, care should be taken to assure that all damages are properly documented and supported. The following is a short checklist for consideration:

- Has the contract been reviewed to assure costs to be presented are allowable?
- Has the original tender been reviewed to understand what costs were originally included?
- Can a link between impact events that occurred on the project and resulting costs be established?
- Have all costs been reviewed to determine those appropriate for presentation?
- Have analysis/methodology statements been prepared which summarise steps taken to quantify damages?
- Has documentation from the project record been included to support damages as presented?

While these questions are summary in nature, they provide a good overview to assure damages are appropriate and supportable.

Endnotes

1. 2002 1st Edition and 2nd Edition in February 2017.
2. 2007 and subsequent revisions.
3. Fragmented Network.
4. The 2017 SCL Delay and Disruption Protocol notes two variations including an "as-planned versus as-built windows" method and a "retrospective longest path analysis".
5. Portions of this chapter have been adapted from a chapter entitled "Damages in Construction Arbitrations" co-authored by Wiley R. Wright III and Mark Baker appearing in 'The Guide to Damages in International Arbitration' (*Global Arbitration Review 2016*).
6. Others include the Manshul and Allegheny formulas.
7. *J F Finnegan Ltd v. Sheffield City Council*, 43 Build. L.R. 124 (Q.B. 1989).
8. *The Construction Lawyer*, Volume 3, Number 1, Winter, 1982.
9. *Alfred McAlpine Homes North, Ltd. v. Property & Land Contractors, Ltd.* 76 BLR 59 (1995).
10. Eichleay Corporation, ASBCA No. 5183, 60-2 BCA (CCH) ¶2688 (1960).

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Regional Overview and Recent Developments: Asia Pacific

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Introduction

Due to the rich historical, cultural, social and racial diversities in the Asia-Pacific region, it is not easy to give a continent-wide overview to a heavy subject like arbitration. Inevitably, the practice of international commercial arbitration will be influenced by these various factors, experiences and legal traditions.

Whilst it would not be entirely accurate or correct to separate the various countries into two distinct spheres of legal tradition, it would be convenient to suggest that most of the countries in the Asia-Pacific region can be viewed as having either Civil Law tradition or Common Law tradition. Some countries such as Brunei and Malaysia have parallel systems of English Common Law and Islamic *Shariah* law co-existing side-by-side, whilst countries such as Laos and Vietnam have Civil Law systems infused with Soviet-style socialist doctrinal ideologies. Although the laws of both the major Civil and Common Law legal traditions will find formal setting in statutes, rules and codes of law, the influence of judicial decisions which set out the principles, standards and rules of law governing arbitration are more important in the Common Law tradition, whilst the opinions and interpretations statutes by well-known jurists are more important in the Civil Law context.

The common uniting golden thread that runs throughout most of the modern arbitration laws in the Asia-Pacific region is the implementation of the UNCITRAL (United Nations Commission on International Trade Law) Model Law, which is applied in whole or in part in most of the countries in the region. There has also been an increasing trend in the merging of the Civil and Common Law techniques and practices that have been developed by international bodies such as the International Bar Association ("IBA"). Important model codes such as the "IBA Rules on the Taking of Evidence in International Commercial Arbitration" have been drafted by the most eminent jurists against the background of Common Law and Civil Law principles and values with regards to obtaining evidence and discovery.

The continued economic growth of many of the economies in the Asia-Pacific countries, coupled with the growth of many national arbitration institutions and their increasing experiences in the administration of international commercial disputes, is an important factor in helping to further fuel the overall growth and increasing popularity of commercial arbitration as an important tool of dispute settlement. As foreign investors generally prefer using international arbitration to resolve their investment disputes, all of the governments in the region are striving to improve on their individual current legal frameworks to be more supportive of arbitration. Investors generally prefer arbitration to litigation because of two main factors. First, the investors generally get a say in appointing their own party-appointed arbitrator in three-person tribunals. More importantly, it is relatively easy to enforce arbitral awards (as compared to Court judgments) around the world. The continued growth of networks and federations of arbitral institutions such as the Regional Arbitral Institutes Forum ("RAIF") and the Asia Pacific Regional Arbitration Group ("APRAG") is also important, as the national arbitration institutions provide new forums to get together to both discuss and improve their respective arbitration laws. Such organisations also seek to assist in providing training sessions and conferences to share and improve both the standards and knowledge of international arbitration institutions in the region.

However, despite the many advances made by international arbitration institutions and organisations in attempting to bridge the Civil Law-Common Law divide in arbitration, and despite the converging practices that are emerging, it is still the case that fundamental traits will remain with the arbitrators that have been tasked to decide the arbitration. Leaving aside the different expectations of arbitrators as to the treatment of procedural and substantive laws, there are cultural differences between arbitrators from Civil Law and Common Law backgrounds. Inexperienced counsel and parties are sometimes lulled into a perception that the cultural neutrality of arbitrators is safeguarded by choosing an arbitrator or a chairperson from a country other than that of the parties. While arbitrators are often guided by what he or she personally feels to be fair, such a sense of justice is largely influenced by one legal system only, that of the arbitrator's own legal system. Appointing authorities and arbitration centres often appoint arbitrators that they feel are best suited for the case but have at times not been mindful of cultural bias. Such cultural differences between the Civil Law-Common Law divide can at times cause difficulties for lesser experienced counsel. While diversity of the pool of arbitrators is now all the rage across all established international arbitration centres, very few of such international arbitration centres have tried to address this issue. Even fewer national arbitration centres have considered this issue.

In January 2017, the ICC International Court of Arbitration unveiled its 2016 statistics. It revealed that a total of 966 new cases administered by the Court were filed in 2016. This involved 3,099 parties from 137 jurisdictions. More significantly, the number of parties from South and East Asia who invoked ICC arbitration increased by 22% in 2016. Singapore was ranked as the number one seat for ICC Arbitrations in Asia and as a seat of arbitration, it ranked 7th in the world. The ICC has increased its attention to ensure that arbitrators who are qualified or have significant experience in the designated governing law of the contract (Civil or Common Law) are being appointed in default situations. The ICC announced amendments to its Arbitration Rules on 4 November 2016 (ICC 2016 Rules), which came into

effect on 1 March 2017. The most significant improvement to the Rules is the introduction of an "Expedited Procedure". It is a "fast track" procedure that seeks to resolve lower value disputes within six-and-a-half months of the transmission of the file to the tribunal. In addition, the ICC has amended Article 11(4) of its Rules to allow the ICC Court to give reasons for its decisions as to matters concerning the appointment, confirmation, challenge and/or replacement of an arbitrator to the parties.

The two predominant seats of arbitration in the Asia-Pacific region, Hong Kong and Singapore, are ranked as the most preferred seats of arbitration outside of Europe by Queen Mary and White & Case's International Arbitration Survey. The HKIAC is generally considered to be the leading international arbitration centre in the Asia-Pacific region and is perceived to be the most neutral arbitration institution for parties coming from both Civil and Common Law jurisdictions. While many of the other international arbitration centres in the Asia-Pacific can generally be pigeon-holed into either predominant centres that favour the appointment of Civil Law arbitrators or Common Law arbitrators, the HKIAC appointing authority excels in catering to the needs of its end-user parties. If one looks at the panels of arbitrators published on the websites of some of the other arbitration centres in the region and if one does a careful study on the arbitrators that have been appointed, one notes that some of these arbitral institutions tend to have an emphasis on appointing arbitrators who tend to come more from either Civil Law backgrounds (e.g. BANI and CIETAC) or conversely appointing arbitrators mainly from Common Law backgrounds (e.g. ICA and SIAC).

The HKIAC has been meticulous in ensuring that it appoints the appropriate arbitrator from the correct legal background to suit the choice of governing laws. Despite the fact that it is geographically outside the ASEAN region and the SAARC region, the HKIAC ensures that it maintains leading arbitrators on its panel of arbitrators from all of the countries in those regions. While there is nothing wrong for certain centres to prefer appointing arbitrators from Civil Law or Common Law backgrounds, this does mean that parties who intend to select the arbitral institution in their agreements will need to be extremely careful about whether or not their selected arbitral institution will, in default situations, be likely to appoint an arbitrator that will be familiar with and uphold the principles of the governing law of the contract that has been agreed by the parties. Many end-users and experienced lawyers from ASEAN countries with Civil Law backgrounds such as Cambodia, Indonesia, Thailand and Vietnam have in recent years begun to stipulate HKIAC arbitration, as an alternate choice to SIAC Singapore, as the applicable arbitration rule in their agreements. This selection of HKIAC is perceived to allow the end-users from Civil Law countries a better likelihood of having an arbitrator from a Civil Law background in the event of a default. Conversely, experienced parties and lawyers from Common Law countries such as Brunei, Malaysia and India are astute enough to select the SIAC as it is well known to heavily favour appointing arbitrators from a Common Law background, particularly from England, the United States and Australia. In contrast to the HKIAC which is very much Asian-centric, the SIAC tries to target end-users from outside Asia including the United Kingdom and the United States. This explains the preference of the SIAC to appoint arbitrators who are nationals from the two countries in many of the more substantial cases. Fifteen members of the SIAC Court are Common Law lawyers and seven members are Civil Law lawyers. The recent setting up of the Singapore case management office by the Secretariat of the International Court of Arbitration of the International Chamber of Commerce in April 2018 will be a game-changer. As the ICC is generally seen as the superior and globally preferred arbitration centre, the new ICC case management office may well draw away cases from the ASEAN Civil Law countries that might other otherwise opt for the SIAC or the HKIAC. However, the new Singapore ICC case management office will certainly greatly help bolster Singapore's position as a leading dispute resolution hub in Asia.

In addition to the ICC and the HKIAC, the KCAB is working closely with the Seoul IDRC in trying to make Seoul a preferred seat of arbitration for both Civil and Common Law end-users. The KCAB has in recent years been meticulous in selecting appointments of arbitrators in default situations. Hong Kong and Singapore both enjoy very strong support from their respective pro-business governments and each has a sterling judicial system of impeccable standards. In addition to very learned and experienced commercial judges who tend to adopt a position of non-interference in the arbitration process, the business communities of both countries and also of communities in the Asia-Pacific tend to strongly support both these jurisdictions to be natural seats for arbitration in their agreements. In the event that the Korean Courts continue to show strong support for the arbitration process and transparency in its judgments, it would seem possible for Seoul to emerge as the third contender.

This chapter attempts to provide an overview of the most significant and recent developments in international arbitration in each of the Asia-Pacific countries discussed below.

Australia

The implementation of the International Arbitration Amendment Act 2010 ("IAA") on the 6 July 2010 has been helpful to shed Australia's reputation as a litigation-centric legal market with comparatively less interest in international arbitration. Arbitration in Australia was generally limited to cases dealing with building and infrastructure, but is now catching on in other industries.

The revision of the IAA has been most helpful in changing mindsets in business communities to adopt Australia as the seat of international arbitration. Whilst the long physical distance between Sydney and other Australian cities will no doubt continue to deter non-Australian users from adopting Australia as a natural seat for arbitration, its clean judicial image may assist in countering the physical distance drawback, and may well become a second choice to Singapore in competing for end-users of arbitration from other larger Asia-Pacific countries such as India, Malaysia and the Philippines who may wish to find an alternative neutral venue to Singapore that also has a strong and transparent judicial system.

The Amendment Act adopted the 2006 revisions to the UNCITRAL Model Law on International Commercial Arbitration and has incorporated the new provisions dealing with the enforcement of interim measures. Australia joined the ranks of Brunei and Hong Kong in this regard in adopting the 2006 revisions to the Model Law. It also recognised the need to have in-built interim measures of protection. The right of parties to previously opt in under the repealed 1974 IAA has now been repealed, and the powers under Article 17H of the Model Law providing for enforcement of interim measures are now part of the new law. Section 16(1) of the IAA makes it very clear that the UNCITRAL Model Law is to be applied as part of the law in Australia.

The different Australian States and Territories have now all adopted uniform national laws on domestic arbitration, as based on the UNCITRAL Model Law, and have now unanimously adopted the IAA as the sole legislation to govern international commercial arbitration in the whole of Australia. There are now limited grounds for Australian Courts to refuse the enforcement of an award. The changes to the International Arbitration Act and the adoption of a new model law for domestic arbitration have in effect meant that

Australia will have a harmonised system for both domestic and international arbitration. Section 19 of the IAA provides clarification to the meaning of the term 'public policy' for the purpose of Articles 34 and 36 of the UNCITRAL Model Law.

In addition to these changes to the statutes, the practice of international arbitration in Australia has been bolstered by the establishment of the Australian International Disputes Centre in Sydney on 3 August 2010. The Australian Centre for International Commercial Arbitration ("ACICA") is the main international arbitration institution in Australia and is respected by domestic and international end-users of arbitration. In March 2011, the International Arbitration Regulations 2011 came into force and designated ACICA to be the default appointing authority to appoint arbitrators to international arbitrations seated in Australia, where the parties have been unable to agree upon an appointment procedure or where they fail to agree to the mutual appointment of the sole arbitrator or chairman of the arbitral tribunal. In a bid to support the arbitration process and also to assist in harmonising judicial approaches to arbitration, the Supreme Courts Federal Court of New South Wales and Victoria each have designated specialist arbitration judges to deal with matters that concern arbitration. The Civil Law and Justice Legislation Amendment Act 2015 made recent amendments to the IAA. One of these amendments has now displaced the earlier position taken in *Esso Australia Resources v Plowman* (1995) 183 CLR 10. The new amendment has now made it clear that documents that have been produced by a party during arbitration proceedings are to be deemed as confidential.

Important Court precedents include *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd* [2012] FCA 21. The Federal Court of Australia in *Castel* held that it had jurisdiction to enforce an award made pursuant to an arbitration conducted under the 1974 IAA, and that it had jurisdiction under Section 8 of the IAA. In *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd (No 2)* [2012] FCA 1214, the Federal Court of Australia held that the public policy ground for setting aside an award required something to offend "*fundamental notions of fairness and justice*".

The Supreme Court of New South Wales in *Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd* [2012] NSWSC 1306 did not agree with a challenge that certain sections of the domestic Commercial Arbitration Act 2010 were unconstitutional. The Court held that its decisional independence was not in any way affected by the 2010 Act. In the case of *UAE Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229, the New South Wales Court of Appeal demonstrated the pro-enforcement attitude of the Australian Courts in enforcing arbitral awards by upholding the Supreme Court's decision to enforce an Abu Dhabi arbitration award. The Supreme Court of New South Wales decided that where parts of an arbitral award had breached of the rules of natural justice in respect of one facet of an arbitration, the Court had the power to sever the pathological parts of the award and to then uphold the balance of the award in accordance with Section 8 of the IAA.

The Commercial Arbitration Act has been enacted in several States including New South Wales, Queensland, the Northern Territory, South Australia, Tasmania, Victoria, and Western Australia.

Australia is a party to a number of bilateral investment treaties and generally selects arbitration under the ICSID Convention as the designated dispute resolution procedure under most of these treaties. Australia is also a party to a number of Free Trade Agreements which, with the exception of the Australia-US Free Trade Agreement, offer investor-State arbitration for the resolution of disputes.

Australia has signed the Energy Charter Treaty subject to ratification, with the declaration pursuant to Article 45(2) not accepting provisional application of treaty and the declaration concerning trade-related investment measures.

ACICA updated its Arbitration Rules on 1 January 2016. One of the major objectives of the new rules was to reduce the rising time and cost of international arbitrations. In 2014, the Perth Centre for Energy and Resources Arbitration ("PCERA") was established to administer dispute resolution in the energy and resources sector.

PCERA is set to be a regional hub for Australian and Asian energy and resources arbitrations. The PCERA Arbitration Principles has been designed to facilitate the efficient resolution of energy and resource industry disputes in the Asia-Pacific.

China

Over the last two years, the Chinese government has been promoting the 'One Belt, One Road' initiative ("OBOR"). OBOR is meant to drive closer regional economic collaboration between China and many countries in Asia and some in Europe. The Chinese government had to assure foreign investors under the OBOR Initiative that it would respect the dispute settlement mechanism and, in particular, international arbitration. As the government had to reassure foreign investors that the arbitration process would be guaranteed and has judicial support, it is not unusual that there has been a hub of activity within the official legal and judicial circles.

China's Arbitration Law is not based on the UNCITRAL Model Law, although some aspects of it adopt similar provisions in some aspects (e.g. some of the provisions relating to foreign-related arbitrations). There is centralisation of authority and administration and as such only institutional arbitration is permitted by the Law in Mainland China. Determinations of the validity of an arbitration agreement may be done either by the arbitration commission or by the People's Court.

Prior to 2017, the arbitration legal system of the People's Republic of China was comprised of six separate constituents: (1) the Arbitration Act of the People's Republic of China (1994); and (2) the Interpretation of the Supreme People's Court on Several Matters in the Application of the Arbitration Law (2006); (3) Chapter 26 of the Civil Procedure Code (2013); (4) the Supreme People's Court on Applying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1987); (5) the three separate sets of regulations of the Supreme People's Court on the acknowledgment and enforcement of arbitral awards made in Hong Kong SAR (2000), Macau SAR (2008) and Taiwan Region (2015); and (6) the Judicial Reply of the Supreme People's Court for individual cases.

In 2017, the Supreme People's Court ("SPC") issued three new sets of judicial regulations on arbitration-related matters. These are, as follows: (a) the Notice of the Supreme People's Court on Related Matters in Centralised Handling of Judicial Review of Arbitration (22 May 2017); (b) the Regulations of the Supreme People's Court on Reporting Matters in the Judicial Review of Arbitration (effective from 1 January 2018); and (c) the Regulations of the Supreme People's Court on Several Matters in the Judicial Review of Arbitration (effective from 1 January 2018). These three new pieces of regulation improve upon the current mechanism of the People's Court's judicial review on arbitration agreements and arbitral awards.

There are many arbitral institutions in China but the three most credible and respected international arbitration institutions in China are: the China International Economic and Trade Arbitration Commission ("CIETAC"); the Beijing Arbitration Commission ("BAC"); and the Shanghai International Economic and Trade

Arbitration Commission (Shanghai International Arbitration Center ("SHIAC"). All of these institutions are generally accepted by foreign investors doing business in China. Foreign investors tend to select BAC, CIETAC and SHIAC over other arbitration centres in China for a variety of reasons. BAC and CIETAC are both located in the capital Beijing while SHIAC is located in Shanghai, the second largest Chinese city and banking hub. All three arbitration centres maintain practices consistent with international standards of neutrality. BAC, CIETAC and SHIAC have allowed for the inclusion of foreign arbitration specialists, as well as leading foreign arbitration specialists in China, on their respective panel of arbitrators. They also allow for foreign lawyers to participate in its hearing process and allow foreign and international Law to be pleaded as governing Law.

The current CIETAC Rules came into force on 1 January 2015. The 2015 Rules included new provisions dealing with the appointment of emergency arbitrators and allowed for joinder/consolidation of arbitrations. In addition, the 2015 Rules introduced special provisions for arbitrations administered by the CIETAC Hong Kong Arbitration Centre. The implementation of the previous 2012 CIETAC rules caused a dispute with CIETAC's former Shanghai and Shenzhen sub-commissions and led to both institutions breaking away from CIETAC. The then regional CIETAC sub-commissions were concerned about a loss of revenue and administrative control caused by the 2012 Rules which stated that any reference to CIETAC in the arbitration agreement meant that the case must be administered by CIETAC's Beijing headquarters. The local governments of Shanghai and Shenzhen supported their respective former CIETAC sub-commissions and split away from Beijing CIETAC headquarters. The new Shanghai and Shenzhen centres began to adopt their own institutional arbitration rules and their own panel of arbitrators. The establishment of the new arbitration centres did not end problems for end-users. Different Courts at different levels in different cities of China have had to pass their judgments and juristic views on the status of arbitral proceedings and awards in the context of setting aside and enforcement proceedings of arbitral awards that had been handled by arbitral tribunals of the two former CIETA sub-commissions.

On 15 July 2015, the SPC issued its Notice of Reply to Questions raised by the Shanghai Municipal Higher People's Court in relation to the Judicial Review of Arbitral Awards involving CIETAC and its Former Sub-commissions.

The SPC confirmed that where an arbitration agreement referred to the "CIETAC Shanghai Sub-Commission" or the "South China Sub-Commission" was concluded before the former CIETAC sub-commissions renamed themselves as a result of the CIETAC split, then the newly formed SHIAC (8 April 2013) or SCIA (22 October 2012) will have jurisdiction over those disputes. It also confirmed that where parties entered into arbitration agreements referring to the "CIETAC Shanghai Sub-Commission" or the "South China Sub-Commission" on the date of or after the name change, but before 17 July 2015, CIETAC will have jurisdiction over any disputes. In the event that a claimant submitted the dispute to SHIAC or the SCIA and the respondent failed to raise objections, then the Courts should not support a party's later application to set aside or resist enforcement of an arbitral award on the ground that the SCIA or SHIAC had no jurisdiction.

The 2015 CIETAC rules contain provisions that empower the tribunal, upon the application of a party, to order any interim measure that it may deem necessary so long as it is in accordance with the applicable law. Under previous CIETAC rules, in the event that parties failed to agree on the language of the arbitration, the default language was the Chinese language. This naturally limited the number of foreign arbitrators who could undertake cases as one had to be fluent in Chinese. The 2015 CIETAC rules have carried on the amendment made in 2012 that gives CIETAC the power to designate any language in the absence of a party agreement. The rules would allow CIETAC to select an appropriate language after having taken into account key factors such as the subject matter of the dispute, as well as the nationality of the parties.

The 2015 CIETAC rules allow the parties to foreign-related arbitrations to freely agree on the governing law of the contract.

The BAC also released its new rules and they came into force on 1 April 2015. Some important provisions introduced by the 2015 BAC Rules include the power for arbitral tribunals or the BAC to refuse to allow the late amendment of a claim or counterclaim. Parties are now allowed to appoint independent transcription providers to record the hearing. Previously, parties to BAC arbitrations did not have access to a full transcript of the hearing and this had caused a lot of problems with evidence. The 2015 BAC Rules now include a provision for joinder of additional parties and also allow for multiple parties to be included, as well as consolidation of arbitrations. In a similar move to CIETAC, the new BAC rules now allow the tribunal to determine the language of the arbitration according to the specific circumstances of the case: in the event that parties have not reached an agreement upon the language of the arbitration, the language used in the arbitral proceedings will not always be Chinese. The tribunal also has the option of conducting arbitral proceedings in multiple languages. One of the most significant changes introduced by the BAC 2015 Rules, which may be an important game-changer, is to allow parties to international arbitration to pay the arbitrators either by hourly rates or according to BAC's *ad valorem* fee schedule. The 2015 BAC Rules give parties the opportunity to choose between the two calculation methods, but if no agreement is reached within the time limit, the arbitrators' fees will be calculated on an *ad valorem* basis. This move is likely to attract well-known international arbitrators who might not otherwise be attracted by the low *ad valorem* scale of fees offered by Chinese arbitral institutions. This change to the fee rule is likely to increase the attraction of leading arbitrators to the BAC more than CIETAC in Mainland China. Having said this, the CIETAC 2015 Rules also contain a separate fee schedule for CIETAC Hong Kong arbitrations and allow the parties to agree to remunerate arbitrators based on hourly rates. The parties in SHIAC arbitration come from over 70 countries and regions. The arbitral awards have been recognised and enforced in more than 40 jurisdictions. In 2015, SHIAC set up the first dispute resolution platform for the BRICS countries-BRICS Dispute Resolution Center Shanghai. In 2014, SHIAC established the Shanghai International Aviation Court of Arbitration ("SIACA") based on the Strategic Cooperation Agreement signed by the International Air Transport Association ("IATA"), China Air Transport Association ("CATA") and SHIAC. SIACA focuses on resolving disputes related to air transportation, aircraft manufacturing, aircraft sales, aircraft financial leasing, aviation insurance, general aviation trusteeship, ground services and air ticket agents.

On 8 April 2010, the Ministry of Justice of the PRC promulgated the Measures on Punishing Illegal Activities by Lawyers and Law Firms (the "Measures"). The Measures, which came into force on 1 June 2010, set out some of the scenarios which give rise to a conflict of interests. The Measures may make life slightly more difficult for arbitrators practising in the PRC.

Article 7(5) of the Measures provides that a lawyer acting as a representative in a case conducted by an arbitral institution in which he has been an arbitrator would constitute an illegal activity involving a conflict of interests. Article 47(3) of the Law of the People's Republic of China on Lawyers (the "Law on Lawyers") expressly provides that a lawyer has to avoid acting as a representative in legal affairs where he has a conflict of interests.

Any breach of the provisions of the Law on Lawyers will result in a warning and a fine. Serious breaches will attract the additional possibility of suspension of a lawyer's practice licence for up to three months, or even the revocation of the law firm's practising licence.

It is not clear if the Law on Lawyers only covers Chinese-qualified lawyers or whether it may also extend to foreign lawyers. Article 3 of the Administrative Regulations for Foreign Law Firms' Representative Organisations in the PRC provides that foreign law firms and foreign lawyers are required to comply with important ethical requirements and "professional disciplines" that are applicable to Chinese lawyers. However, there is no definition of the term "professional disciplines". Therefore, it is even more unclear as to whether or not the Law on Lawyers, which regulates the conduct of Chinese-qualified lawyers, will actually also extend to foreign lawyers practising in China. In early 2018, the PRC Government through its Central Leading Group for Comprehensively Deepening Establishment of the Belt and Road Dispute Settlement Mechanism and Body gave its Opinion leading to the creation of three new international commercial Courts in Beijing, Xi'an and Shenzhen which are under the auspices of the SPC. The intention of these Courts is for the resolution of disputes related to the Belt and Road Initiative. There has been growing international criticism as to the lack of neutrality of such Courts in cases that are to be held between PRC parties, particularly State-owned entities, on the one side, and non-PRC parties, on the other. It is likely that international parties and weaker counterparties who may be pressured to have their disputes heard in the PRC will likely negotiate to insert arbitration agreements stipulating for Hong Kong SAR, PRC into their contracts with PRC counterparties.

Hong Kong

Hong Kong has a unique position of simultaneously being part of China but also a special administrative region under the "One Country, Two Systems" doctrine. This has assisted the HKIAC appointing board and its secretariat tremendously in becoming the most reputable arbitration centre in the Asia-Pacific region, after the ICC. The HKIAC was given the 2015 Global Arbitration Review Award for 'Innovation by an Individual or Organisation in 2014'. The fact that the HKIAC does not scrutinise awards but instead leaves it to the tribunal to render a valid award greatly helps to minimise the risk of interference with the tribunal's decisions and also importantly avoids significant delays and increased additional costs associated with the scrutiny process. HKIAC's 2013 Administered Arbitration Rules are the most comprehensive set of rules on the market. The adoption of the Rules was nominated by GAR as one of the best developments of 2013. The Hong Kong Courts regularly uphold the sanctity of agreements by parties to arbitrate and the enforcement of arbitral awards are robustly upheld by the Courts. Hong Kong itself has historically been the preferred seat for China-related arbitrations. It has increasingly been viewed as a real alternative to the ICC Singapore for Civil Law countries within the ASEAN region. Many end-users with Civil Law backgrounds have been disillusioned by other arbitration centres who have a tendency to appoint arbitrators from Common Law backgrounds with no real experience of Civil Law have in recent years began to stipulate the HKIAC as a cheaper alternative to ICC Arbitration. In addition, the ASEAN Comprehensive Investment Agreement provides an investor with recourse against a Member State through arbitration under any arbitration institution. As Hong Kong is not within an ASEAN country, it allows the HKIAC to position itself as an absolutely neutral geographic forum to resolve disputes. The HKIAC has also traditionally been a very popular seat of arbitration with countries in its vicinity including Mainland China, Japan and South Korea. The HKIAC was the first offshore arbitral institution to set up an office in Shanghai/Mainland China in 2015 and this reflected the HKIAC's reputation as the arbitration centre for foreign parties with disputes relating to the PRC.

The absolute neutrality of its world class judiciary, and the work of leading arbitral institutions, such as the HKIAC and ICC, have been instrumental to maintain Hong Kong as a neutral forum for foreign parties to resolve their disputes.

Hong Kong's Arbitration Ordinance (Cap. 341) (Arbitration Ordinance), which was passed on 11 November 2010 and came into force on 1 June 2011, has unified both of the regimes dealing with domestic and international arbitrations. The 2010 Ordinance has effectively extended the application of the UNCITRAL Model Law to all arbitrations seated in Hong Kong. This has made it more user-friendly as it means that the parties are no longer required to decide whether their arbitration is domestic or international and consequently spend time on deciding which law is applicable.

Under the Arbitration Ordinance, the powers of the Hong Kong Courts to intervene in domestic arbitrations have now been curtailed. Arbitration awards handed down in Hong Kong can now only be challenged by way of setting aside in accordance with Article 34 of the UNCITRAL Model Law. This had been the old procedure adopted only for international arbitrations in Hong Kong. The Arbitration Ordinance has adopted many of the articles in the Model Law to both domestic and international arbitrations. Several provisions of the English Arbitration Act 1996 had also been used as a guide in the drafting of some of the new sections of the Arbitration Ordinance.

Some of the non-Model Law provisions in the new Ordinance include powers to allow the Courts to order a person to attend proceedings before an arbitral tribunal to give evidence. It allows the Courts to recover an arbitrator's fees where the arbitrator's mandate has been terminated upon a successful challenge, or where the arbitrator was terminated as a result of a failure to act. It is also interesting to note that the parties may mutually agree to "opt-in" provisions for judicial interventions that had previously been given to domestic arbitrations. In any event, the new Arbitration Ordinance automatically applies these "opt-in" provisions to all domestic arbitration agreements that had been entered into before and within six years after the commencement of the Arbitration Ordinance on 1 June 2011.

Hong Kong was the second country in the Asia-Pacific region (after Brunei) to have implemented the new interim measures that are based on Article 17 of the Model Law, as amended in 2006. As such, the power of arbitral tribunals to grant interim measures, such as an order for preservation of assets, and other preliminary orders, designed to protect the integrity and end result of the arbitration process, are now in place. The new Ordinance has also expressly endorsed the requirement for confidentiality and for all information disclosed during arbitral proceedings and the arbitral award to be kept confidential.

For *ad hoc* proceedings under the Arbitration Ordinance, the HKIAC has been designated to appoint arbitrators where the parties have failed to agree or have not designated an appointing authority, or the designated appointing authority fails to carry out its function.

The HKIAC also has the power to determine whether a tribunal of one or three arbitrators should be appointed to consider a dispute. The HKIAC is one of the more eminent arbitration institutions in the Asia-Pacific region. It has managed to attract and maintain a pool of leading international arbitrators who are reasonably remunerated and have assisted in maintaining the HKIAC as one of the foremost leading arbitration centres in Asia. The 2013 HKIAC

Administered Arbitration Rules (2013 HKIAC Rules) came into force on 1 November 2013. Some of the important new features of the 2013 HKIAC rules include: the introduction of emergency relief provisions (which complement changes to the Arbitration Ordinance in July 2013); the introduction of standard terms of appointments for arbitrators and an hourly fee cap of HKD 6,500 per hour; a new power of the tribunal to order security for costs; and greater guidance on interim measures of protection. Other important introductions include amendments to the existing joinder provisions and the introduction of provisions for the consolidation of arbitrations and for single arbitrations under multiple contracts to take place. Article 41 of the 2013 HKIAC Rules also introduces an expansion of the application of the expedited procedure increasing the monetary threshold from HK$250,000 to HK$25 million and will also allow the expedited procedure to apply in the event that it is agreed and in cases of exceptional urgency. The HKIAC will first consider the views of the parties before deciding if there is exceptional urgency.

The HKIAC Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules ("the 2015 Procedures") came into force on 1 January 2015. These 2015 Procedures apply where parties wish to arbitrate under the UNCITRAL Arbitration Rules but wish the HKIAC to provide administrative assistance. The 2015 Procedures were promulgated to allow the HKIAC to administer arbitrations which applied either of the 1976, 2010 and 2013 UNCITRAL Rules. The 2015 Procedures explicitly allow the HKIAC to also administer investor-State arbitrations under the UNCITRAL Rules.

The HKIAC has the edge over all other national arbitration centres in Asia as their secretariat is composed of counsel of Common Law and Civil Law backgrounds and, more importantly, will appoint appropriate arbitrators to deal with disputes that are governed by either Civil Law or Common Law. Unlike other Asian arbitration centres that appear to favour appointing Common Law arbitrators from outside the Asia-Pacific region, the HKIAC has a trusted reputation for appointing the appropriate qualified arbitrator according to the circumstances of the case. On 1 January 2016, the HKIAC introduced a new Practice Note on Consolidation of Arbitrations, applicable to all requests for consolidation submitted under Article 28 of the HKIAC Rules on or after that date. The Practice Note gives useful practical guidance on issues to be considered and set out in any request for consolidation and also for responses to such requests.

On 18 May 2015, the Hong Kong Government announced that it had plans to create an international dispute resolution hub in a heritage building (currently housing the Hong Kong Court of Final Appeal). The hub is intended to house the HKIAC, the Asia Office of the ICC International Court of Arbitration, the CIETAC Hong Kong Arbitration Centre and the Asia-Pacific regional office of the Hague-based Permanent Court of Arbitration. As of June 2017, the Hong Kong Government has announced it would allocate space in the former French Mission Building and the West Wing of the former Central Government Offices to host such arbitration bodies.

In the decision in *Gong Ben Hai v Hong Kong International Arbitration Centre* [2014] HKCFI (judgment of 28 April 2014), the Court of First Instance dismissed a claim brought against the HKIAC over its decision not to disqualify two arbitrators. The Court ruled that the HKIAC was not the proper defendant in Court proceedings pertaining to an arbitrator challenge and that the proper defendant was the respondent in the arbitration. The Court also held that arbitral institutions were immune from suit under the Hong Kong arbitration ordinance unless they exercised their functions in a dishonest manner.

In the decision of *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKEC 514, the Hong Kong Court of First Instance refused to enforce a PRC Mainland arbitral award on public policy grounds. In this case, one of the arbitrators had acted as both an arbitrator and a mediator. The very fact that one member of the tribunal had *ex parte* communications after the commencement of the arbitration process was deemed as unacceptable by the Court. It took the view that such circumstances would be contradictory to the "basic notions of morality and justice in Hong Kong". It is important to note that the Court also confirmed there is nothing wrong in principle with the concept of arbitration-mediation. Indeed, Sections 32(3) and 33 of the new Arbitration Ordinance expressly allows an arbitrator to act as a mediator with the parties' agreement, subject to certain important safeguards that are designed to ensure that there is an equality of access to confidential information. The *Keeneye* judgment is, however, timely and an important judgment as it provides an example as to the serious risks involved in situations where an arbitrator is also acting as a mediator.

On 19 February 2013, the Hong Kong Court of Final Appeal in the case of *Pacific China Holdings Limited (in liquidation) v Grand Pacific Holdings Limited* (FAMV No. 18) of 2012 refused to grant Pacific China leave to appeal against a judgment of the Hong Kong Court of Appeal. The Court of Appeal had, in its judgment in May 2012, confirmed that the threshold level to set aside an arbitral award on grounds of lack of due process is meant to be high and that a High Court should only set aside an arbitral award on grounds of lack of due process if the conduct of an arbitral tribunal was sufficiently "egregious". The Court of Appeal held that only "a sufficiently serious error" that undermined due process could be regarded as a violation of Article 34(2) of the Model Law and that "[a] party who has had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process". The Court of Appeal also confirmed that the burden is on the party seeking to set aside the award to show that it has suffered prejudice as a result of the lack of due process. However, the Court of Appeal agreed with the High Court that the "Court may refuse to set aside an award notwithstanding such violation if the Court was satisfied that the outcome could not have been different". The principle was followed by the High Court in *Po Fat Construction Company Limited v The Incorporated Owners of Kin Sang Estate* (HCCT 23/2013). In *Shanghai Fusheng Soya-Food Co Ltd v Pulmuone Holdings Co Ltd* [2014] HKEC 825, the High Court refused an application to set aside a domestic ICC award on the ground that the award was in conflict with the public policy of Hong Kong. The Court made it clear that a narrow construction must be given to the term "contrary to public policy" as the case is not concerned with the substantive merits of a dispute nor the correctness an award.

Whilst Hong Kong is not a party to any Bilateral Investment Treaties or Multilateral Investment Treaties, allowing for recourse to arbitration under the ICSID regime, with the "One Country, Two Systems" principle enshrined in the Basic Law, Hong Kong has established its own network of bilateral investment treaties, otherwise known as Investment Promotion and Protection Agreements with other countries, providing for arbitration under the UNCITRAL Arbitration Rules. In October 2016, with the enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2017, a new Part 10A (Sections 98E–98W) was added to the Arbitration Ordinance. The latest amendments introduced by this 2017 Bill have abolished the previous Common Law tort and offence of champerty and maintenance in as far as third-party funding of arbitration is concerned. In June 2017, the Legislative Council approved the passage of the 2017 Bill. The new law officially amended the Arbitration Ordinance (Cap. 609)

and has abolished the doctrines of champerty and maintenance for arbitration. The new law now allows third parties with no genuine interest in the disputes to fund the arbitration, in return for a share in any award or settlement. The new 2017 law allows a third-party funder to provide funding for arbitration to a statutorily defined "*funded party*" by way of a "*funding agreement*". This funding is provided in return for a financial benefit only in the event that the arbitration is "*successful within the meaning of the funding agreement*". The Hong Kong Secretary of Justice, Rimsky Yuen SC, has in a recent official statement made it clear that Hong Kong was interested in becoming the hub for dispute resolution for China's One Belt One Road Regime. The Secretary Justice emphasised that in addition to its: world-class judiciary; strategic geographical location; and strong base of international law firms, Hong Kong had one additional advantage. This was in the "*ease of cross-border enforcement of arbitral awards between the Contracting States of the New York Convention as well as with the Mainland and the Macau SAR*". Indeed, this special arrangement between China and Hong Kong for enforcement of awards (*Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong*) coupled with the HKIAC's unrivalled experience among non-Mainland arbitration institutions in handling disputes involving Chinese parties does give Hong Kong the edge over all other non-PRC/Mainland jurisdictions.

India

The Indian Arbitration and Conciliation Act came into force in January 1996 and is largely based on the UNCITRAL Model Law. The Arbitration and Conciliation Act, 1996 was amended by the Arbitration and Conciliation (Amendment Act), 2015. The Amendment Act incorporates many of the proposals that had been recommended in the 246th Law Commission Report released in 2014 (Law Commission Report). There have been many important changes made by the Amendment Act that has improved the practice of arbitration in the country. Under the original 1996 Act, there was no designation of the High Court being the exclusive Court to deal with arbitration matters. This resulted in international parties having to approach lower Courts in rural places of India to obtain necessary relief from Court. The amended Act makes it clear that as soon as the arbitral tribunal has been constituted, the Courts can no longer entertain any application for interim relief, unless the Court should find that the interim relief that has been ordered by the tribunal is not workable. The amended Act also now requires a prospective arbitrator to disclose in writing the existence of any past or present relationship with either of the parties or the subject matter of the dispute, which is likely to give rise to justifiable doubts as to his independence and impartiality. Seminal Indian Supreme Court judgments of particular importance to international arbitration include the following:

(i) in the decision of *Chloro Controls v Severn Trent Water Purification* [2013] SCC 641, the Supreme Court decided that the expression '*any person*' in Section 45 "*clearly refers to the legislative intent of enlarging the scope of the words beyond 'the parties' who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party*". The Court also held that a non-signatory party could be subjected to arbitration provided the transactions were with a group of companies and the Principal Agreement in the case tied up all the other agreements; so the fact that a party was non-signatory to one or other agreement may not be of much significance. It held that "*the performance of any one of such agreements may be quite irrelevant without the performance and fulfilment of the Principal or the Mother Agreement*";

(ii) in *Shri Lal Mahal Ltd. v Progetto Grano Spa*, 2013 (8) SCALE 489, the Supreme Court held that although public interest has varied from time to time, an award which is patently in violation of statutory provisions cannot be said to be in the public interest. It construed the term 'public policy' of India in a narrower fashion as earlier laid down in *ONGC v Saw Pipes Ltd* (2003) SSCC 705, which considered an award patently illegal if it is contrary to the terms of the contract entered into between the parties. The Court concluded to say that "*[i]llegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court*";

(iii) the Supreme Court, in *Antrix Corp. Ltd. v Devas Multimedia P. Ltd*, 2013 (7) SCALE 216, had to deal with another issue in relation to the appointment of an arbitrator. The parties had entered into an arbitration agreement providing for arbitration under rules and procedures of the ICC or UNCITRAL. The respondent exercised the arbitration clause and appointed an arbitrator under the ICC Rules. The petitioner initiated separate arbitration proceedings seeking to appoint an arbitrator under the Act. The Supreme Court referred to Section 11(6) of the Act and held that once an arbitration agreement has been invoked by any party, and an arbitrator has been appointed, the other party to the dispute cannot again independently invoke the provisions of the arbitration agreement. Once an arbitral tribunal has been appointed, Section 11 of the Act did not permit the Court any powers to refer the same dispute again to arbitration; and

(iv) the Supreme Court, in *World Sport Group (Mauritius) Ltd. v MSM Satellite (Singapore) Pte. Ltd.* (Civil Appeal No. 895 of 2014), held that in foreign arbitrations seated outside India, arbitrators had the right to decide issues of fraud. The Indian Courts could decline to enforce an award only if it reaches the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, but could not do so on the grounds that allegations of fraud or misrepresentation are involved. The Supreme Court, in *Oil and Natural Gas Corporation Ltd. v Western Geco International Ltd.* (2014) 9 SCC 263, held that the expression 'fundamental policy of Indian law' had to be construed narrowly when a Court is asked to set aside an arbitral award. The Court held that a tribunal must adopt a judicial approach in line with the principles of natural justice, and the arbitral award should not be so irrational that no reasonable person would have reached the same decision.

The repealed explanation provided under the original Act that defines 'public policy' has since been replaced with a new explanation that now brings the legislation in line with those recent judicial precedents in India. Explanation 1 to Section 34(2)(b), Arbitration and Conciliation Act, 1996, as amended by the Amendment Act, now provides that an arbitral award would be in conflict with public policy if the award: (i) had been affected by corruption or fraud or was in breach of confidentiality in relation to settlement agreements or non-admissibility of evidence, forming part of conciliation proceedings in other arbitral proceedings; (ii) conflicts with basic notions of morality and justice; and (iii) contravenes the fundamental policy of Indian law.

Explanation 2 to Section 34(2)(b) of the Amendment Act has made it clear that a Court is not entitled to review an award on determining whether the award is in contravention with the fundamental policy of India. The Arbitration and Conciliation (Amendment) Bill 2018 is currently in the process of being tabled before the Indian Parliament. The main objectives of this new Bill are: (1) to allow arbitrators to be appointed by arbitral institutions designated by the Supreme Court or High Court instead of direct appointments by the Courts; (2) to insert a new Part 1A to the Act for the

establishment of an independent body to grade arbitral institutions and accreditation of arbitrators; (3) to statutorily provide for confidentiality of information relating to arbitral proceedings and to indemnify arbitrators from legal proceedings for any action or omission done in good faith in the course of arbitration proceedings; and (4) to clarify that Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, is only applicable to arbitral proceedings which commenced after 23 October 2015.

India has not signed or ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and is not a party to any Bilateral Investment Treaties or Multilateral Investment Treaties allowing for recourse to arbitrations under ICSID.

Indonesia

As the largest and most populous ASEAN country with a thriving economy, Indonesia is an important place for arbitration, albeit mainly domestic arbitration. Indonesia is not generally designated as the seat of arbitration by non-Indonesian parties for a number of reasons. Rightly or wrongly, there is a perception that the Indonesian judiciary would not support the enforcement of domestic arbitral awards where there is no international pressure, unlike the recognition and enforcement of international awards by way of Indonesia's membership of the 1958 New York Convention. This perception is not necessarily correct, as Indonesian Courts do not have the power to get involved whilst an arbitration matter is ongoing. Article 3 and Article 11 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("the Arbitration Law") prohibits the State Courts from hearing a case which is in breach of an arbitration agreement or has already been referred to arbitration.

However, imaginative parties have tried to get around this prohibition by filing a Court action as a claim under tort instead of a breach of contract claim. It is ultimately up to the Indonesian Supreme Court to be firm and make a decision as to whether or not they would uphold the spirit and intent of the arbitration law. There is nothing to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship where the parties have agreed that all disputes are to be resolved by way of arbitration. It would be correct, in principle, to avoid confusion in the law to adhere to the contractual analysis of the dispute as it is a contractual relationship in which the parties have the right to expect their obligations to each other to be determined by way of arbitration. Courts of other Civil Law countries have taken the view that a claim in tort falls within the scope of an arbitration agreement, if it can be shown that the claim is actually based on the contract and contractual obligations between the parties. Generally, claims made in tort for loss and damages caused as a result of material damage are arbitrable issues. Typical arbitration agreements are generally broadly drafted along the lines that parties will resort to arbitration for "*any and all disputes or differences arising out of or in relation to the agreement between the parties or as to their rights and obligations*". This is deemed by Courts and tribunals in Civil countries to be broad enough to catch both claims in contract as well as tort. Other jurisdictions take the view that if the same claim could be made concurrently on either grounds of contract or grounds of tort, then it can be heard by the tribunal and the Court should decline jurisdiction.

Parties in Indonesia tend to select institutional arbitration rather than *ad hoc* arbitration as there is a general perception that arbitration should be conducted and administered by an arbitral institution. The largest and most important arbitral body is the Indonesian National Board of Arbitration ("BANI"), which handles the largest number of arbitration cases in the country. Until recently, all matters connected to the oil and gas industry had to pass through BPMIGAS and had to include a BANI arbitration agreement. Due to the size of the economy and population of Indonesia and overwhelming dominance of BANI, the size of the arbitration disputes handled by BANI are generally multiple times greater than the combined total *quantum* of many other arbitral institutions in ASEAN countries. There are current proposals from BANI and other end-users of arbitration to amend and update the current Arbitration Law of Indonesia, and it is expected to be brought more in line with the UNCITRAL Model Law. BANI has recently amended its rules of arbitration and they came into force on 1 January 2018. In addition to BANI, other smaller arbitration institutions in Indonesia include the Indonesian *Shariah* Arbitration Board, the commercial and financial disputes of which are based on *Shariah* principles. The Indonesian Capital Market Arbitration Board ("BAPMI") is another small institutional arbitration body that has been set up to resolve disputes pertaining to capital market activities under the administration of an institution. Finally, the Indonesian Construction Arbitration and Alternative Dispute Resolution Board ("BADAPSKI") is a specialist arbitration centre for construction cases.

Like the rest of the ASEAN countries, apart from Singapore, there are not many international arbitrations taking place in Indonesia which have no connections to local Indonesian parties or local Indonesian contracts. Many of the disputes relating to Indonesian contracts tend to be arbitrated in Singapore under the ICC rules of arbitration. The ICC is trusted by Indonesian lawyers as it has a propensity to appoint arbitrators that have understanding of Indonesian law or of Civil Law. Over the last few years the HKIAC was becoming more attractive to Indonesian end-users than the SIAC, especially in cases where end-users had agreed for the governing law of the arbitration to be Indonesian law. However, with the new setting up of the ICC Secretariat in Singapore, it is likely that end-users who wish to get around the strong possibility of the SIAC appointing non-civil law arbitrators, will now increasingly view ICC arbitration in Singapore as the better alternative institution where Indonesian disputes are to be seated in Singapore.

The Indonesian Civil Code is directly derived from and translated from the Dutch Civil Code; the latter is written in Dutch. As with many Civil Law systems, Indonesian law relies on the comments and interpretations of prominent professors and authors in the respective relevant fields of law for the interpretation of statutory provisions. It is generally deemed to be proper to cite positions and statements made in leading textbooks by very eminent professors. Such opinions, including commentators of the codes and laws tend to be treated as an important source of Indonesian law. Indonesian law allows arbitral tribunals to issue an attachment order to prevent a party to the arbitration from transferring or disposing of its assets during the arbitral proceedings. Indonesian tribunals also issue provisional awards to order a party from doing something that may damage the arbitration process. Indonesia is not in favour of ICSID arbitration and it has been in the process of terminating or not renewing all of its existing BITs with other countries since 2015.

Japan

The main source of law relating to domestic and foreign arbitral proceedings and recognition and enforcement of awards in Japan is the Arbitration Act (Law No. 138 of 2003). The Japanese Arbitration Act, which was amended in 2004, is substantially modelled on the UNCITRAL Model Law (the original 1985 version). Article 25 of the

Act stipulates that there must be equal treatment of all parties to the arbitration. An arbitral tribunal or a party may make an application to a Japanese Court to assist in the taking of evidence. However, the IBA Rules on the Taking of Evidence in International Commercial Arbitration have seen increasing acceptance and adoption in international arbitrations that have been recently conducted in Japan.

Whilst it is not unique, Japanese arbitration law also allows the arbitral tribunal, or one or more of its members, to attempt an amicable mediation and settlement of the dispute with the consent of the parties. Many commercial arbitrations in Japan have been amicably settled in this manner. In addition to the Model Law, Japan has special provisions for consumer arbitration and individual employment arbitration for the future dispute, by which a consumer has the right to terminate the arbitration agreement entered into with a business and the arbitration agreement between an individual employee and a business employer is invalid. Japan has signed and ratified the Washington Convention and it is a party to some Bilateral Investment Treaties allowing for recourse to arbitration under ICSID. As with Korea, Japanese Courts simply dismiss actions rather than stay these when such an action has been brought in respect of a dispute which is the subject of an arbitration agreement.

The Japan Commercial Arbitration Association ("JCAA") is the most active and important arbitration institution in Japan. The JCAA has its own arbitration rules and maintains a list of prominent arbitrators on its panel of arbitrators. The JCAA has recently amended its arbitration rules; such amendments came into force on 1 February 2014. Some of the important changes include expediting the conduct of the arbitral proceedings, and Rule 39.1 of the amended rules provides that an arbitral tribunal shall use reasonable efforts to hand down an arbitral award within six months from the date when the tribunal was constituted. The amended JCAA Rules also introduced provisions for interim measures by an emergency arbitrator. The Osaka High Court in its decision on 28 June 2016 overturned the finding of the lower Court and instead upheld a challenge against an arbitral award as a result of the failure of the presiding arbitrator to disclose a potential conflict of interest in a JCAA arbitration that was seated in Osaka.

The Osaka High Court held that the potential conflict was subject to an arbitrator's continuous obligation to disclose such conflicts. It also held that an arbitrator would not be entitled to be released from this disclosure obligation simply because the arbitrator claimed that he was never allegedly informed of the class action undertaken by his law firm for one of the parties arbitrating before him. There is a growing trend for arbitrators and counsel in Japan to apply or seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration. An arbitral tribunal is entitled to grant an interim measure to provide security to the integrity of the arbitration hearing process or to protect the condition of the subject matter of the dispute until an arbitral award has been rendered.

Article 15 of the Act allows a party, either before or during an arbitral proceeding, to request from a Court an interim measure of protection in respect of any civil dispute that forms the subject of the arbitration agreement. In a decision issued on 10 March 2011, the Tokyo District Court dismissed a plaintiff's tort claim as there was an existing arbitration agreement in place between the plaintiff and one of the defendants.

In a decision issued on 23 August 2013, the Tokyo District Court dismissed an application to set aside an award and endorsed the arbitration agreement that the parties had agreed to enter into. The Court held that in accordance with the Japanese Arbitration Act, the minimum requirement for a valid arbitration agreement was an agreement to arbitrate in writing. The Court rejected the mistake submissions brought by the applicant.

Korea

The Korean Arbitration Act was first enacted in 1996 and initial amendments were introduced on 31 December 1999. Although the 1999 revisions to the Arbitration Act did not adopt the Model Law in its entirety, a large part of the Act and 1999 revisions were already largely based on the UNCITRAL Model Law, with some modifications to allow compliance with the Korean judicial system. The latest amendments to the Arbitration Act in May 2016 came into effect on 30 November 2016. The three main amendments include: a widened scope of what constitutes arbitrable disputes; increased scope for interim measures; more powers being granted to arbitral tribunals on evidence gathering; and a more simplified procedure for the enforcement of arbitral awards. The amendments have also expanded the 'in-writing' requirements for a valid arbitration agreement to accommodate all forms of recorded format, which have the impact of creating a valid arbitration agreement, as long as it demonstrates the intention of the parties to settle disputes by way of arbitration. Several non-monetary disputes including intellectual property rights and antitrust matters, which had previously been regarded as non-arbitrable, can now be arbitrated. The new amendments to the Act give an arbitral tribunal power to make an order for protective interim measures, when so requested by a party. The interim measure would be granted if a party can show that there would otherwise be a likelihood of irreparable harm that cannot be compensated by way of damages and that the measure outweighs any injury likely to be caused to the party against whom such measures are directed. In addition, the applicant needs to show it has a reasonable chance to succeed on the merits of its claim. Korean Courts have a tendency to recognise and enforce arbitral awards. Despite the fact that Korea is largely a Civil Law country, it has developed an arbitration system that appears to be more similar to American arbitration, but is slightly different from Japanese arbitration laws. Although early Korean arbitration law was based on Japanese law, its arbitration system and practices appear to be heavily influenced by American arbitral practices and allow for cross-examination of witnesses and documents production. Unlike Article 16 of the Model Law, which endows final jurisdiction to the arbitral tribunal to determine its own jurisdiction, Article 17 of the Korean Arbitration Act allows a party that is challenging jurisdiction to appeal the tribunal's decision that it has jurisdiction to a competent Court for a final ruling.

The key arbitration institution is the Korean Commercial Arbitration Board and it has been rather proactive in both updating its rules and remuneration scales to keep up with international developments. The latest KCAB International Arbitration Rules (the 2016 Rules) became effective on 1 June 2016. These rules are applicable where at least one of the parties to the arbitration is non-Korean or if the place of arbitration stipulated in the arbitration agreement is in any non-Korea jurisdiction. The most important update brought in by the 2016 Rules is the introduction of its new emergency arbitrator regime. This new regime is set out in Appendix 3 of the 2016 Rules and is a game-changer. It will provide interim relief to the parties before the constitution of the arbitral tribunal. The KCAB Secretariat can now appoint a sole emergency arbitrator within two weeks of the date of the request. Any emergency arbitrator is obliged to deliver his or her decision within 15 days from the date of his or her appointment. The 2016 Rules allow for concurrent submission of claims arising out of multiple agreements within a single request for arbitration if the agreements all contain identical or compatible arbitration agreements and if the claims can be shown to have arisen out of the same transaction or same series of transactions. The 2016 Rules allows for all written communications and submissions to be submitted by way of electronic communication, unless otherwise

provided in the Rules, or unless directed otherwise by the arbitral tribunal or the KCAB Secretariat.

Korea is a signatory to the Washington Convention, as well as a signatory to various Bilateral Investment and Multilateral Investment Treaties, which provide for the resolution of disputes by way of arbitration under ICSID.

In an important ruling (case number 2006Da20290), the Supreme Court on 28 May 2009 had to hear a case wherein the defendant had attempted to resist the enforcement of a foreign arbitral award by alleging that the plaintiffs had acted in fraudulent conduct. The Supreme Court rejected the defendant's arguments, and held that the enforcement of a foreign arbitral award could only be refused in the situation where: (i) there was clear and objective evidence of fraudulent conduct that is punishable under the Law; (ii) the defendant could not have been aware of such fraudulent conduct, it could not properly make this challenge to the enforcement of the award; and (iii) the defendant also had to demonstrate that the fraudulent conduct was related to a material issue in the arbitration. In effect, a losing party who wishes to set aside an arbitral award has to establish, by clear and convincing evidence, that before the arbitration the successful party had made fraudulent assertions, or had taken fraudulent actions during the arbitration proceedings so as to deceive the arbitral tribunal into rendering a decision based on the fraudulent conduct. In May 2013, the Seoul Bar Association, the KCAB and the Seoul Metropolitan Government jointly set up the Seoul International Dispute Resolution Centre to host arbitration hearings seated in Korea and the region. The KCAB has recently set up its own International Arbitration Centre in 2018 to cater to international disputes. Under the present law, only registered foreign legal consultants are legally allowed to represent a party as counsel in international arbitration proceedings seated in Korea, with the caveat that the law of the lawyer's admitted jurisdiction or international customary law is applicable to the arbitration. Korea passed the Arbitration Industry Promotion Act which took effect on 28 June 2017 to promote arbitration as a dispute settlement mechanism for both domestic and international disputes. The Act is designed to make South Korea a more attractive seat of arbitration and one that is also competitive in the global arbitration market. However, it is unfortunate that the Act did not go far enough to allow foreign lawyers to participate as counsel in arbitration cases. This means that Seoul still has some way to go to catch up with other market leaders like Hong Kong and Singapore.

New Zealand

International arbitration in New Zealand is regulated by the Arbitration Act 1996 (amended in 2007). The Arbitration Amendment Act 2007 came into force on 18 October 2007 and made several changes to the Arbitration Act 1996. The amendments were intended to bring the 1996 Act in line with recent changes to the UNCITRAL Model Law and to increase the parties' control over the arbitration process and reduce judicial intervention. The Amendment Act now gives arbitrators wide powers to make interim and preliminary orders. The Act basically adopts the UNCITRAL Model Law, with minor modifications. The UNCITRAL Model Law is set out in a Schedule to the Act and applies to both international and domestic arbitrations. There have been recent amendments to the Act in 2016 which empowered the Minister of Justice to appoint a default appointing authority for all arbitrations sited in New Zealand. AMINZ (the Arbitrators and Mediators Institute of New Zealand) has been appointed as the default appointing authority on 9 March 2017. The proposed Arbitration Amendment Bill 2017 will uphold the validity of arbitration agreements within trust deeds. Such arbitration clauses shall be binding on all trustees and beneficiaries alike. A tribunal would then have the same powers as the High Court to appoint representatives for any minor or unascertained beneficiaries.

In general, the New Zealand Courts are highly supportive of the arbitration process and they are reluctant to disrupt or intervene in arbitration proceedings (with the exception of special circumstances provided for in the Act). This attitude even extends to arbitrations seated outside New Zealand. The Court of Appeal in *Danone Asia Pacific Holdings v Fonterra Co-operative Group Limited* [2014] NZCA 536 stayed a discretionary case management in favour of an international arbitration that was seated in Singapore. As the respondent was the parent company to the contractual counterparty but not the counterparty itself, the automatic stay provisions under Article 8 of Schedule 1 were not available. The Court of Appeal upheld the High Court's decision in exercising its discretion to stay on the basis that the existence of the arbitration was a very material consideration.

There is a right of appeal to the High Court on points of Law, where the Second Schedule of the Arbitration Act applies. The Second Schedule applies to domestic arbitrations sited in New Zealand (unless the parties expressly agree otherwise) and to international arbitrations sited in New Zealand if the parties expressly agree. The problem of this mechanism is that it substantially destroys the issue of confidentiality in arbitration, as the appeal proceedings will normally be done in public.

The New Zealand Supreme Court (the highest Court in New Zealand's judicial system, having replaced the Privy Council) had, in *General Distributors Ltd v Casata Ltd* [2006] 2 N.Z.L.R. 721 (S.C), held (by a majority of three to two) that the effect of Clause 6(1)(a) of the Second Schedule to the Arbitration Act 1996 was that costs are automatically in issue in every arbitration subject to that provision, unless the parties agreed otherwise. This has meant that an arbitral tribunal is required to address costs in its award and, if it did not, the parties could seek a further award under Article 33 of the First Schedule.

Article 17 of the Amendment Act deals with interim measures and allows the arbitrator to make orders to preserve assets of which any subsequent award can satisfy, maintain or restore the *status quo* of the parties pending determination of the dispute and the power to make an order for security for costs.

In *General Distributors Ltd v Melanesian Mission Trust Board* [2008] 3 NZLR 718, the High Court was asked to decide whether a "discovery ruling" ordered by an arbitral tribunal during the interlocutory process amounted to an "award". It was held that the discovery order was not a decision "on the substance of the dispute" between the parties, in terms of the definition of "award", and so could not be the subject of an appeal to the High Court. The High Court emphasised that such an appeal was only available in respect of decisions touching on the legal rights or duties which arose from the dispute which had been referred to arbitration. There is no right of recourse to appeal any international arbitration awards, unless it has otherwise been agreed by the parties. Such international awards may only be set aside on limited grounds. Any applications to set aside awards and appeals for domestic arbitrations must be brought within three months of receipt of the award.

The New Zealand Court of Appeal in the decision of *Hi-Gene Limited v Swisher Hygiene Franchise Corporation* [2010] NZCA 359 confirmed that a party seeking to challenge enforcement of an arbitral award, pursuant to Article 36 of the First Schedule to the Arbitration Act 1996, has to cross a high threshold. Initially the representatives of both parties came to an agreement to hold the arbitration in North Carolina, the United States. Subsequently, the

New Zealand party, Hi-Gene, tried to change the place of arbitration to New Zealand. Swisher continued with its proceedings in the US and was unchallenged. When Swisher sought to enforce the arbitral award against Hi-Gene in New Zealand, the latter opposed enforcement on the grounds that the arbitrators' refusal to adjourn the proceedings had prevented Hi-Gene from presenting its case under Article 36(1)(a)(ii) of the Act and that this also constituted a breach of natural justice under Articles 36(1)(b)(ii) and (3)(b). The New Zealand Court of Appeal referred to the earlier decision of *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 and held that the public policy exception to enforcement must be narrowly interpreted. The Court of Appeal also held that Article 36(1)(a)(ii) and the public policy and natural justice standards had to be interpreted consistently and narrowly in requiring very serious grounds for Court intervention. Finally, the Court or Appeal held that Hi-Gene had been adequately notified of the hearing and as such there was no breach of natural justice. The Court of Appeal in *Kyburn v Beca* [2015] NZCA 290 had to deal with an issue relating to conflict with New Zealand public policy. The Court of Appeal held that there had been a breach of natural justice, as the arbitrator had inspected a property only with a witness for one party. However, the Court of Appeal exercised its discretion and did not set aside the award on the grounds that the arbitrator's breach did not have any material effect on the outcome of the decision.

The New Zealand Act allows appeals from arbitral awards only on questions of law but not questions of fact. The New Zealand Court of Appeal in *Gallaway Cook Allan v Carr* [2013] NZCA 11 took the same approach and further emphasised the importance of encouraging the use of arbitration to resolve commercial disputes, and facilitating the recognition of and enforcement of arbitration agreements and arbitral awards. The Court of Appeal had to deal with Article 34 of the Act and it held that the *discretion* is of a wide and apparently unfettered nature. It held that the two specific purposes are to encourage the use of arbitration as an agreed method of resolving commercial and other disputes, and to facilitate the recognition and enforcement of arbitration agreements and arbitral awards. The Court said that: "*The principles and philosophy behind the statute are party autonomy within its framework, equal treatment, reduced court intervention and increased powers for the arbitral tribunal … The statutory principles and philosophy, when considered in the context of this case, plainly favour validation of the agreement. In our judgment it would be inappropriate within the exercise of our statutory discretion to set aside the award.*"

The New Zealand Court of Appeal in *Zurich Australian Insurance Limited v Cognition Education Limited* [2013] NZCA 180 had to deal with the interpretation of Article 8 of the Model Law. It held that in determining whether there is in fact a dispute for the purposes of Article 8(1), the Court must assess whether the party seeking arbitration has an arguable defence to the claim which has been filed in Court. If there is no arguable defence, then there is no dispute within the meaning of Article 8(1) and a summary judgment may be entered for the claimant. On the other hand, if the Court is satisfied there is an arguable defence, a stay of the Court proceedings will be granted and a referral to arbitration ordered.

The New Zealand Court of Appeal, in *Gallaway Cook Allan v Ewan Robert Carr* [2013] NZCA 11, held that an arbitral award will not be set aside on the basis that the arbitration agreement is invalid, if the invalid part of the arbitration agreement can be severed from the valid part. In that case, the arbitration agreement had provided for an appeal on questions of fact, which is not allowed under the Act. The Court of Appeal refused to set a partial award aside. The parties appealed to the Supreme Court who then heard lengthy submissions in *Ewan Robert Carr v. Gallaway Cook Allan* [2013] NZSC Trans 26. The Supreme Court set aside the award (*Ewan Robert Carr and Brookside Farm Trust Limited v Gallaway Cook Allan* [2014] NZSC 75) and held that it was not possible to sever a clause which would cause the effect of altering the nature and substance of what the agreement that the parties had agreed to enter into. The Court also rejected the submission that in order to ascertain the intention of the parties, one had to make a subjective inquiry into the intention of the parties. The majority of the Supreme Court held that a consideration of the *travaux préparatoires* showed that Article 34 (2)(a)(iv) could only be applied in situations where there was a valid arbitration agreement, but where the agreed procedure was not followed. They explained that the article was a separate and distinct provision that could not be read as one that could supersede Article 34 (2)(a)(i). The High Court in *Infratil Infrastructure Property Limited v Viaduct Harbour Holdings Limited & Ors* [2015] NZHC 2533 ordered a non-party to produce documents for the purposes of an arbitration. The order was made on the basis that they were relevant and material and the Court reasoned that the confidentiality of the documents would be adequately protected by the arbitration process.

Singapore

The Singapore Courts have been one of the most robust Courts in the region to enforce both arbitration agreements and awards. The Singapore International Arbitration Centre ("SIAC") was established in 1991 and is the statutory appointing body of arbitrators in the event of default by the parties in making an appointment of an arbitrator. The International Court of Arbitration of the International Chamber of Commerce ("ICC") has confirmed that 6% of all new ICC cases filed in 2015 had named Singapore as the seat of arbitration. This has indeed upheld Singapore as the number one seat of ICC Arbitration in Asia. The ICC has an advantage over all other arbitration centres in ASEAN as it has a very diverse team at both its Secretariat as well as at its Court of Arbitration which work hard to ensure that the right qualified or experienced arbitrators are appointed in each case. As opposed to other institutions that have a propensity to appoint arbitrators from outside the Asia-Pacific region, the ICC is generally known for its diversity-conscious position and tends to appoint arbitrators from within the region and to allocate the appropriate Civil or Common Law arbitrators for the arbitration. The appointment of a world-class arbitration practitioner such as Alexis Mourre as the new President of the ICC Court has seen even more moves by the ICC to look at the issue of diversity of the arbitrators appointed by the ICC in default situations. This is only likely to benefit Singapore as more end-users in the region will be likely to be even more encouraged to designate ICC Singapore clauses in their arbitration agreements. Maxwell Chambers has rightly described itself to be the "*world's first integrated dispute resolution complex housing both best-of-class hearing facilities and top international ADR institutions*". Maxwell Chambers continues to attract end-users to use its hearing rooms and facilities even in cases where Singapore is not the seat of the arbitration.

The early adoption of the Model Law as part of the International Arbitration Act ("IAA") allowed Singapore to advance itself rapidly by promoting its role as an important centre for international legal services, as well as international arbitrations. As of 1 January 2010, Singapore updated its International Arbitration legislation. One of those key changes had been the introduction of a new Section 12A of the IAA, which now empowers Singaporean Courts to make interim orders in aid of an arbitration seated outside Singapore.

Previously, under the repealed Section 10 of the IAA which incorporates Article 16(3) of the Model Law, parties could only bring an appeal against the decision of the arbitral tribunal which has

ruled that it has jurisdiction. This section has now been repealed and Section 4 now provides an avenue for appeal against the decision of an arbitral tribunal even in the event the arbitral tribunal rules that it has no jurisdiction. The Singapore Parliament passed amendments to the Civil Law Act on 10 January 2017 to legalise third-party funding in arbitration. These amendments have set out regulation of third-party funders and provide clear guidelines for such funders to follow.

Two different Singapore Court of Appeal decisions that differ in certain conclusions as to how Clause 20 of the FIDIC Red Book is to be interpreted and how an arbitral tribunal is to deal with a DAB decision. The Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara* (Persero) TBK [2011] SGCA 33 ("2011 CRW") upheld the High Court's decision to set aside a final award that had been issued by the Majority Members in an ICC International Court of Arbitration Case under the IAA. The Court of Appeal held that the Majority Members of the tribunal had breached their jurisdiction and the rules of natural justice by failing to review the merits of the DAB's decision and failing to give PGN the opportunity to defend its position. FIDIC issued a Guidance Memorandum in April 2013 (http://fidic.org/node/1615) to amend Clause 20 and referred to the 2011 CRW judgment in introducing the new amendments. The changes were significant and affect the treatment of FIDIC construction contracts on a worldwide basis.

The Court of Appeal in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30 took a different approach to the 2011 CA and decided to interpret Clause 20 in light of the "intention" of the drafters of the FIDIC Standard Form of Contract, and also relied upon the 2013 FIDIC Guidance Memorandum. The minority judge, minority arbitrator and PGN took the view that the provisional award sought by CRW would not be "final" for the purposes of Section 19B, since the DAB decision was liable to be opened up and reviewed pursuant to Clause 20.6[2] of the FIDIC Conditions of Contract at the arbitration of the parties' main dispute over the merits of DAB No 3. The 2015 Majority CA held that a DAB decision made under Clause 20.4 of the Red Book which was automatically converted into an Interim Award was final and binding as it was PGN's obligation to make prompt payment to CRW of the full Adjudicated Sum awarded under the DAB decision. The Court also held that it was not commercially sensible to read Clause 20.4 to suggest that the DAB decision would cease to be binding as soon as the tribunal had made a determination on any aspect of the merits of the parties' underlying dispute. It held that CRW was entitled to enforce for the full adjudicated sum despite the issuance of a Final Partial Award that had dismissed several heads of claims worth several million dollars. The dissenting judge agreed with PGN's contention that the 2011 Majority Arbitrators intended the interim award to be a provisional award because they not only said that an award giving effect to DBA No 3 would only be "*final up to a certain point in time*" and "*will not and cannot be altered until the arbitration hearing*", thereby implying that the Interim Award could and might be altered at, or after, that point in time, but he also stated that the Interim Award was an award "*[p]ending the final resolution of the Parties' dispute*".

In *Maldives Airports Co Ltd & Anor v GMR Male International Airport Pte Ltd* [2013] SGCA 16, the Court of Appeal dismissed the jurisdiction objection raised by the Maldives government and the latter's reliance on the Act of State doctrine. The Court held that a State can waive immunity and that the Maldives government had done so when it agreed to enter into the agreement, which clearly provided that the Maldives government had unconditionally waived any such immunity. Furthermore, the Court of Appeal held that the Act of State doctrine did not apply as the dispute was in fact private in nature and private law remedies were being sought. The Court of Appeal held that it had the power to do so pursuant to Section 12A(4) of the IAA but held that the balance of convenience did not favour an injunction being granted. The Court held that damages was an adequate remedy for the Maldives government's breach of agreement but that it was impractical to grant an injunction as the wide scope of the injunction meant that parties were likely to repeatedly seek assistance or directions from a Singapore Court on whether a particular action contravenes the injunction. The Singapore Court also took a pragmatic approach that the injunction could not in practice be complied with due to the breadth of the terms and the restrictions imposed on the Maldives government's State functions in operating the airport.

In *PT First Media TBK v Astro Nusantara International BV & others* [2013] SGCA 57, the Singapore Court of Appeal allowed a losing party (Lippo) to oppose enforcement of an arbitral award on the grounds of lack of jurisdiction even though the losing party had failed to take steps available to it to challenge the award on jurisdiction. Astro had initiated arbitration proceedings against subsidiary companies of the Lippo group who were signatories and also brought an application to join certain Astro subsidiary companies that were not party to the arbitration agreement to be joined in the arbitration. The Court of Appeal considered that a party could either make an application under Article 16(3) of the Model Law to set aside an arbitral award on jurisdiction or it could raise jurisdictional objections at the time of enforcement proceedings. The High Court, in *Swiss Singapore Overseas Enterprise Pte Ltd v Exim Rajathi Pte Ltd* [2010] 1 SLR 573, affirmed the position that an award that had been procured by fraud could be set aside as being contrary to public policy. However, the Court decided not to set aside the arbitral award on the facts of this case.

The *High Court in Mount Eastern Holdings Resources Co., Limited v H&C S Holdings Pte Ltd* [2016] SGHC 01 reiterated that it is only in deserving cases where a breach of natural justice has been proven, that the Singapore Courts will be willing to set aside arbitral awards on such a basis. The grounds upon which the Court will set aside an arbitral award are strictly limited to those in Section 24 of the IAA and/or Article 34 (2) of Model Law.

The Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 took a very pro-arbitration stance by holding that there is a presumption of arbitrability so long as the dispute falls within the scope of the arbitration agreement.

The Court of Appeal in *Sanum Investments Ltd v Laos* [2016] SGCA 57 overturned the High Court and upheld a tribunal's dismissal of a jurisdictional challenge made by the government of Laos. The challenge was premised on the arguments that a bilateral investment treaty entered into by China and Laos did not apply to Macau. More importantly, the Court of Appeal held that in the event of a jurisdictional challenge of an arbitral tribunal, the Courts should undertake a *de novo* review on jurisdiction without any automatic deference to the tribunal's findings. Although a Court may consider the reasoning of the tribunal, the Court is not bound to accept the arbitral tribunal's reasoning or conclusion on the matter. The Court of Appeal also held that in accordance with the default "moving treaty frontier" principle of State succession, a territory that undergoes a change in sovereignty will automatically drop out of the treaty regime of the predecessor sovereign and such a presumption would be maintained unless expressly displaced. The Court of Appeal in *L Capital Jones Ltd v Maniach Pte Ltd* [2017] SGCA 3 considered an application for a stay of proceedings in favour of arbitration under Section 6 of the IAA. It had to make a decision on whether the minority oppression claim brought by the respondent was arbitrable and whether the opposing parties had taken a step in the Court proceedings. The Court of Appeal affirmed its earlier decision in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 that minority oppression claims under Section

216 of the Companies Act were arbitrable matters. It held that there was an element in minority oppression disputes that would make it contrary to public policy for the disputes to be resolved by an arbitral tribunal rather than a Court. The Court took a pro-arbitration stance by stating that there was nothing in the Companies Act that precluded the arbitration of a claim under Section 216. The Court of Appeal in *Rals International Pte Ltd v Cassa di Risparmio di Parma Piacenza SpA* [2016] SGCA 53, held that an arbitration clause within a contract does not extend to claims on promissory notes that had been issued pursuant to the contract, unless there was express incorporation of the arbitration clause within the notes themselves. The Court of Appeal in *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] SGCA 03 held that minority shareholder oppression claims were generally arbitrable but it held that, on the facts of Capital Jones, the majority shareholder of a joint venture company had taken a step in the Court proceedings even though it was actually the joint venture company itself that had taken out the actual striking out application. Whilst this case is good news for arbitration, it may also allow litigants to try to use the judgment to blur the separate legal personality lines of a company and that of its majority controlling shareholders.

The Singapore International Commercial Court ("SICC") has heard and released its first Court judgment on 12 May 2016. The SICC in *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 01 revealed the Singapore commercial Court's approach to contractual interpretation in relation to implied terms and ambiguity as well as the impact of foreign illegality on business dealings. In relation to implied terms, the SICC made it clear that a Court must first ascertain how the gap in the contract had arisen and would only consider any implication if the parties did not contemplate the gap. The Court made it clear that such an implication has to be necessary in a commercial sense to give the contract efficacy and that the specific term to be implied will be considered if it was one that the parties would have certainly accepted had the proposed term been put to them at the time of the contract. As of January 2017, the SICC had handed down a total of eight reasoned judgments. Two of those judgments are now the subject of pending appeals to the Court of Appeal. It is clear that the SICC is a game-changer for the region and would be likely to augment and add to Singapore's reputation as a legal and arbitration hub. Singapore enacted the Choice of Court Agreements Act in October 2016 to give legal effect to the country's ratification of the Hague Convention on Choice of Court Agreements. The Hague Convention and Choice of Court Agreements Act apply to all international civil and commercial disputes and lay out a legal framework to allow exclusive choice of Court agreements to be upheld in favour of Courts in contracting States. They also facilitate mutual recognition and enforcement of Court judgments handed down by Courts of contracting States. The Secretariat of the International Court of Arbitration of the International Chamber of Commerce officially inaugurated its new case management office in Singapore on 23 April 2018. This was a masterstroke that was greatly welcomed by potential end-users of arbitration, particularly those from Civil law countries, who preferred to have Singapore as a seat of arbitration.

Some Other ASEAN Jurisdictions: Malaysia; Thailand; and Vietnam

Some of the jurisdictions have considerable domestic arbitrations. Countries like Malaysia, Thailand and Vietnam have never been considered as popular seats for international arbitration, but they have been trying hard to advertise themselves as being alternative destinations for arbitration.

The Malaysian Arbitration Act 2005 (Act 646) is substantially based on the UNCITRAL Model Law and came into force in Malaysia on 15 March 2006. Whilst there are comparatively many domestic arbitrations taking place in Malaysia, notably construction disputes under the auspices of the Architects Institute of Malaysia ("PAM"), there are relatively few international arbitrations taking place. Most international parties tend to select the SIAC as the preferred venue of arbitration and Singapore as the seat of arbitration. Where Malaysia is adopted as the seat of arbitration, international parties appear to favour ICC Arbitration agreements to be adopted in place of domestic arbitration centres. This is to ensure that default appointments of arbitrators are completely neutral and have no connection to the Government. The KLRCA is heavily funded by the Malaysian Government and has stated in its promotional brochures that there is no withholding tax on fees for arbitrators sitting in KLRCA arbitrations. While there is no statutory provision that directly supports this proposition, the KLRCA appears to rely upon a special government cabinet directive that remains confidential and remains undisclosed to the public. In 2013, a leading locally-based KLRCA arbitrator, who was appointed by the KLRCA as sole arbitrator, was caught for allegedly taking a bribe. He was sentenced to six months imprisonment on 5 January 2017. The prosecution succeeded in its case that the guilty arbitrator had given KLRCA a bad image. The offence of cheating allows for a maximum penalty of five years in jail under the Malaysian penal code. The KLRCA has since rebranded itself and changed its name to the AIAC. The Malaysian Government's investment entity, 1Malaysia Development Bhd, was involved in a high-profile arbitration against Abu Dhabi's State Investment Fund, IPIC, but settled the arbitration proceedings in April 2017 and has been making repayments. The repercussions of the arbitration has not ended with the settlement. There are currently multiple investigations launched by the United States and other governments into alleged money laundering activities. Unfortunately, the recent upheavals in Malaysian politics and allegations of corruption made against the recently ousted Malaysian prime minister in May 2018[1] and allegations of Malaysia being ranked as the second most-corrupt country in the world does not assist in trying to convince arbitration end-users that Malaysia is a safe seat of arbitration.[2]

In the case of *Mohamed Azahari Bin Matiasin v Undefined*, a Malaysian (Sabah) High Court held that foreign lawyers (including West Malaysian lawyers), who were not advocates within the meaning of the Advocates Ordinance 1953, are prohibited from representing parties in any arbitration proceedings in Sabah. The Malaysian High Court held that the phrase 'exclusive right to practice in Sabah', which appears in Section 8 of the Ordinance, means that only lawyers who have been admitted to the Sabah Bar have exclusive rights to legal practice both 'in and outside' Courts. This means that a lawyer who is not a member of the Sabah Bar should apply for *ad hoc* admission to the Sabah Bar if he or she wishes to represent a party in arbitration. The judgment was overturned by the Court of Appeal, but on appeal, it was reinstated by the Federal Court Decision. Malaysia's apex Court has therefore ruled that the right to practice arbitration in Sabah is within the exclusivity of the advocates of Sabah. It remains to be seen what impact this Malaysian apex Court decision will have on other States in Malaysia, such as Sarawak. Section 11(1)(c) of the Legal Profession Act 1976 makes it very clear that only Malaysian citizens and permanent residents may be admitted to the Malaysian Bar. It is extremely difficult for foreign lawyers to be called on an *ad hoc* basis to the Malaysian Bar and this was confirmed by the Malaysian Federal Court in the case of *Cherie Booth QC v Attorney General of Malaysia* [2006] 6 MLJ 501.

The Thai Arbitration Act 2002 (B.E. 2545), which came into force on 30 April 2002, has some features of the UNCITRAL Model Law. The Act applies to both domestic and foreign arbitration matters.

The main arbitration institutions in Thailand are the Thai Arbitration Institute of the Alternative Dispute Resolution Office; the Office of the Arbitration Tribunal of the Board of Trade of Thailand and the Thailand Arbitration Center ("THAC"). The government of Thailand has been well aware of the importance of arbitration for the development of the economy. It established the THAC in 2015 as one of its new essential policies to improve the practice of arbitration in Thailand. As of January 2016, the THAC was provided with state of the art new premises in the new EmQuartier building in the heart of the business district. The well-designed new premises and well-equipped hearing rooms rival those in other ASEAN countries including Maxwell Chambers in Singapore.

There are, however, restrictive practices and laws in operation that do not encourage non-Thai parties for selecting arbitration seats in Thailand. For instance, the Royal Decree Naming Occupations and Professions Forbidden to Aliens Law 2000 (B.E. 2543) prevent foreign lawyers from acting in arbitrations where the governing law is Thai law or where there is a need to apply for any enforcement of the arbitral award in Thailand. Foreign arbitrators and lawyers are also subject to restrictive working visa and work permit requirements. The THAC is working closely with the relevant authorities in Thailand to address these impediments and unless and until such work permit limitations are resolved, it would be difficult to attract more end-users to designate Thailand as a popular seat of arbitration.

The 2010 Law on Commercial Arbitration ("Vietnam Act") came into force on 1 January 2011. Whilst the drafters have stated that the Act is based on the UNCITRAL Model Law, due to significant departures from the Model Law, the UNCITRAL itself does not classify the Vietnam Act as a Model Law jurisdiction. One of the available grounds for setting aside an arbitral award under the Vietnam Act is for the opposing party to show that the award is contrary to "fundamental principles of Vietnamese laws". This has replaced the original standard wording of "public policy" as set out by the UNCITRAL Model Law. This gives challengers a lot more options to resist enforcement of arbitral awards than the options under the Model Law. Vietnamese Courts also use "fundamental principles of Vietnamese laws" as a ground to refuse recognition and enforcement of foreign arbitral awards. The Vietnam Act also provides that any arbitration disputes without any foreign element involved will be strictly subjected to Vietnamese law and that the language of the arbitration proceedings has to be Vietnamese. There is also no distinction made between procedural law and substantive law under the Arbitration Law. The National Assembly of Vietnam approved the 2015 Civil Procedure Code which came into force on 1 July 2016. The Code sets out a chapter for the recognition and enforcement of foreign arbitral awards. The Code has brought the implementation of the Arbitration Law closer to the New York Convention. The Myanmar parliament enacted its new Arbitration Act on 5 January 2016. The Myanmar Act has been designed to govern both domestic and international arbitration but it also deals with the recognition and enforcement of domestic and foreign awards.

Note

The views expressed in this chapter are those of the author only, and do not necessarily represent any of the institutions with which he is connected.

Endnotes

1. https://www.channelnewsasia.com/news/asia/najib-1mdb-malaysia-corruption-scandal-10255114.
2. http://time.com/4262897/five-facts-globa-corruption/.

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Dr. Ong is experienced in all aspects of: commercial arbitration and construction arbitration, including bridges, downstream plants, power stations, malls, pipelines, ports, rigs and roads; insurance; mining and minerals disputes; energy disputes (coal mining and supply disputes, production sharing contracts, electricity supply, gas contracts and oil exploration joint ventures); intellectual property; information technology; post-M&A disputes; and shipping. He is a Vice-President of the Asia Pacific Regional Arbitration Group (APRAG), Vice-Chair of the Inter-Pacific Bar Association. He is or has been a visiting professor of law at both Civil Law and Common Law universities including: Kings College London; Queen Mary University (London); National University of Malaysia (UKM); National University of Singapore (NUS); University of Hong Kong; University of Malaya; Universitas Indonesia; and Padjajaran University (Indonesia). He is recognised as a leading arbitrator and counsel in all major legal directories including *Who's Who Legal: Thought Leaders – Arbitration* (2017); and one of the top 30 arbitration practitioners in the world by *Expert Guides: Best of the Best 2017*. He is also listed as one of the *19 Most in Demand Arbitrators (Asia-Pacific Region)* by *Chambers & Partners* and described as "*one of the top arbitrators in terms of degree of demand*".

Dr Colin Ong Legal Services

Dr. Colin Ong Legal Services is an internationally-recognised leading commercial and dispute resolution law firm in Brunei Darussalam, and acts for a broad spectrum of clients. It is one of the very few commercially-focused law firms in Brunei and has been consistently listed as a leading banking, arbitration and commercial law firm by independent legal publications such as: *Who's Who Legal*; *IFLR 1000*; and *AsiaLaw Leading Lawyers*. The firm and its lawyers are to date the only Brunei lawyers to have been listed in *Euromoney's International Who's Who Legal* Series in five categories and also in *Experts Guide* in Commercial Arbitration, Commercial Litigation and Best of the Best categories.

In addition to international commercial arbitration and litigation services, other main areas of practice include: banking law and setting up and marketing of funds; aviation; energy disputes; coal mining and supply disputes; company law; oil and gas; intellectual property; joint ventures; production sharing contracts; project finance; shipping matters; technology transfer; and foreign investments. The firm is often instructed to act for and against multinationals and also for and against quasi-government companies within the ASEAN region and for several major global banks, and has regularly acted for and against many of the leading international and regional law firms in the world. Some members of the firm are also visiting academics and are contributing authors for various leading loose-leaf works in the fields of banking, arbitration and litigation, for several international legal journals in Asia, the UK and the US including: *Arbitration* (*CIArb*); *Asian International Arbitration Journal*; *Business Law International*; *Butterworth's Journal of International Banking & Financial Law*; *China-ASEAN Law Review*; *Dispute Resolution International*; and *Maritime Risk International*.

Australia

Nick Longley

Brian Rom

HFW

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The Commonwealth of Australia is a federation, comprising six States and two Territories. Each State and Territory is a separate jurisdiction. In Australia, International Arbitration is governed by the Federal statute, the International Arbitration Act 1974 (Cth) ("**IAA**"), which was significantly amended in 2010 and in 2015. Domestic Arbitration is governed by the Commercial Arbitration Act ("**CAA**") in each State or Territory. The CAAs in each state are very similar and are known as the "**Uniform Acts**".

The IAA adopts the UNCITRAL Model Law ("**Model Law**") with amendments and the CAA, in essence, mirrors the Model Law with some amendments.

The formalities for an arbitration agreement follow the minimal requirements of Article 7 (Option 1) of the Model Law. The agreement may take any form but must be in writing. It can be a clause in a contract, in the form of a separate agreement, appear in an exchange of letters or in pleadings. The agreement must clearly refer all or certain disputes arising out of a defined legal relationship to arbitration. Ordinary rules of contractual interpretation are applied to determine whether an arbitration clause is incorporated into a contract (*Kennedy Miller Mitchell Films Pty Ltd v Warner Bros. Feature Productions Pty Ltd* [2017] NSWSC 1526).

Subject to issues of arbitrability (see question 3.1 below), the type of disputes that are referable to arbitration are limited only by the agreement between the parties.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Neither the IAA nor the CAA prescribes the elements of an arbitration agreement. However, an arbitration agreement should provide for the following:

a) which disputes may be referred to arbitration;
b) the seat of the arbitration;
c) the number and qualification (if any) of the arbitrators;
d) the governing law of the arbitration agreement;
e) the procedural rules that apply; and
f) the language of the proceedings.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Under the IAA and the CAA, courts are required to stay court proceedings in favour of arbitration if a party so requests prior to submission of that party's first substantive statement. Courts will readily stay proceedings in favour of arbitration if the arbitration agreement is valid and broad enough to encompass the dispute and if the dispute is "arbitrable".

Courts take a liberal and "commercially realistic" approach to the interpretation of the breadth of an arbitration agreement (*Comandate Marine Corp v Pan Australia Shipping Ltd* [2006] FCAFC 192 and more recently *John Holland Pty Limited v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 and *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The IAA governs the enforcement of international arbitration proceedings. The IAA incorporates and gives effect to the Model Law. Under the IAA, courts enforce arbitration proceedings by preventing parties from commencing court proceedings in breach of the agreement to arbitrate (Section 7 of the IAA) and by enforcing the tribunal's award, subject to limited exceptions under Article 36 of the Model Law (Article 35 of the Model Law). The position is broadly identical for domestic arbitrations.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

No, there are separate laws governing domestic and international arbitration. International commercial arbitration seated in Australia is governed by the IAA. Domestic arbitration is governed by each State's CAA, which are very similar across all States and Territories. The CAA does not expressly adopt the Model Law. However, many of the provisions of the CAA are very similar or identical to the Model Law.

One difference is that, for domestic arbitrations, the parties may agree to a right of appeal against the arbitral award on a question of law (Section 34A). In the absence of an agreement, no such right of

appeal exists against a domestic award and recourse is only possible on the narrow grounds under Article 34 of the Model Law.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes. International arbitration in Australia is substantially based on the Model Law.

Significant differences include:

(a) the parties are taken to have had a full opportunity to present their case, if they have had a reasonable opportunity to present their case (Section 18C);

(b) express powers given by the IAA to the courts to support international arbitration in relation to the production of evidence (Section 23A) and subpoenas (Section 23);

(c) allowing tribunals to make orders for consolidation of arbitration proceedings (Section 24); and

(d) express provisions dealing with interest (Sections 25 and 26) and costs (Section 27).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The parties are given considerable flexibility as regards the conduct of international arbitration proceedings. Certain fundamental rights underpinning the process are mandatory; for example, a party's right to equal treatment and to be given a reasonable opportunity to present its case and to be given sufficient notice of any hearing. Common law principles of due process and natural justice also apply to arbitral proceedings.

Other non-derogable rights under the Model Law include the enforcement provisions discussed in question 2.1 above (right to a stay of court proceedings in favour of arbitration and the limited right of recourse under Article 34 of the Model Law).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Australian courts start from the position that "any claim for relief of a kind proper for determination of a court" is arbitrable (*Elders CED v Dravco Corp* [1984] 59 ALR 206). This is more so in the sphere of international arbitration where a liberal approach is taken to arbitrability.

The IAA and CAA apply to "commercial arbitrations". A pre-existing commercial relationship between parties is not required and it is sufficient if the dispute is commercial in nature. For example, a family dispute involving transactions of a commercial nature will suffice (*Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170).

However, certain disputes involving, in particular, matters of legitimate public interest, are not considered appropriate for arbitration, including:

a) certain intellectual property disputes (e.g. patent or trade mark disputes);

b) taxation disputes, but, generally speaking, only those purporting to bind the tax authorities;

c) insolvency-related proceedings where arbitration could have the effect of obviating the statutory regime; and

d) insurance disputes, unless the parties agree to refer the matter to arbitration after the dispute arises.

There are also some statues which bar arbitration proceedings for particular disputes. For instance, Section 11(2) of the *Carriage of Goods by Sea Act 1991* (Cth) renders void an arbitration clause incorporated in a sea carriage document or bill of lading relating to the carriage of goods from any place outside Australia to any place in Australia, unless the arbitration clause is conducted in Australia.

Where part of a claim is arbitrable, courts have a discretion to stay the non-arbitrable part pending the arbitration of the remainder (*Re Infinite Plus Pty Ltd* [2017] NSWSC 470).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. Arbitral tribunals may rule on their own jurisdiction. The IAA adopts Article 16 of the Model Law and Section 16 of the CAA is substantially the same as Article 16.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

A party commencing court proceedings in Australia in breach of an arbitration clause runs the risk of not only having those proceedings stayed, but also being liable for costs. While a costs order is a matter for the court's discretion, courts have ordered indemnity costs against the party commencing proceedings in breach of the arbitration agreement (*Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Generally, the court must not intervene in any arbitral proceedings other than where provided for by statute (Article 5 of the Model Law adopted by the IAA and Section 5 of the CAA).

In respect of issues of jurisdiction, a court may only intervene once the tribunal itself has ruled on the matter (Article 16(3) of the Model Law and Section 16(9) of the CAA).

A request for the court to intervene must be made within 30 days of receipt of the tribunal's ruling and the court's decision is not appealable.

When reviewing the tribunal's decision on its own jurisdiction, courts determine the issue *de novo* while at the same time giving deference to cogent reasoning of the tribunal (*Lin Tiger Plastering Pty Ltd v Platinum Construction (VIC) Pty Ltd* [2018] VSC 221 at [40] and authorities referred to by the court).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Generally, tribunals have no jurisdiction over individuals or entities that are not parties to the arbitration agreement. The following exceptions apply:

a) court proceedings may be stayed against third parties claiming "through or under a party to the arbitration agreement" (Section 7(4) of the IAA) which applies where a cause of action or defence is derived from another party (see *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170 from [289] to [323]) or, for example, where the rights of a third party seeking an indemnity depends on the rights of a party to an arbitration agreement (*Flint Ink NZ Ltd v Huhtamaki Aust Pty Ltd* [2014] VSCA 166);

b) subject to the parties agreeing otherwise, a tribunal may consolidate two or more arbitral proceedings: on the ground that they involve a common question of law or fact; the rights to relief arise out of the same transaction; or if otherwise desirable; and

c) a court may, upon a request from the tribunal or a party, issue subpoenas against third parties or order that such a party provide documents to the tribunal or attend before the tribunal or the court for examination for an arbitration seated in Australia (*Samsung C&T Corporation, Re Samsung C&T Corporation* [2017] FCA 1169).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Each State and Territory of Australia has its own law dealing with limitation. These limitation periods are regarded as matters of substantive law and the applicable law will be the law chosen by the parties, or alternatively, the law having the closest connection to the contract. The limitation periods apply equally to court and arbitration proceedings.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

An arbitration involving an Australian company in voluntary administration is not automatically stayed. However, courts have a general power under Section 447A of the Corporations Act 2001 (Cth) ("**the Act**") to stay arbitration proceedings for a limited period of time so as to avoid disrupting and distracting administrators (*In the matter of THO Services Limited* [2016] NSWSC 509).

The liquidation of a company which is a party to an arbitration results in an automatic stay of the arbitration and leave of the court is required to proceed with the arbitration (Section 471B and 500(2) of the Act).

Cross-border rules allow for arbitration proceedings in Australia to be stayed where one of the parties is subject to overseas insolvency proceedings (Cross-Border Insolvency Act adopting Article 20 of the Model Law on Cross-Border Insolvency).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Generally, parties are free to decide which laws apply to the substance of a dispute.

Failing designation by the parties, the arbitral tribunal shall apply the law determined by the relevant conflict of law rules. The law governing the arbitration agreement will usually be the law of the seat.

The proper law of the contract will usually be the law most closely connected with the contract. In all cases, the tribunal shall decide the question in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

A tribunal may decide a dispute *ex aequo et bono* or as *amiable compositeur* if the parties have expressly authorised it to do so.

In an application to stay court proceedings in favour of a foreign-seated arbitration, under Section 7(2) of the IAA, the question as to whether the applicant was a party to the foreign arbitration agreement was determined by the choice of law rules of the forum hearing the stay application (which in Australia, at common law, results in application of the *lex fori*) and not the law of the putative arbitration agreement (*Trina Solar (US), Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6).

In contrast, an application to enforce a foreign arbitration award in Australia where the validity of the arbitration agreement is in dispute is determined by the law of the putative arbitration agreement (Section 8(5)(b) of the IAA).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Mandatory laws that apply by virtue of an Australian nexus cannot be ousted by a choice-of-law clause. A common example would be claims arising under the Australian Consumer Legislation and in particular claims for misleading and deceptive conduct. Other examples would include relevant corporations, tax and workplace legislation.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The governing law of the contract selected by the parties will usually govern the arbitration agreement (including its formation, validity and legality). Where the contract is silent the following rules apply:

a) the courts identify the law that the parties intended would govern the arbitration agreement by implication. The choice of seat is said to "import an acceptance" that the parties were aware that the law of that country would apply to the conduct and supervision of arbitration; and

b) where no choice of seat is apparent, the court considers the law to which the arbitration agreement has the "closest and most real connection".

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to agree the arbitrators, including the number of arbitrators and any qualifications.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. For an international arbitration, if the parties fail to agree on the number of arbitrators for international arbitrations, the default number of arbitrators is three (Article 10 of the Model Law). For domestic arbitration, the default number is one.

If the parties are unable to agree on the appointment of a three-panel tribunal, each party shall appoint one arbitrator, and the two appointed arbitrators will appoint the third arbitrator.

If the two appointed arbitrators cannot agree or the parties cannot agree on the appointment of a sole arbitrator or if the system breaks down, the court may appoint (Articles 11(3) and (4) of the Model Law). Similar provisions exist in the CAA.

By regulation, the court's power to appoint arbitrators under the IAA has been delegated to the Australian Centre for International Commercial Arbitration ("**ACICA**").

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Generally, no. The court will only intervene where:

(a) the parties are unable to agree the arbitrator or where the system of appointment has broken down (see question 5.2 above); or

(b) where there are justifiable doubts as to impartiality or independence or a lack of agreed qualifications. A challenge to the impartiality or independence of an arbitrator may be made under Articles 12 and 13 of the Model Law (and Sections 12 and 13 of the CAA), but only within 15 days after becoming aware of the constitution of the arbitral tribunal or the relevant circumstances. Institutional rules may also allow challenges to arbitrators (see, for example, Rules 17 and 18 of the ACICA Rules).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Arbitrators are required to be independent and impartial. A challenge based on the arbitrator's independence, neutrality and/or impartiality turns on evidence of actual or apprehended bias. The test for apprehended bias involves an enquiry into whether a fair-minded lay observer might reasonably apprehend that the arbitrator might not bring an impartial mind to the resolution of the dispute.

Only a "real danger of bias" will suffice. Tenuous associations will be disregarded. So, for example, in *Sino Dragon Trading Ltd v Noble Resources International Pty Ltd* [2016] FCA 1131, a challenge based solely on an indirect relationship between a lawyer appointed as an arbitrator and his firm's office in China did not give rise to any real danger of bias.

Courts also acknowledge the significance of the *IBA Guidelines on Conflicts of Interest in International Arbitration*, which set out a non-exhaustive list of scenarios that give rise to an appearance of a conflict of interest (Red and Orange List) as well as scenarios which do not (Green List).

Arbitrators are required to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence as soon as he or she is approached for an appointment. The arbitrator has an ongoing disclosure obligation during the term of his or her appointment (Article 12 of the Model Law).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Parties are generally free to agree on their own rules of procedure. In the event that the parties do not agree, the tribunal can conduct the arbitration in such a manner as it considers appropriate. The tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.

Both ACICA and the Resolution Institute (which are both Australian-based dispute resolution institutions) publish arbitration rules. Other institutional rules such as the UNCITRAL Rules are also commonly adopted.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties are free to agree on the procedure they consider appropriate, including any arbitration rules. Subject to such agreement or a direction of the tribunal, the default procedure is as set out in Article 23 of the Model Law. This requires an exchange of statements of facts in support of each party's claim or defence together with supporting documents (Article 23 of the Model Law and Section 23 of the CAA).

Subject to any contrary agreement, the tribunal can hold oral hearings or the arbitration can be "on the papers only".

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Within Australia, there are Legal Profession Uniform Rules in each State and Territory which require solicitors and barristers, respectively, to maintain a paramount duty to the court and the administration of justice. In these rules, a "court" is defined to include "arbitration" and this is not restricted to arbitration within Australia.

This duty, however, only applies to an Australian practitioner or a registered Australian foreign lawyer. Foreign lawyers are bound by the ethical rules of conduct that apply in their home jurisdiction.

Where there is a risk that the fairness and integrity of the proceedings may be compromised by differing ethical rules applicable to each parties' counsel, the tribunal may adopt the *IBA Guidelines on Party Representation in International Arbitration* which set minimum standards of ethical behaviour regardless of the jurisdiction of the counsel involved. Article 8.2 of the ACICA Rules 2016 requires that the parties use best endeavours to ensure that their legal representatives comply with these guidelines.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators are, amongst other things, obliged to:

(a) disclose circumstances that give rise to justifiable doubts as to his impartiality or independence (Article 12);

(b) treat parties equally and to give parties a reasonable opportunity to present their case (Article 18);

(c) determine the procedure in such a manner as the arbitrator considers appropriate (Article 19(2));

(d) determine the dispute in accordance with the rules of law chosen by the parties (Article 28(1)); and

(e) provide a reasoned award, unless otherwise agreed by the parties (Article 31).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

In so far as arbitrations are concerned, there are no such rules.

There are no restrictions placed upon the nationality or residency of arbitrators.

Further, there are no restrictions on the representation of a party. The following specific provisions apply:

(a) Section 29 of the IAA allows parties to appoint representatives from any legal jurisdiction or any other person of their choice. Section 29(3) states that acting for a party in an arbitration, including the appearance in front of a tribunal, does not breach any law regulating the admission or practice of law; and

(b) similarly, Section 24A of the CAA allows parties to choose their own representative. Section 24A(2) of the CAA provides that no offence under the Legal Profession Uniform Law is committed by a non-Australian lawyer merely by representing a party in arbitration proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Both the IAA and CAA provide arbitrators with immunity for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

While the arbitration is on foot, the court should not intervene. The court's role is limited to aiding, supervising, maintaining and enforcing decisions of the tribunal. This includes:

a) staying court proceedings in favour of arbitration (Section 7 of the IAA);

b) the appointment of arbitrators where parties are unable to agree (Article 11, Model Law);

c) enforcing interim measures ordered by the tribunal (Article 17H, Model Law);

d) assisting with the taking of evidence (Article 27, Model Law); and

e) recognising and enforcing tribunal awards (Article 35, Model Law).

The CAA gives courts similar powers for domestic commercial arbitrations.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless the parties agree otherwise, international tribunals may, under Article 17 of the Model Law, grant interim measures (also known as "temporary measures of protection" or "conservatory measures") directing a party:

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

b) to take action that would prevent current or imminent harm or prejudice to the arbitral process itself;

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

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

Domestic tribunals have the same powers under the CAA, although the scope of relief is more extensively defined (see Section 17(3)).

Domestic and international tribunals may not make *ex parte* preliminary orders under Article 17B of the Model Law directing another party not to frustrate the purpose of an interim measure requested.

Assistance may be sought from the court to enforce an interim measure ordered by the tribunal (Article 17H of the Model Law and Section 17H of the CAA).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

For both international and domestic arbitration a court has the same power to issue interim measures in relation to arbitration proceedings as it has under its own interlocutory rules (Article 17J of the Model Law and Section 17J of the CAA).

A request for interim relief from the court has no effect on the jurisdiction of the tribunal (Article 9 of Model Law).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Where the tribunal has ordered an interim measure, the courts will enforce it subject to the limited grounds for refusing recognition under Article 17I of the Model Law. Interim measures sought from the court under Article 17J of the Model Law are ordered where the "balance of convenience test" is satisfied.

Whilst the matter has not been considered directly, the view is that national courts should only entertain and grant interim measures where the tribunal is unable or unwilling to do so itself (The Hon. Justice Croft, Judge in Charge of the Arbitration List in the Supreme Court of Victoria speaking extra-judicially in 2009).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

There has been some uncertainty as to whether an anti-suit injunction in aid of an arbitration is available in addition to an application for a stay of proceedings under Section 7 of the IAA (or Section 8 of the CAA). In general, the view is that both remedies are available.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

An arbitral tribunal may order a party to the arbitral proceedings to pay security for costs (Section 23K of the IAA and Section 17 of the CAA).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Interim measures ordered in a domestic or international arbitration (including a foreign arbitration) can be enforced by a court, subject to the limited exceptions, which include, among others:

a) failure to provide security required by the tribunal for an interim measure; or

b) where the interim measure is incompatible with the powers conferred upon the court.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The parties have considerable freedom to determine the procedure for conducting arbitration proceedings. Failing an agreement, Article 19 of the Model Law gives international arbitral tribunals the power to determine the admissibility, relevance, materiality and weight of the evidence and they are not bound by local rules of evidence. A similar provision in Section 19 of the CAA applies to domestic arbitrations.

Evidence which may not be admissible in court proceedings may be admissible in arbitrations, although the tribunal may give it less weight if it considers it less reliable.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Under Article 19(2) of the Model Law (and Section 19(2) of the CAA), international arbitration tribunals have broad powers to conduct the arbitration including issues relating to disclosure and witness evidence.

In practice, tribunals often have regard to the IBA's *Rules on the Taking of Evidence* or the Chartered Institute of Arbitrators' *Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration*. Many tribunals in practice will attempt to limit the scope of discovery by proposing narrow categories of documents relevant to the specific issues in dispute.

Where necessary, a party can apply to the court to provide orders requiring attendance at the arbitration or the production of a document.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Under Article 27 of the Model Law, the tribunal or a party may, with the tribunal's approval, request the court's assistance in taking evidence. The court may execute the request within its competence and according to court rules. Australian courts may, in addition to other forms of relief, issue letters rogatory – requesting foreign courts to obtain evidence from a witness outside Australia.

Under Section 23(3) of the IAA, a party to an arbitration may, with the permission of the tribunal, apply to court for a subpoena requiring a person (including a non-party) to produce documents to the arbitral tribunal or to attend for examination before the arbitral tribunal. Courts are further empowered to order a person to attend before the court for examination (Section 23A of the IAA).

Courts have shown a degree of flexibility in supporting requests for subpoenas, even when made early in the arbitration process. However, to avoid abuse, a subpoena will not be issued against a non-party unless the court is satisfied that it is reasonable in all the circumstances to do so (Section 23(5) of the IAA). Nor will a court exercise its powers to order a person to attend court for examination (Section 23A of the IAA), unless the person is given an opportunity to make representations to the court.

The courts have similar powers to assist domestic arbitrations under the CAA (Sections 27 and 27A).

However, Australian courts have no jurisdiction to issue a subpoena unless the arbitration is seated in Australia (*Samsung C&T Corporation, Re Samsung C&T Corporation* [2017] FCA 1169).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Under the Model Law, the tribunal is free to adopt procedures for the production of written and/or oral witness testimony that it considers appropriate.

Australian tribunals often adopt the provisions in the *IBA Rules on the Taking of Evidence in International Arbitrations*.

Tribunals have the power to administer oaths or affirmations.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Common law privilege rules apply to arbitration proceedings. Under these rules, confidentiality attaches to statements and other materials brought into existence for the sole purpose of seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings, including arbitrations.

Communications between a party and its in-house counsel will attract privilege if the in-house counsel is employed as a lawyer and consulted by the party in his or her professional capacity for the dominant purpose described above. Privilege will not attach if the in-house counsel is consulted to provide non-legal services, such as commercial advice.

Privilege can be waived expressly or implicitly; for instance, where a party discloses the effect of legal advice.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The requirements for international and domestic arbitration awards follow Article 31 of the Model Law which requires the award to be in writing and signed by the arbitrators. There is no requirement to sign every page. In proceedings involving more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal

shall suffice, provided that the reason for any omitted signature is stated. A date and place of the arbitration must be stated and the award must be delivered to each party.

A reasoned award must be given, unless the parties agree otherwise. In *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, the New South Wales Court of Appeal confirmed that, unlike a court judgment, a tribunal award is only required to state the decision and explain succinctly what the decision is. A tribunal is not required to approach the task of issuing an award in the same manner as is required of a judge issuing a judgment. Nevertheless a failure to state adequate reasons for accepting or rejecting material evidence can leave the award open to challenge (*Ottoway Engineering Pty Ltd v ASC AWD Shipbuilder Pty Ltd* [2017] SASC 69).

It should be added that the final award is only final if it deals with all the issues that were referred to arbitration, regardless of whether the arbitrator calls it a final award or not (*Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Constructions)* [2017] VSC 97).

A significant delay between the oral hearing and the making of an award may result in the award being set aside if it is found to have impaired the arbitrator's ability to assess the evidence (*Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2017] WASC 379).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The correction of errors (the "slip rule") is addressed in Article 33 of the Model Law and Section 33 of the CCA. Within 30 days of receiving the award, unless the parties agree another time period, a party may, with notice to the other party, request the tribunal to correct any errors. A party can also within this time period request that the tribunal deals with claims presented in the proceedings but omitted in the award (Article 33(3) and Section 33(5)). The tribunal may, within 30 days, correct or amend the award on their own initiative (Article 33(3) and Section 33(4)).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Article 34 of the Model Law (and Section 34 of the CAA) sets out the very limited grounds on which a party can challenge an award, i.e., incapacity of a party, invalidity of the arbitration agreement, procedural irregularities, lack of arbitrability and public policy. The latter includes awards induced or affected by fraud or breach of the rules of natural justice (Section 19 of the IAA). In relation to natural justice, arbitrators are not bound to slavishly adopt the position advocated by one party or the other. Nor are they required to put every evaluation of the evidence to a party for consideration before making a determination (*Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, applied recently in *Mango Boulevard P/L v Mio Art P/L & Ors* [2017] QSC 87).

Nevertheless, courts will intervene where a party could not have reasonably foreseen that the arbitrator would proceed to determine an issue (*Hui v Esposito Holdings Pty Ltd* [2017] FCA 648).

Generally, no challenge lies against an award on the basis of an incorrect finding of fact or law. Courts recognise the difference between an excess of jurisdiction and a challenge really going to the merits of legal and factual questions, but superficially characterised and cloaked as an excess of jurisdiction question (*Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [6]). The exception is where parties to a domestic arbitration agree to a right of appeal on a point of law (Section 34A of the Uniform Acts). The application to challenge the award must be made within three months after the date on which it was served on a party.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

While the courts have not ruled on this, it is unlikely that the parties could exclude the right of a party to seek recourse against an award under Article 34.

Other than that, parties to a domestic arbitration agreement can exclude the right of appeal on a point of law. There are no rights of appeal for international arbitrations.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they cannot.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

There is no appeal on the merits from an international arbitration award issued under the IAA. Challenges to awards are limited to the grounds set out under Article 34 of the Model Law.

For a domestic award, an application for leave to appeal must be made within three months from the date the party received the award (Section 34A(6) of the CAA) and must identify the question of law to be determined and the grounds on which an appeal should be granted (Section 34A(4)).

The court must not grant leave unless it is satisfied:

(a) that the determination of the question of law will substantially affect a party's rights;

(b) that the question of law is one which the tribunal was asked to determine; and

(c) that, on the basis of the findings of fact in the award:

i. the decision of the tribunal on the question is obviously wrong; or

ii. the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

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

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Australia signed the New York Convention in 1975 without reservations. The Convention has been enacted into domestic law pursuant to the IAA.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Australian courts lean in favour of recognising and enforcing arbitral awards, subject to narrow exceptions that are consistent with the Model Law; see, for example, *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223 which dealt with an unsuccessful challenge to the enforcement of a CIETAC award in Australia where it was alleged that a party had not been given an opportunity to present its case in the arbitration proceedings. International awards are recognised under Section 8 of the IAA and domestic awards are recognised under Section 35 of the CAA.

The process of enforcement involves an application to court and the production of an authenticated original or certified copy of the award.

There is, generally speaking, a two-stage process: (1) making an *ex parte* application for leave to enforce; and (2) if leave is granted, staying enforcement for the purpose of giving the debtor an opportunity to apply to the court to set aside the order. The latter involves an *inter partes* hearing.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Australian courts apply the *res judicata* principle to arbitration proceedings. Where a cause of action has been finally determined by a tribunal, it may not be re-heard by an Australian court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

An award will only be unenforceable on public policy grounds if it fundamentally offends Australia's notions of justice. The bar is set high and the courts read the public policy exception narrowly in line with the pro-enforcement purpose of the New York Convention.

The IAA states, non-exhaustively, that an award will be contrary to public policy in Australia if:

a) the making of the award was induced or affected by fraud or corruption; or

b) a breach of the rules of natural justice occurred in connection with the making of the award.

In line with a strong pro-arbitration trend, Australian courts apply a restrictive approach when considering challenges based on want of natural justice. For example, in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, the Federal Court rejected an application to set aside enforcement of an international award on the grounds of a denial of natural justice. The court held that a substantial denial of natural justice was required to enliven the court's discretion to set aside or resist enforcement of an award.

This approach has since been followed in a number of subsequent decisions (*Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37, *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724, *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10, *Hui v Esposito Holdings Pty Ltd* [2017] FCA 648 and *Mango Boulevard P/L v Mio Art P/L & Ors* [2017] QSC 87).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Prior to the amendments to the IAA in October 2015, confidentiality operated on an "opt-in" basis; the parties were required to expressly agree that the proceeding be confidential. The amendment to the IAA now reverses that position with the effect that, subject to certain limited exceptions, arbitrations seated in Australia will be confidential unless the parties agree otherwise. The same applies to domestic arbitrations under the CAA (Sections 27E to 27G).

Arbitration-related court proceedings are not confidential.

Under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (which Australia signed on 18 July 2017, and which entered into force on 18 October 2017), ICSID arbitrations are not confidential, subject to limited exceptions.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Subject to the exceptions set out in Section 23D of the IAA for international arbitration and Section 27F of the CAA for domestic arbitration, information disclosed in arbitration proceedings may not be disclosed in subsequent proceedings. Information can be disclosed if it is necessary for enforcement.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

It is implicit in an arbitration agreement that an arbitrator shall have jurisdiction to exercise every right and discretionary remedy given to a court of law. However, common law rules concerning, amongst other things, the rule against penalties apply equally to arbitration.

However, it should be noted that the proportionate liability regimes in some states may not apply to arbitration.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Arbitrators have the power to award interest. Subject to the terms of any agreement or any law regulating a party's right to interest, the tribunal may award interest at a "reasonable rate" for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made (Section 25 of the IAA and Section 33E of the CAA) or thereafter from a date prescribed by the tribunal until the date of payment. The arbitral

tribunal is also empowered to award interest (including compound interest) for the post-award period.

The right to interest is a matter for the tribunal's discretion. However, as a general rule, the rate of interest will, in the absence of an agreement to the contrary, be the maximum rate prescribed for Supreme Court judgment debts for each State or Territory. For example, in New South Wales, the pre-judgment rate of interest is currently 5.5% (4% above the Reserve Bank of Australia interest rate) and the post-judgment interest rate is 7.5% (6% above the Reserve Bank of Australia interest rate).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Unless the parties have otherwise agreed, arbitral tribunals may order that the costs of the reference, including fees and expenses of the arbitrator, shall be payable by a particular party. The general rule is that the successful party will receive its costs. Examples of where the general rule is displaced are where the successful party:

a) fails on particular issues, particularly issues that feature predominantly or involve significant time and costs;

b) unreasonably pursues points that have no merit; or

c) conducts itself in a manner that warrants it being deprived of its costs.

The tribunal may also have regard to "Calderbank offers".

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An arbitration award may be subject to Goods and Services Tax ("**GST**") depending on whether the payment made under the award constitutes consideration for a "supply" and, if so, whether the supply is taxable, input-taxed or GST-free supply.

A supply can take many forms. It does not include damages arising from termination or breach of contract unless the damages relate to an earlier supply; for example, non-payment for the supply of goods and services.

A supply is taxable if it is connected with Australia and the person making the supply is registered or required to be registered. A supply is not connected with Australia if it is made by a non-resident.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Litigation funding is lawful in Australia and there is an active market. Litigation funders are focusing their attention on arbitration. A regulation introduced in 2013 excludes litigation funding schemes and arrangements from the definition of a managed investment scheme (MIS) under the *Corporations Act 2001* (Cth). It also provides an exemption from the requirement to hold an Australian Financial Services License (AFSL) for persons providing funding as part of either a single-party or multi-party litigation, as long as they have appropriate processes in place for managing conflicts of interest. This acted to free litigation funders from extensive regulations.

Australian lawyers are prohibited from entering into contingency fee agreements under which fees are charged based on a percentage of the arbitration proceeds. This prohibition does not apply to litigation funders.

However, conditional costs agreements are permitted. Conditional costs agreements allow for payment of a premium or uplift fee calculated by reference to the legal fees (as opposed to the amount of the award).

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Australia has signed and ratified the ICSID Convention.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Australia is party to 20 BITs and 11 Free Trade Agreements ("**FTA**"). Not all of these investment treaties include Investor-State Dispute Settlement ("**ISDS**") provisions, most notably the FTAs with New Zealand, Malaysia, Japan and the USA.

Australia is party to BITs with the following countries: China (11 July 1988); Vietnam (11 September 1991); Papua New Guinea (20 October 1991); Poland (27 March 1992); Hungary (10 May 1992); Indonesia (29 July 1993); Hong Kong (15 October 1993); Romania (22 April 1994); Czech Republic (29 June 1994); Laos (8 April 1995); Philippines (8 December 1995); Argentina (11 January 1997); Peru (2 February 1997); Pakistan (14 October 1998); Lithuania (10 May 2002); Egypt (5 September 2002); Uruguay (12 December 2002); Sri Lanka (14 March 2007); Mexico (21 July 2007); and Turkey (29 June 2009).

Australia has ISDS provisions in the following FTAs: Singapore-Australia Free Trade Agreement (2003); Thailand-Australia Free Trade Agreement (2005); Australia-Chile Free Trade Agreement (2009); ASEAN-Australia-New Zealand Free Trade Agreement (2010); Korea-Australia Free Trade Agreement (2014); China-Australia Free Trade Agreement (2015); and the Trans-Pacific Partnership ("**TPP**") Agreement (signed in 2016, but not yet in force).

The Energy Charter Treaty was signed by Australia in 1994, but never ratified.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The language in Australia's BITs is broadly similar to that of BITs between many other states.

Existing BITs and FTAs include clauses entitling investors to treatment that is no less favourable than that accorded to investments of nationals from any third country ("most favoured nation" clauses), e.g. Article 9.4 of the China-Australia FTA (2015).

Australia has not yet applied the Model Investment Treaty provisions. However, many of the more modern FTAs apply wording similar to these provisions (such as the ISDS provisions in Chapter 9 of the TPP Agreement).

There is no general requirement to exhaust local remedies.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Other than in exceptional circumstances, the common law defence of state immunity is not available to Australian State and Federal entities facing civil actions. Under the IAA, State and Federal entities are bound by arbitration awards and Australian courts readily uphold arbitration awards against such entities.

In respect of foreign states, the *Foreign States Immunities Act* 1985 (Cth) provides for limited state immunity. The actions of foreign states are generally immune from proceedings, unless it has submitted to the jurisdiction. However, the commercial activities of a foreign state are not immune from proceedings (Section 11 of the *Foreign States Immunities Act* 1985 (Cth)). In *Lahoud v The Democratic Republic of Congo* [2017] FCA 982, the court held that foreign state immunity was irrelevant in circumstances where the state had submitted to the jurisdiction of the ICSID tribunals. This case was the first time an Australian court has recognised and enforced an ICSID award.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

In response to the amendments to the IAA in 2010, Australian courts continue to demonstrate strong support of arbitration. A key amendment to Section 21 of the IAA ensures that parties to an international arbitration agreement are unable to contract out of the Model Law, and its stringent requirements for recourse against awards in Articles 34 and 36.

Courts have responded to these changes by resisting attempts to challenge awards that fail to meet the requirements, particularly where the challenge is regarded as a disguised attack on the factual findings in the award. This approach was adopted in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (discussed in question 11.3 above).

From 1 July 2017, the Australian Capital Territory introduced its CAA and now the arbitration law in all States and Territories is aligned.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

ACICA published a new set of rules in 2016 which, amongst other amendments, make significant changes aimed at minimising time spent and costs incurred in an arbitration. This includes the following:

a) an overriding objective to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved (Article 3);

b) provisions dealing with the appointment of arbitrators in multi-party disputes (Article 13), consolidation (Article 14) and joinder (Article 15); and

c) on an opt-in basis, a separate set of rules of expedited arbitrations.

In addition, emergency interim measures (Article 33) were previously included in 2011 amendments to the rules.

The Resolution Institute also published Arbitration Rules in 2016 which contain similar, but not identical, provisions to the ACICA rules. The Resolution Institute rules include the following:

a) the arbitral tribunal shall use its best endeavours to deliver all awards within 365 days of the appointment of the arbitral tribunal (Article 16); and

b) if the total amount of the claims, counterclaims and set-off defences (excluding interest and costs) is less than $250,000 there shall be no hearings, unless requested in writing by all of the parties or directed by the arbitral tribunal (Article 17).

Amendments have been proposed to the IAA under the Civil Law and Justice Legislation Amendment Bill 2017 (Cth) which, amongst other matters:

a) simplify the process of enforcement of foreign arbitration awards;

b) exclude confidentiality in the case of Investor-State arbitrations under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration; and

c) provide that, in assessing costs, a tribunal is not bound by any scales of costs applicable to court proceedings.

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Brian also has extensive experience negotiating commercial outcomes for clients in mediations and other informal procedures. He has published articles on both construction and shipping law and is qualified to practise in Australia, England and Wales, and South Africa.

HFW is a sector-focused global law firm with more than 500 lawyers working across the Americas, Asia, Australia, Europe and the Middle East.

We have in-depth knowledge of arbitration rules in Australia and strong experience with both ACICA and the Resolution Institute. In recent years we have seen a steady increase in the number of arbitrations conducted in Australia as organisations seek efficient and cost-effective forums under which to resolve their international disputes. Our International Arbitration team support clients in disputes across HFW's core sectors including aviation, commodities, construction, energy, insurance and reinsurance and shipping. HFW's team are able to draw on experience both locally as well as under multiple arbitration forums and the rules of specific trade bodies, such as GAFTA and LMAA, to advise clients on the most suitable approach to secure the outcome that they aim to achieve.

Brunei

Dr. Colin Ong Legal Services

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The legislation governing arbitration in Brunei is the Arbitration Order, 2009 ("AO"), which regulates domestic arbitrations, and the International Arbitration Order, 2009 ("IAO"), which regulates international arbitrations. The Arbitration Order and the International Arbitration Order both require that the arbitration agreement should be in writing, and they were based on the legal requirement of an arbitration agreement as provided for in Article 7 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). The arbitration agreement should be contained in a written document signed by the parties or in an exchange of letters, telex, fax or other means of communication which records the agreement. Alternatively, the exchange may be an exchange of the statement of claim and defence in which the existence of an agreement has been alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement so long as the contract is in writing and the reference is such as to make that clause part of the contract. An arbitration agreement may be made in the form of an arbitration clause in a contract or in the form of a separate agreement. No specific choice of words or particular format is required to constitute an arbitration agreement, but the intention to arbitrate must be clear and unequivocal. A reference in a bill of lading to a charterparty, or some other document containing an arbitration clause, would constitute a valid arbitration agreement if the reference was clearly inserted so as to make that clause part of the bill of lading.

1.2 What other elements ought to be incorporated in an arbitration agreement?

There are no special requirements or formalities if an individual person is a party to a commercial agreement which includes an arbitration agreement. However, the usual requirement that the individual should have the capacity to enter into a contract will apply. Minors and persons of mental incapacity will not be bound by contracts made by them. Similarly, bankrupts and companies in liquidation would require leave of their legal representatives and the court to enter into an arbitration agreement and to subsequently participate in arbitration proceedings. It would be useful to set out: the legal "seat" of the arbitration; the arbitration rules; and the number of arbitrators. Parties would usually insert an express clause to say that where they are unable to agree upon an arbitrator or the chairperson, the president of the Arbitration Association Brunei Darussalam ("AABD") will appoint the same. Parties would usually also expressly agree to the 2010 UNCITRAL Rules.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

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

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Order, 2009 and the International Arbitration Order, 2009 govern the enforcement of arbitration proceedings. For arbitration agreements to which the IAO applies, a stay of court proceedings in favour of arbitration is mandatory under Section 6, unless the court is satisfied that the arbitration agreement has been found to be null and void, inoperative or incapable of being performed. Section 6 of the AO regulates domestic arbitrations and gives the court discretion to grant stay of proceedings in favour of arbitration. A court has to exercise its discretion judiciously and needs to satisfy itself that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement. The court also needs to ensure that at the time when the proceedings were commenced, the applicant for a stay of proceedings was, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

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

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The IAO adopts and enacts the Model Law in its First Schedule.

Section 3(1) of the IAO does stipulate that, subject to the modifications made by the IAA, with the exception of Chapter VIII (which provides for Recognition & Enforcement of Awards), the Model Law would have the force of law in Brunei Darussalam. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is set out in the Second Schedule of the IAO. Some of the differences between the Model Law and IAA are as follows:

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

(b) Unlike Article 10 of the Model Law which provides for three arbitrators, Section 10 of the IAO provides that there is to be a single arbitrator.

(c) In addition to the grounds under Article 34(2) of the Model Law, the IAO allows for two additional grounds of challenge under Section 36:

- where the making of the award was induced or affected by fraud or corruption; or
- where a breach of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The strict criteria under Section 5(2) of the IAO must be followed for a matter to be deemed as an international arbitration. An arbitrator must not fall foul of any of the grounds set out under Article 34(2) of the Model Law and under Section 36 of the IAO.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Section 13 of the IAO prohibits arbitrations that are contrary to public policy. In general, all "commercial" nature disputes are arbitrable. Any matter that can be arbitrated is capable of being privately decided by the parties and any remedies and rights over which the parties have free disposition can be referred to arbitration. Almost all matters can be referred to arbitration except those related to issues like citizenship, legitimacy or children, marriage and other family law issues, criminal liability, winding up of companies, and matters where it is contrary to public policy to have such matters to be determined by way of arbitration.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. Arbitral tribunals may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement under both the AO and IAO. The IAO (First Schedule) adopts Article 16 of the Model Law. Section 21 of the AO is substantially the same as Article 16 of the Model Law.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The Brunei courts would usually stay the proceedings in favour of arbitration unless they are satisfied that the arbitration agreement "*is void, inoperative or incapable of being performed*".

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The Brunei courts shall not intervene in any arbitral proceedings other than where provided for by statute. Under both the AO (Section 31(9)) and the IAO (under Article 16(3) of the Model Law), if a party wishes to challenge the arbitral tribunal on jurisdiction, it has to make an appeal to the Brunei High Court within 30 days of receipt of such decision. A further appeal to the Brunei Court of Appeal is permitted only with leave of the High Court. Pending the appeal on the issue of jurisdiction, the arbitral tribunal may continue with the arbitration proceedings and may make an award under both the AO and the IAO.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

An arbitral tribunal may assume jurisdiction over individuals or entities who are not parties to the arbitration agreement where there is an assignment or novation of the agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no specific laws or rules that prescribe limitation periods for the commencement of arbitration in Brunei. The Limitation Act prescribes limitation periods for causes of action and allows a six-year limitation period for actions for breach of contract. Limitation periods under the Limitation Act will apply equally to commencing arbitration proceedings. It is important to emphasise that limitation periods are regarded as matters of substantive law. The governing law chosen by the parties will apply, or alternatively, the law having the closest connection to the contract.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Under Bruneian insolvency law, the term "bankruptcy" is used in relation to individuals, while the term "insolvency" is used for companies. Section 166(a) of the Brunei Companies Act provides that "*at any time after the presentation of a winding-up petition,*

and before a winding-up order has been made, the company, or any creditor or contributory, may where any action or proceeding against the company is pending in any Court, apply to the Court in which the action or proceeding is pending for a stay of proceedings therein". Although it is not clear whether or not an arbitration proceeding would be caught under this provision, in general there is an old principle in common law that matters relating to insolvency are not arbitrable as a matter of public policy. However, as there are no provisions in the newer 2009 Arbitration Order and International Arbitration Order that specifically address the situation where there are insolvency proceedings affecting parties to an ongoing arbitration, it is quite likely that the operative words of Article 8(1) of the Model Law would allow the courts to stay such insolvency proceedings in order for the dispute to be referred to arbitration.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Under the AO, where the seat of the arbitration is in Brunei, a domestic arbitration dispute shall be decided in accordance with the substantive laws of Brunei. In respect of international arbitration under the IAO, the dispute will be determined according to the choice of law as agreed upon by the parties. The parties will have to ensure that there is no breach of Section 44 of the IAO. Where parties have not elected any choice of law in an international arbitration, the law applicable shall be determined by the conflict of laws rules.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

General circumstances and factors such as illegality and mandatory rules pertaining to transnational public policy will be considered in the case of both the IAO and the AO.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Where parties have not elected for any express choice of law in the arbitration agreement, the agreement will be determined in accordance with the choice of law that has been expressly selected to govern the substantive agreement. Where no choice of law has been selected, the applicable law governing the arbitration agreement shall be the law of the country with which the substantive contract is most closely connected. This is where the contract was concluded or is to be performed, or is the place of residence of one of the parties.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to choose who they wish to have as arbitrator and to select the number of arbitrators and special qualifications (if any) of the arbitrators they may wish to appoint. There are no special qualifications that are required of the arbitrators unless the parties have otherwise agreed or as may be set by arbitral institutions. In practice, parties in Brunei tend to select lawyers as arbitrators for cases where a sole arbitrator is called for, and occasionally non-lawyers as arbitrators in three-member arbitral tribunals where specialist skills are required.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Parties are free to agree on the procedure for appointing arbitrators, whether by the arbitration agreement or subsequent to the dispute having arisen. In the absence of any agreement for appointing arbitrators, or where the agreed procedure fails, an application may be made to the statutory appointing authority to do so. This is set out under Article 8 of the IAO and under Article 13 of the AO. It is important to note that under Article 8 of the IAO, the appointing authority shall only select an arbitrator from the panel of arbitrators maintained by the Arbitration Association Brunei Darussalam.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The Brunei courts will only intervene where the parties are unable to agree the arbitrator or where the system of appointment has broken down. The courts have the power to hear applications of challenge against an arbitrator under the IAO (Article 13(3) of the Model Law) and under the AO (Section 15(4)), and may also remove an arbitrator for failure or impossibility to act under the IAO (Article 14(1) of the Model Law) and under the AO (Section 16).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The Arbitration Association Brunei Darussalam ("AABD") requires arbitrators to adhere to the Model Law provisions contained in Articles 12 and 13 thereof, and requires all arbitrators on its panels to disclose any potential conflicts of interest. The AABD also adopts the IBA Guidelines on Conflicts of Interest in International Arbitration 2014. Sections 14(1) and 14(2) of the AO oblige an arbitrator, when approached for a possible appointment, to make disclosure of any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Both the IAO (Article 19 of the Model Law) and the AO (Section 23) provide that parties are free to agree on the procedure to be followed by the arbitral tribunal in conduct of proceedings. Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. It is common for parties to agree to the 2010 UNCITRAL Rules of Arbitration, and it is also the recommended choice of arbitration rules by the AABD.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

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

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

A lawyer who is a Brunei advocate and solicitor holding a current Brunei practising certificate is subject to the professional conduct rules set out in the Legal Profession Act and the Advocates and Solicitors (Practice and Etiquette) rules (the "Practice Rules"). Whilst there are no specific rules governing the conduct of Brunei advocates and solicitors in arbitral proceedings in Brunei or elsewhere, the Practice Rules are generally considered to bind the conduct of an advocate and solicitor's arbitration practice in Brunei.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The IAO and the AO provide for the powers to the arbitral tribunal, which include making orders or giving directions to any party for:

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

In addition, the IAO adopted the recommendations of the UNCITRAL in 2006 and allows the arbitral tribunal to give interim measures to:

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

The duties required of an arbitral tribunal in Brunei Darussalam are:

(a) to act fairly and impartially;
(b) to treat the parties equally and to give each party a reasonable opportunity to present its case; and
(c) to conduct the case expeditiously without unnecessary delay or expense.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Under the Brunei Legal Profession Act, a person who is not an advocate and solicitor under the Legal Profession Act and does not hold a valid Practising Certificate may not appear and act as an advocate and solicitor in any legal matters in Brunei. The Arbitration Association Brunei Darussalam has for many years been pushing for a change in the Act and always tries to get parties to consent to the grey area in relation to arbitration proceedings sited in Brunei Darussalam.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Both the IAO and the AO provide for immunity to an arbitral tribunal sitting in a Brunei arbitration. An arbitrator is not liable for any act or omission in respect of the discharge of his functions as an arbitrator unless he has been shown to have acted in bad faith.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The Brunei courts may only make orders that are in support of arbitration pursuant to powers given under the IAO and the AO, particularly in matters pertaining to the enforcement of an arbitration agreement, ordering interim measures of protection under the AO (arbitrators under the IAO have full powers to issue such orders), enforcing subpoenas made by an arbitral tribunal, and assisting in the taking of evidence.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitral tribunal may award interim relief and is not required to seek the assistance of the courts to order interim relief. Any orders or directions made by an arbitral tribunal in the course of an arbitration shall, by leave of the court, be enforceable in the same manner as if they were orders made by the court and, where leave is so given, judgment may be entered in terms of the order or direction. In summary, international tribunals sitting in Brunei may, under Article 17 of the Model Law, grant interim measures directing any party to:

(a) maintain or restore the *status quo* pending determination of the dispute;
(b) take urgent action to prevent imminent harm or prejudice to the arbitral process;
(c) preserve assets out of which a subsequent award may be satisfied; or

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

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Under the IAO and the AO, the Brunei courts have the same powers as the arbitral tribunal to order interim relief. In particular, the IAO (Article 9 of the Model Law) allows that a court may grant an interim measure of protection before or during arbitral proceedings. Any requests made to the court for interim relief alone will not have any effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The Brunei courts tend to adopt the same practice as those in other Model Law countries and tend not to interfere in arbitration proceedings in Brunei. However, the Brunei courts will support an arbitration proceeding when required, and will be likely to do so in cases where an application for interim measures has been made to the court where such applications are justified.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The Brunei courts had a hand in producing the earliest case law authority on anti-suit injunctions to reach the Privy Council in London in the case of *SNI Aerospatiale v Lee Kui Jak & Anor* [1987] 3 All ER 510. In the event that the arbitration is seated in Brunei and the commencement of foreign court proceedings would be tantamount to a breach of the arbitration agreement or an agreement to arbitrate, the Brunei courts would be able to issue an anti-suit injunction to prevent or restrain the party from bringing proceedings before the foreign courts. The power to grant such injunctive relief is a discretionary power inherent to the Brunei courts under the Supreme Court Act and under the Specific Relief Act.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Arbitral tribunals seated in Brunei and the Brunei High Courts have the power to order security for costs under the AO. The power of the arbitral tribunal to order a claimant to provide security for costs is quite broad under both the IAO and the AO.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Under the IAO and the AO, arbitral tribunals have the same powers that are available to a court. Any preliminary relief and interim orders that are made by an arbitral tribunal are enforceable in the same manner as if it were an order of the court. Interim measures and preliminary relief measures that have been ordered by an arbitral tribunal are to take immediate effect and be enforced through the courts (should such a need arise).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The IAO (Article 19 of the Model Law) and the AO (Section 23(3)) specifically provide that the power conferred upon the arbitral tribunal includes the power to determine admissibility and relevance. The arbitrators will also have to conduct the proceedings in accordance to the rules of natural justice. The AABD encourages its panel of arbitrators to adopt the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Article 19(2) of the Model Law endows international arbitration tribunals with broad powers to conduct the arbitration, including powers to order disclosure and witness evidence.

In practice, tribunals seated in Brunei often have regard to the IBA's Rules on the Taking of Evidence in International Arbitration. In practice, many tribunals will attempt to limit the scope of discovery by proposing narrow categories of documents relevant to the specific issues in dispute. It is possible for a party to apply to the court to provide orders requiring attendance at arbitration, or the production of a document. An arbitral tribunal cannot order the disclosure of documents that are privileged or are subject to legal professional privilege.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Article 27 of the Model Law allows a party, with the tribunal's approval, to request the national court's assistance in taking evidence. The court may execute the request within its competence and according to Brunei Supreme Court Rules.

Under Section 23 of the IAO, a party may, with the permission of the tribunal, apply to court for a subpoena requiring a person to produce documents to the arbitral tribunal or to attend for examination before the arbitral tribunal.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Arbitral tribunals under both the IAO and the AO have the power to order the giving of evidence by affidavit or take affirmations of the parties and witnesses. The UNCITRAL Arbitration Rules are generally adopted in arbitrations seated in Brunei along with the IBA Rules on the Taking of Evidence in International Arbitration. Unless otherwise agreed between the parties, an arbitral tribunal has the power to decide on holding oral hearings together with cross-examination being allowed, or it may conduct the proceedings on the basis of documents only. The IAO and the AO also provide that the Brunei courts may order that a subpoena to testify, or a subpoena to produce documents, be issued to compel the attendance before an arbitral tribunal of a witness within Brunei. Parties and witnesses are examined and cross-examined on oath or by affirmation.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Privilege of documents under Brunei law is subject to the Evidence Act and common law. Documents that are privileged include all documents that are covered by legal professional privilege. Any communications between a lawyer and client during the course of a professional relationship are privileged and cannot be disclosed without the consent of the affected party who holds the privilege. In addition, any documents that have been produced for the purpose of without-prejudice settlement negotiations are also subject to privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

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

(a) the award must be in writing;

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

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

(d) the date of the award and the place of arbitration must be stated; and

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

Further, unless it has been agreed otherwise by the parties, decisions of the arbitral tribunal shall, in accordance with Article 29 of the Model Law, be made by a majority of the members of the arbitral tribunal. There is no requirement that the arbitrators sign every page.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Article 33 of the Model Law and Section 43 of the AO endows power upon an arbitral tribunal to correct errors ("slip rule"). Unless the parties agree another time period, within 30 days of receiving the award, a party must give notice to the other party that it wishes to request the arbitral tribunal to correct any errors. If so agreed by the parties, a party, with notice to the other party, may also within this time period request the arbitral tribunal to give an interpretation of a specific point or part of the award. The tribunal may, within 30 days, correct or amend the award on its own initiative under Article 33(3) of the Model Law and Section 43(2) of the AO.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

There is no right of an appeal against an award made in an international arbitration under the IAO. Under the Model Law, the only recourse to an aggrieved party is for it to make an application to set aside the award. However, a party may apply to set aside an award on the limited grounds provided under Article 34 of the Model Law and under the two additional grounds under Section 36 of the IAO. For domestic arbitration under the AO, a party may appeal against an award on a question of law (Section 49).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

There are provisions under the AO that allow for the parties to agree to exclude the jurisdiction of the court to hear an appeal against awards. In addition, an express agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the Brunei court in the AO. There are no provisions to allow parties to agree to exclude the jurisdiction of the court to hear an application to set aside an award(s).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties have no power to agree to expand the scope of appeal of an arbitral award beyond the grounds available in the AO.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

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

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

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

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

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

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

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

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

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

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

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

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Upon the issuance of an arbitral award by an arbitrator in respect of a dispute, that same dispute cannot be re-litigated in court. The principle of *res judicata* will apply equally to an award or to a ruling made by an arbitrator.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

There is a very high threshold to be met. The applicant seeking to challenge the arbitral award will have to set out the specific public policy which it alleges the award has breached. The applicant would then need to demonstrate that the error was one of a nature that enforcement of the award would injure the public or would contravene fundamental principles of justice and fair play.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Yes, arbitral proceedings in Brunei Darussalam are confidential. The notion of confidentiality will extend down to the issued award, except where necessary disclosure is required to enforce the award. The IAO (Sections 27 and 35) and the AO (Sections 56 and 57) allow parties to apply for proceedings to be heard other than in open court, to request that the resulting judgments are not published, or to restrict any publication of specified information.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

It may only be disclosed if the parties to the arbitral proceedings consent to it or if a court has ordered disclosure.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no limitations as to what an arbitral tribunal sitting in Brunei may award, and it may award any remedy or relief that could have been ordered by the Brunei courts if the dispute had been the subject of civil proceedings in that court, unless expressly so agreed between the parties. Although an arbitral tribunal may generally award any civil remedy allowed under the common law, Brunei law will not recognise or enforce punitive damages.

13.2 What, if any, interest is available, and how is the rate of interest determined?

An arbitral tribunal may award interest on the awarded sum ordered to be paid under the award from the date of award to the date of payment. The general rate of interest will be the court rate which is 6% *per annum*.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

An arbitral tribunal sitting in Brunei will generally exercise its discretion in favour of the successful party and order costs and expenses in the award. The general practice of awarding shifting fees is at the discretion of the arbitral tribunal.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

It depends on the circumstances. There is no personal income tax in Brunei, but there is tax on corporations. The award itself is not subject to tax, but a limited liability company incorporated in Brunei may have to pay tax if tax is deemed to be payable under the circumstances.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

In accordance with the Legal Profession (Contingency Fees) Rules (under Section 65 of the Legal Profession Act), contingency fees may be agreed upon only between a client and a Brunei advocate and solicitor who holds a practising certificate. There are no professional funders active in the market but it is possible for professional third-party funders to work together with registered Brunei law firms.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, Brunei has signed and ratified the ICSID Convention.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Brunei is a party to several BITs, but not to the Energy Charter Treaty. Brunei has, to date, signed eight BITs and the ASEAN Agreement on the Protection and Promotion of Investment, which applies to all ASEAN countries. In addition, Brunei has signed the 2009 Comprehensive Investment Treaty between members of ASEAN. Brunei is in a negotiation process with many more countries and is likely to enter into several new BITs in the near future.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

No, there are no such standard terms or model language, although Brunei does try to use uniform language where possible. The language that is used in BITs is generally uniform and Brunei's BITs contain fair and equitable treatment, full protection and security provisions and non-discriminatory treatment provisions. Brunei's BITs contain express provisions for the protection of investors from expropriation, as well as national and most-favoured-nation treatment provisions.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Brunei courts adopt the doctrines of international comity and state immunity when a foreign sovereign refuses to submit to its jurisdiction. However, if it is the case that the foreign sovereign has entered into a commercial agreement and has agreed to undergo arbitration, it is most likely that the state immunity defence will not be entertained by Brunei courts.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

In general, the bulk of domestic arbitration cases are to be found in the construction industry. International arbitration is gaining popularity in Brunei. Domestic and international contractors and international investors who enter into contracts with the Government of Brunei Darussalam always insist on arbitration as the form of dispute resolution. The reason is mainly of a historical nature, but under the revised constitution and laws of Brunei Darussalam, Judicial Review has been abrogated and the Government of Brunei Darussalam remains immune from suit before the Brunei courts. An arbitration process is therefore the only means for such contracting parties or investors to resolve their disputes. As for non-Government cases, the common types of disputes that are generally referred to arbitration include: building and construction disputes; distribution agreements; engineering and infrastructure projects; investment disputes; joint ventures; maritime issues; oil & gas issues; and sale of goods. The AABD is the only independent arbitral appointing institution in Brunei. It was formed in 2004 and became the default statutory appointing body under both the IAO and the AO when the legislation was first introduced in 2009. Part of the AABD's objectives is also to assist Brunei Darussalam in developing and providing advisory and assistance support in the field of arbitration. The AABD seeks to assist parties who wish to resolve their disputes by way of arbitration and also tries to arrange places for arbitration hearings, and to ensure that the panel of international arbitrators are kept to a very high standard and there is a wide choice of diversity of leading international arbitrators, who are currently mainly non-Brunei nationals. The AABD strongly encourages all of its arbitrators to adopt the latest international arbitration practices and cost-controlling techniques. The Brunei Government has recently formed a new wholly owned company called the Brunei Darussalam Arbitration Centre ("BDAC"). The BDAC board of directors is completely selected by the Government and three-quarters of the board include senior members of the Government. The Chairman of the BDAC board usually holds key government positions including Permanent Secretary of the Prime Minister's Office. To date, foreign and local investors prefer to include a choice of arbitration specifically stipulating the AABD when choosing a seat of arbitration in Brunei.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Over the last several years, the AABD has taken many steps to promote the efficient and cost-effective management of arbitral references and encourage arbitrators on its panel to be familiar with key publications on costs including, but not limited to: the *ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration* (2012); Ong & O'Reilly, *Costs in International Arbitration* (Lexis Nexis, 2013); and *CIArb Practice Guidelines on Drafting Arbitral Awards Part III Costs* (2016).

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Dr. Ong is a member of the Brunei, English, and Singapore Bars. He is Counsel at Eldan Law LLP in Singapore and Queen's Counsel at 36 Stone, London. Chartered Arbitrator and Arbitration Fellow at various institutions (including FCIArb, FMIArb and FSIArb). President of Arbitration Association Brunei Darussalam; Advisor to Council Board of the Indonesian National Board of Arbitration (BANI); Vice President, Appointing Council, Thailand Arbitration Center (THAC); Appointing Council of the Cambodian National Commercial Arbitration Centre (NCAC); and Advisory Committee Member of the China-ASEAN Legal Research Centre. He has extensive Court experience with important reported judgments pertaining to arbitration matters. He is regularly instructed as counsel or arbitrator on major commercial and construction arbitrations within Brunei, England, China, Hong Kong, India, Japan, Qatar, Indonesia, Malaysia, Singapore, South Asia, Thailand, and the UAE. He is a visiting professor of civil law as well as common law jurisdictions and has handled cases under many different governing laws. He was identified as one of 45 leading arbitration practitioners under 45 years old by *Global Arbitration Review*. He acted as arbitrator or as counsel/lead counsel in over 320 international arbitrations under most major arbitration rules including AAA, BANI, HKIAC, ICC, LCIA, LMAA, KLRCA, SIAC, TAI and the UNCITRAL Rules. He was lead counsel in *PGN v CRW* [2015] SGCA 30, which was the runner-up in the GAR Awards 2016 for '*the most important decision*' category. In 2010, he became the first practising lawyer from ASEAN (non-head of State or senior judge) to be elected as a Master of the Bench of the Inner Temple. He is also the first ASEAN national lawyer appointed English Queen's Counsel.

Dr. Ong is experienced in all aspects of: commercial arbitration and construction arbitration, including bridges, downstream plants, power stations, malls, pipelines, ports, rigs and roads; insurance; mining and minerals disputes; energy disputes (coal mining and supply disputes, production sharing contracts, electricity supply, gas contracts and oil exploration joint ventures); intellectual property; information technology; post-M&A disputes; and shipping. He is a Vice-President of the Asia Pacific Regional Arbitration Group (APRAG), Vice-Chair of the Inter-Pacific Bar Association. He is or has been a visiting professor of law at both Civil Law and Common Law universities including: Kings College London; Queen Mary University (London); National University of Malaysia (UKM); National University of Singapore (NUS); University of Hong Kong; University of Malaya; Universitas Indonesia; and Padjajaran University (Indonesia). He is recognised as a leading arbitrator and counsel in all major legal directories including *Who's Who Legal: Thought Leaders – Arbitration* (2017); and one of the top 30 arbitration practitioners in the world by *Expert Guides: Best of the Best 2017*. He is also listed as one of the *19 Most in Demand Arbitrators (Asia-Pacific Region)* by *Chambers & Partners* and described as "*one of the top arbitrators in terms of degree of demand*".

Dr Colin Ong Legal Services

Dr. Colin Ong Legal Services is an internationally-recognised leading commercial and dispute resolution law firm in Brunei Darussalam, and acts for a broad spectrum of clients. It is one of the very few commercially-focused law firms in Brunei and has been consistently listed as a leading banking, arbitration and commercial law firm by independent legal publications such as: *Who's Who Legal*; *IFLR 1000*; and *AsiaLaw Leading Lawyers*. The firm and its lawyers are to date the only Brunei lawyers to have been listed in *Euromoney's International Who's Who Legal* Series in five categories and also in *Experts Guide* in Commercial Arbitration, Commercial Litigation and Best of the Best categories.

In addition to international commercial arbitration and litigation services, other main areas of practice include: banking law and setting up and marketing of funds; aviation; energy disputes; coal mining and supply disputes; company law; oil and gas; intellectual property; joint ventures; production sharing contracts; project finance; shipping matters; technology transfer; and foreign investments. The firm is often instructed to act for and against multinationals and also for and against quasi-government companies within the ASEAN region and for several major global banks, and has regularly acted for and against many of the leading international and regional law firms in the world. Some members of the firm are also visiting academics and are contributing authors for various leading loose-leaf works in the fields of banking, arbitration and litigation, for several international legal journals in Asia, the UK and the US including: *Arbitration* (*CIArb*); *Asian International Arbitration Journal*; *Business Law International*; *Butterworth's Journal of International Banking & Financial Law*; *China-ASEAN Law Review*; *Dispute Resolution International*; and *Maritime Risk International*.

China

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The *Arbitration Law of the People's Republic of China 1994* ("Arbitration Law") provides that an arbitration agreement shall take the form of arbitration clauses contained in the underlying contract or other forms of written agreements for arbitration reached before or after the disputes arise (Article 16, Arbitration Law). The *Supreme People's Court Interpretation of Some Issues on the Application of the Arbitration Law of the People's Republic of China 2006* ("Supreme People's Court Interpretation") further explains that the meaning of "agreement for arbitration in other written forms" shall include agreements on resorting to arbitrations that are reached in the form of contracts, letters or data messages (including telegraph, telefax, electronic data interchange and e-mail), etc. (Article 1, Supreme People's Court Interpretation). Furthermore, according to Article 16 of the Supreme People's Court Interpretation, both parties have the right to choose the law governing the arbitration agreement.

An arbitration agreement/clause shall include an express willingness to arbitrate, terms of reference for arbitration and a designated arbitration institution (Article 16, Arbitration Law). The parties may reach a supplementary agreement regarding the terms of reference and choice of the arbitration institution, when no agreement is reached or the agreement reached does not stipulate such issues explicitly. The arbitration agreement is null and void if no such supplementary agreement is reached (Article 18, Arbitration Law).

Article 17 of the Arbitration Law provides that an arbitration agreement shall be null and void in the following circumstances: (1) the agreed matters for arbitration exceed the range of arbitrable matters as specified by law; (2) a party that concluded the arbitration agreement has no capacity for civil conduct or has limited capacity for civil conduct; or (3) a party coerced another party into concluding the arbitration agreement.

1.2 What other elements ought to be incorporated in an arbitration agreement?

(1) Arbitration Institution & Place of Arbitration

The exponential economic growth of China into the second-largest economy globally has brought an unprecedented number of cross-border commercial disputes involving China and unprecedented complexity. A growing number of independent arbitration bodies have therefore flourished in China. There is no hierarchical or territory jurisdiction of arbitration bodies in China. The major independent arbitration bodies have their own rules, their own practice of adoption of panels of arbitrators, their own geographic emphasis, and their own professional focus. Certain local arbitration bodies focus more on domestic commercial transactions, while arbitration bodies in the Chinese metropolitans, such as Beijing, Shanghai and Shenzhen, traditionally have capabilities and market coverage for administering arbitrations of international economic and commercial disputes. In addition, China also has a number of arbitration bodies specialising in other matters, including international maritime affairs, such as the China Maritime Arbitration Commission ("CMAC").

The China International Economic and Trade Arbitration Commission ("CIETAC") has been recognised as one of the most prominent arbitration institutions internationally. Previously known as the CIETAC Shanghai Sub-Commission ("CIETAC Shanghai"), it was renamed as the Shanghai International Economic and Trade Arbitration Commission (or the Shanghai International Arbitration Centre) ("SHIAC") on 11 April 2013. SHIAC promulgated its new arbitration rules, effective as of 1 May 2013, which innovatively permit third parties to participate in the arbitration proceedings, subject to certain conditions (Article 31). On 22 October 2013, following the establishment of the China (Shanghai) Pilot Free Trade Zone ("FTZ") by the Chinese central government, SHIAC established the FTZ Court of Arbitration, tailored for the resolution of disputes between parties registered in the FTZ. On 8 April 2014, SHIAC released the FTZ Arbitration Rules designated for arbitration cases administered by the FTZ Court of Arbitration. The FTZ Arbitration Rules were formulated in light of the arbitration rules of several world-renowned arbitration institutions; for instance, *inter alia*, the ICC, SCC, SIAC, HKIAC and UNCITRAL Arbitration Rules. The FTZ Arbitration Rules also contain some innovative changes and, to name a few, the arbitral tribunal may grant interim measures if this is permitted by the laws of the place of arbitration; an emergency arbitrator mechanism may be adopted if this is permitted by the laws of the place of arbitration; and the parties may choose arbitrators other than those listed by the FTZ Court of Arbitration, etc.

Arbitration is essentially a consensual process by the parties within their autonomy. It is critical for parties to select the institution with clarity and specific reference to one of the Chinese arbitration bodies or institutions, and designate the venue for their arbitration.

(2) Language

While Chinese arbitration legislation does not contain provisions regulating the language used in arbitration

proceedings, the CIETAC Arbitration Rules (2015) provide that where the parties have agreed on the language of arbitration, their agreement shall prevail. In the absence of such agreement, the language of arbitration to be used in the proceedings shall be Chinese or any other language designated by CIETAC having regard to the circumstances of the case. Therefore, if the parties want to avoid being designated a language that they do not want, they should make it clear in their arbitration clause/agreement which language they want for the arbitration.

(3) Governing Law

Article 18 of the *Law of the Application of Laws for Foreign-related Civil Relations of the People's Republic of China* ("Law of the Application of Laws") (promulgated by the State People's Congress on 28 October 2010, and effective as of 1 April 2011) provides that the parties are free to choose the law applicable to the arbitration agreement, and in default of such choice, the law of the place of the arbitration institution or the arbitration seat shall apply. When drafting a contract, the parties more frequently than not pay more attention to the law applicable to their substantive disputes, and remain silent on the governing law of the arbitration agreement/clause. Based on the above-mentioned new rules, parties are advised to set out the governing law of the arbitration agreement/clause when negotiating the terms and conditions of a business contract.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Generally speaking, the People's Courts (especially those in major cities) tend to act with a positive attitude towards the enforcement of arbitration agreements.

Article 5 of the Arbitration Law provides that if the parties have concluded an arbitration agreement and one party institutes an action in a People's Court, the People's Court will not accept the case, unless the arbitration agreement is null and void.

If the parties have concluded an arbitration agreement and one party has instituted an action in a People's Court without declaring the existence of the arbitration agreement and, after the People's Court has accepted the case, the other party submits the arbitration agreement prior to the first hearing, the People's Court will dismiss the case unless the arbitration agreement is null and void. If, prior to the first hearing, the other party has not raised an objection to the People's Court's acceptance of the case, that party shall be deemed to have renounced the arbitration agreement and the People's Court will continue to try the case (Article 26, Arbitration Law).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

In addition to the Arbitration Law and the Supreme People's Court Interpretation, China is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention"). The *Civil Procedure Law of the People's Republic of China* (promulgated by the State People's Congress on 9 April 1991, amended on 31 August 2012) ("Civil Procedure Law") also contains a chapter on arbitration.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Chapter 7 of the Arbitration Law stipulates rules for foreign-related arbitrations, and the remaining provisions of the Arbitration Law apply to both domestic and foreign-related arbitrations.

Apart from the establishment, rules and composition of foreign-related arbitration commissions and appointment of foreign arbitrators, the main differences between the provisions governing domestic and foreign-related arbitration are as follows:

Preservation of Evidence – applications are made in respect of foreign-related arbitration to the Intermediate People's Court instead of the local level People's Court where the evidence is located (applicable to domestic arbitrations).

Setting Aside and Refusal of Enforcement of Awards – the grounds for setting aside or refusal of enforcement of awards are more restrictive and are on procedural issues.

Other than CIETAC, the other international arbitration institution is the China Maritime Arbitration Commission, which accepts contractual and non-contractual maritime disputes arising from, or in the process of, transportation, production and navigation by or at sea, in coastal waters and other navigable waters adjacent to the sea.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The drafting of the Arbitration Law was influenced by the *UNCITRAL Model Law*; but the Arbitration Law is different from the *UNCITRAL Model Law* in many important aspects, including the following:

Application – while the *UNCITRAL Model Law* applies only to international arbitrations, the Arbitration Law applies to both domestic and foreign-related arbitrations (Articles 1 and 65).

Form of Arbitration – it is generally agreed that the Arbitration Law recognises only institutional arbitration and not *ad hoc* arbitrations. However, an *ad hoc* arbitration award made outside China may be recognised as valid if the governing law of the *ad hoc* arbitration permits such arbitration.

Challenge of Jurisdiction – the *UNCITRAL Model Law* permits the arbitral tribunal to rule on its jurisdiction, including any objection with respect to the existence or validity of an arbitration agreement (Article 16). Under the Arbitration Law, the arbitration commission may rule on the validity of an arbitration agreement, failing which, such power is vested in the People's Court (Article 20). The ruling of the arbitration commission on the validity of an arbitration agreement is subject to the review of the People's Court upon the setting aside and enforcement of awards.

Number of Arbitrators – under the *UNCITRAL Model Law,* the parties have a choice regarding the number of arbitrators, failing which three arbitrators shall be appointed (Article 10). Under the Arbitration Law, the number shall be one or three, or failing agreement, the chairman of the arbitration shall make the decision thereof (Articles 30 and 32).

Default Appointment of Arbitrators – the *UNCITRAL Model Law* vests the power of appointing arbitrators in default in the court or in another specified authority (Article 11). Such power is vested in the chairman of the arbitration commission under the Arbitration Law.

Minimum Qualifications of Arbitrators – under the Arbitration Law, a person can only be appointed as an arbitrator if he/she satisfies the specified minimum requirements in terms of qualification, experience and knowledge (Article 13). There are no such minimum requirements under the *UNCITRAL Model Law*.

Interim Measures of Protection – the *UNCITRAL Model Law* allows the parties to apply directly to the court for interim protection measures (Article 9). Under the Arbitration Law, the application is made to the arbitration commission, which will submit the application to the People's Court (Articles 28, 46 and 68).

Court Assistance in Taking Evidence – the *UNCITRAL Model Law* provides that the arbitral tribunal or a party with the approval of the tribunal may request the court's assistance in the taking of evidence (Article 27). There is no such provision in the Arbitration Law.

Making of Awards – under the *UNCITRAL Model Law*, the parties may agree that the decision of the tribunal may be made unanimously or by a majority of the arbitrators (Article 29). Under the Arbitration Law, a decision must be made in accordance with the opinion of the majority of the arbitrators. If there is no majority in the opinions of the arbitrators, the decision by the presiding arbitrator shall prevail (Article 53).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The Arbitration Law is very similar to the arbitration rules of the arbitration institutions in that it regulates the particular details of arbitral proceedings. However, according to Article 73 of the Arbitration Law, the arbitration institution shall formulate its rules regarding foreign arbitration in compliance with the Arbitration Law and the relevant provisions of the Civil Procedure Law. Therefore, if the parties choose a Chinese arbitration institution, there will be no problem in respect of the differences between the arbitration rules and the law of the place of arbitration.

If the parties choose a foreign arbitration institution, attention must be paid to the Arbitration Law where the place of arbitration is in China to ascertain if there is any provision in the Arbitration Law that may conflict with the rules governing the parties' arbitration proceedings.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Article 2 of the Arbitration Law provides that contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organisations that are equal subjects may be arbitrated. The following disputes may not be arbitrated: (1) marital, adoption, guardianship, support and succession disputes; and (2) administrative disputes that shall be handled by administrative organs as prescribed by law (Article 3, Arbitration Law).

According to Article 77 of the Arbitration Law, labour-related disputes and disputes over contracted management in agriculture within the agricultural collective economic organisations shall be subject to arbitration governed by other special legislation.

The general approach used in determining whether a dispute is arbitrable vests authority in the arbitration institution. However, if one party requests the arbitration institution while the other party requests the People's Court, to determine whether the dispute is arbitrable, the decision of the People's Court's shall prevail (Articles 17 and 20, Arbitration Law).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

An arbitrator is not permitted to rule on the question of his/her own jurisdiction. According to Article 20 of the Arbitration Law, where a challenge arises as to the validity of the arbitration agreement, a party may request the arbitration commission to make a decision or apply to the People's Court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the People's Court for a ruling, the People's Court shall give a ruling. Any challenge of the validity of the arbitration agreement shall be raised prior to the arbitration tribunal's first hearing.

The authority for determining the jurisdiction of the arbitrator is vested in the arbitration commission. For example, the arbitration commission may grant the authority to the arbitral tribunal to decide its own jurisdiction if it considers this necessary (Article 6, CIETAC Arbitration Rules).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

If one party files a case in the People's Court in breach of an arbitration agreement, the opposing party shall request the court to dismiss the case due to lack of jurisdiction. The People's Court shall review the validity and scope of the arbitration agreement. Once the People's Court holds that the arbitration agreement is valid and the issue is subject to arbitration, the case shall be dismissed. If, prior to the first hearing, the opposing party has not raised an objection to the People's Court's acceptance of the case, that party shall be deemed to have renounced the arbitration agreement and the People's Court shall continue to try the case. (Article 271, Civil Procedure Law; Article 26, Arbitration Law.)

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Please see question 3.2 above. The question of the jurisdiction of a tribunal arises where the parties dispute the validity of an arbitration agreement, and the tribunal shall decide on its own jurisdiction only when it accepts the disputes before the People's Court. The People's Court shall review the arbitral tribunal's affirmative decision regarding the jurisdiction if either party challenges the validity of an arbitration agreement. The standard of review in respect of such an affirmative decision regarding jurisdiction is *de novo*.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

In China, it is generally accepted that an arbitration agreement/clause can only bind the parties to it; that is, generally, an arbitral tribunal is not entitled to assume jurisdiction over individuals or entities that are not parties to an agreement to arbitrate.

However, the Supreme People's Court Interpretation takes a step further to provide for the possibility of an arbitration agreement/clause to bind a third party in the following cases:

- Where a party is merged or divided after concluding an arbitration agreement, such arbitration agreement shall be binding on the successor who assumes its rights and obligations.
- Where a party has died after concluding an arbitration agreement, the arbitration agreement shall be binding on the successor who inherits his/her rights and obligations in the matter to be arbitrated.

The circumstances prescribed in the preceding two paragraphs are not applicable if the parties have agreed otherwise when concluding the arbitration agreement.

Article 18 of CIETAC 2015 Arbitration Rules allows either party wishing to join an additional party to the arbitration to file the Request for Joinder with CIETAC, "based on the arbitration agreement invoked in the arbitration that *prima facie* binds the additional party". CIETAC shall make the decision after the arbitral tribunal hears from all parties including the additional party if the arbitral tribunal considers the joinder necessary.

In addition, Article 31 of the SHIAC 2015 Arbitration Rules provides that the claimant and the respondent may make a request for the joinder of a third party with its consent to the arbitration. The tribunal shall decide on the joinder of the third party.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

According to Article 74 of the Arbitration Law, if the law does not have a special stipulation regarding limitation periods for arbitration, the statute of limitation for litigation shall apply. Generally, Chinese law does not have special limitation periods for arbitration. According to legislation in China, such period is generally three years in the case of domestic disputes (Article 188, General Rules of Civil Law of the People's Republic of China ("General Rules of Civil Law")), and four years in the case of international sales contracts and technology import and export contracts (Article 129, *Contract Law of the People's Republic of China* ("Contract Law")), commencing from the date a party knows or should have known his/her/its rights are harmed.

The limitation period can be suspended during the last six months of the limitation period where the claimant fails to exercise his/her/its right of claim due to the following obstacles: (1) *force majeure*; (2) persons with no capacity for civil conduct or with limited capacity for civil conduct have no legal agent, or such legal agent has died, lost the capacity for civil conduct or lost the authority for agency; (3) following succession, the successors or the estate administrators have not been determined; (4) the claimant is controlled by the obligor or others; and/or (5) other obstacles that prevent the claimant from exercising his/her/its right of claim. The suspended limitation period shall expire six months after the elimination of its suspension cause(s) (Article 194 of the General Rules of Civil Law).

The limitation period can also be discontinued if: (1) the claimant makes a request for performance with the obligor; (2) the obligor consents to perform its obligations; (3) the petition is put before a People's Court or an arbitration tribunal; and/or (4) other circumstances exist that are equivalent to the filing of a lawsuit or an application for arbitration. A new limitation period will commence from the date when the cause of the discontinuance ends (Article 195 of the General Rules of Civil Law).

Such rules are regarded as procedural by the court, i.e., a party will lose its right to sue if it does not proceed with the case before the end of such period. However, Chinese legislation does not prohibit the voluntary performance of a party after the expiry of such limitation period.

The Law of the Application of Laws provides that the law that governs the application of limitation periods is that of the relevant law governing foreign-related civil relations. Meanwhile, the Law of the Application of Laws explicitly excludes the application of any choice of law rules of a foreign jurisdiction. Therefore, the People's Court considers rules for statutes of limitation as substantive rules.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pursuant to Article 20 of the *Enterprise Bankruptcy Law of the People's Republic of China*, after the People's Court accepts an application for bankruptcy, any civil action or arbitration related to the debtor, which has started but has not yet ended, shall be suspended. The civil action or arbitration can be resumed after a bankruptcy custodian takes over the debtor's assets.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

As to the governing law of the substance of a dispute, Article 3 of the Law of the Application of Laws permits the parties to choose the laws applicable to the dispute that may arise from their business transactions, failing which the law of the closest relationship, or the laws at the habitual residence of the party whose fulfilment of obligations can best reflect the characteristics of the contract, shall apply.

Some special provisions that are widely applied in foreign-related dispute practice include:

- Article 36: For real property rights, the law of the place in which the real property is located shall apply.
- Article 37: For movable property rights, if the parties have not made a choice, the law of the place of the relevant property where the legal fact occurs shall apply.
- Article 44: For tort liabilities, the law of the place where the tort is committed shall apply. However, if the parties have common regular residence, the law of the place of the common habitual residence shall apply. If the parties reach an agreement on the choice of law, the agreement shall be followed.
- Article 48: For the attribution and contents of intellectual property rights, the law of the place in which protection is requested shall apply.
- Article 50: For the infringement liabilities of intellectual property rights, the law of the place in which the protection is requested shall apply. The parties may reach an agreement on the applicable law after the infringing act has happened.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There is explicit stipulation on the application of mandatory laws in Chinese laws. If there are mandatory provisions on foreign-related civil relations in Chinese laws, these mandatory provisions shall apply directly (Article 4 of the Law of the Application of Laws).

If the parties try to circumvent the application of Chinese laws through choosing foreign law or the law of a foreign jurisdiction, this choice shall be deemed as ineffective (*Article 194 of the Opinions of the Supreme People's Court on Several Issues regarding the Implementation of the General Principles of Civil Laws of the People's Republic of China*). For example, contracts for Chinese-foreign equity joint ventures, for Chinese-foreign contractual joint ventures and for Chinese-foreign cooperative exploration and development of natural resources to be performed within the territory of the People's Republic of China must apply Chinese laws (Article 126 of the Contract Law). Further, foreign debts and foreign guarantees shall be subject to the approval of the relevant foreign exchange authorities. Therefore, in practice, the relevant PRC laws are directly applicable and exclude the application of foreign laws chosen by the concerned parties. This is also directly reflected in judicial practice, such as in the court decisions relating to the guarantee contract dispute between the Bank of China (Hong Kong), Guang'ao Development Co. and Liu Tianmao, the guarantee contract dispute between Bank of China (Hong Kong), Hong Kong Xinjiyuan Industrial Co., Fushan City Dongjian Group Co., etc.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The parties may choose the laws applicable to the arbitration agreements. When the parties have not made a choice, the laws in which the arbitration authority is located or the arbitration takes place shall apply (Article 18, Law of the Application of Laws).

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

According to Article 13 of the Arbitration Law, arbitrators must meet one of the following conditions: (1) they have been engaged in arbitration work for at least eight years; (2) they have worked as a lawyer for at least eight years; (3) they have been a judge for at least eight years; (4) they are engaged in legal research or legal teaching and in a senior position; or (5) they have legal knowledge and are engaged in professional work relating to economics and trade, and in senior positions or equivalent professional levels. Pursuant to Article 16 of the Arbitration Law, a valid arbitration agreement must include a designated arbitration commission. Therefore, only institutional arbitrations are recognised under the Arbitration Law; *ad hoc* arbitration is not recognised under Chinese law. As mentioned, CIETAC and all the local arbitration commissions currently require arbitrators to be selected from their respective panels of arbitrators. However, the CIETAC Arbitration Rules allow the parties to appoint arbitrators from outside CIETAC's panel of arbitrators, subject to confirmation by the chairman of CIETAC. As to the procedure for the selection of arbitrators, both the Arbitration Law and the CIETAC Rules contain provisions concerning how arbitrators are to be selected. Basically, in arbitration cases, excluding those subject to summary procedure, because of the size of the claim (CIETAC and other arbitration commissions have special rules concerning cases subject to summary procedure), where there is one claimant and one respondent and there is no agreement as to having a sole arbitrator, each party shall appoint an arbitrator and the presiding arbitrator shall be appointed by agreement of the parties or by the chairman of the arbitration commission. Where the parties fail to decide on the composition of the tribunal or fail to choose an arbitrator within the prescribed time limit, the chairman of the arbitration commission shall make the choice.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Generally speaking, the chairman of the arbitration commission shall make a decision where the parties fail to decide on the composition of the arbitral tribunal or fail to choose an arbitrator within the prescribed time limit.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

There are no provisions in the Arbitration Law or any other legislation in China that allow the court to intervene in the selection of arbitrators. However, the court may refuse the enforcement of an award where the arbitral tribunal is improperly constituted or where there is misconduct by the arbitrators.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Article 34 of the Arbitration Law provides that in any of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for withdrawal: (1) the arbitrator is a party in the case or a close relative of a party or of an agent in the case; (2) the arbitrator has a personal interest in the case; (3) the arbitrator has another form of relationship with a party or his agent in the case, which may affect the impartiality of the arbitration; or (4) the arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The principal legislation governing the procedure of arbitrations in China is the Arbitration Law, which applies to all arbitration proceedings conducted in China, whether domestic or foreign-related. The Arbitration Law contains various provisions governing the general procedure of arbitrations, including the commencement of arbitration, appointment of the arbitral tribunal, filing of defences, interim measures, conduct of hearing and evidence. These provisions are supplemented by judicial interpretations, replies and summaries of the Supreme People's Court and more detailed arbitration rules of the arbitration commissions.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The Arbitration Law sets out some procedural steps that the parties are required to follow when commencing arbitration proceedings.

Before any party can apply to initiate arbitration proceedings, there must be a valid arbitration agreement/clause and a specific arbitration claim (Article 21, Arbitration Law). Such application must be within the authority of the chosen arbitration commission.

The claimant must submit the written arbitration agreement/clause and a written application for arbitration to the appropriate arbitration commission (Article 22, Arbitration Law). The claimant must also provide sufficient copies of the written arbitration agreement and the application as stipulated by the rules of the relevant arbitration commission.

Pursuant to Article 24 of the Arbitration Law, if the arbitration commission accepts an application for arbitration, it is obliged to notify the claimant of its decision within five days from the date of receipt of the application. If the arbitration commission considers that the application does not comply with the required formalities and should be rejected, it shall inform the claimant of its decision and state the reason for rejection in writing within five days from the date of receipt of the application. If the arbitration commission accepts the application, it shall, within the time limit prescribed in its arbitration rules, deliver copies of its arbitration rules and its list of arbitrators to the claimant and the respondent, together with a copy of the application.

The respondent shall submit a written defence to the arbitration commission within the time limit specified in the arbitration rules (Article 25, Arbitration Law). Upon receipt of the respondent's defence, the arbitration commission shall serve a copy on the claimant within the time limit specified in the arbitration rules.

Article 27 of the Arbitration Law provides that the claimant may amend its arbitration claim, and the respondent may acknowledge or refute the claim and shall have the right to raise a counterclaim.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no specific laws or rules governing the conduct of counsel from China in arbitral proceedings sited in China. However, the *Law of the People's Republic of China on Lawyers* and the *Code of Conduct for Lawyers* prescribe some basic rules concerning the provision of legal services by lawyers. For example, a lawyer is prohibited from privately accepting authorisation, collecting fees, or accepting money, things of value or other benefits offered by a client, in violation of regulations, meeting with a judge, prosecutor, arbitrator or another staff member concerned, etc.

These laws or rules stipulate that only lawyers who acquire their practice certificates pursuant to the law of China shall be subject to their purview. It is not clear if Chinese lawyers who practise law outside China are also subject to these laws and rules.

As for the rules governing the conduct of counsel from countries other than China in arbitral proceedings sited in China, pursuant to Article 7 of the *Decision of the Government Administration Council of the People's Central Government Concerning the Establishment of a Foreign Trade Arbitration Commission Within the China Council for the Promotion of International Trade*, foreign citizens are allowed to represent a party in an arbitral proceeding sited in China. However, pursuant to the *Provisions of the Ministry of Justice Regarding the Implementation of the "Regulations for the Administration of Foreign Law Firms' Representative Organizations in China"*, foreign counsels are not allowed to provide opinions or certifications on acts or events to which the laws of China are applicable.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Under the arbitral legislation in China, the arbitration commission, rather than the arbitral tribunal, shall decide on the validity of an arbitration agreement/clause (Article 20, Arbitration Law). An award will not only be signed by the arbitrator(s), but the official seal of the arbitration commission will also be affixed (Article 54, Arbitration Law). Most powers and duties of arbitrators are imposed by the rules of arbitration commissions.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Yes. According to the *Regulations on the Administration of Foreign Law Firms' Representative Offices in China* (promulgated by the State Council, and effective as of 1 January 2002), a foreign lawyer is not permitted to engage in matters relating to Chinese legal affairs. In 2004, the Ministry of Justice further clarified that producing an opinion on Chinese laws shall be treated as conducting Chinese legal affairs. This means that a foreign lawyer may, as an attorney-at-law, participate in arbitrations in China, but cannot interpret Chinese law.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

An arbitrator is protected from legal liability as long as he/she does not commit any intentional fault stipulated by law. Under the Arbitration Law, if an arbitrator commits embezzlement, accepts bribes or is involved in malpractice for personal benefit or perverts the law in the arbitration of a case, or the arbitrator privately meets with a party or agent or accepts an invitation to entertainment or a gift from a party or agent, he/she will assume legal liability and be removed by the relevant arbitration commission from the register of arbitrators (Articles 34, 38 and 58, Arbitration Law).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The People's Courts generally do not have jurisdiction to interfere in arbitration proceedings, although the courts may refuse to enforce an arbitral award in certain circumstances where there is a procedural irregularity.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Under the Arbitration Law, an arbitrator is not permitted to award specific types of preliminary or interim relief, and only the People's Court has the power to grant such interim relief. In general, interim relief granted by the People's Court can be divided into two categories: interim property preservation measures; and interim evidence preservation measures (Articles 28, 46 and 68, Arbitration Law). The Civil Procedure Law provides that the parties may request a competent court to grant injunctive relief even before the

institution of arbitration proceedings (Article 101, Civil Procedure Law; Article 542, *Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China*).

Besides interim property preservation and interim evidence preservation, an arbitrator may award other preliminary or interim relief. Appendix III of the CIETAC 2015 Arbitration Rules provides for the *Emergency Arbitrator Procedures*, in which an emergency arbitrator may award a preliminary or interim relief. Such interim relief is binding on both parties. The party obtaining this award may submit it to a competent court for enforcement. After the arbitration tribunal is formed, the tribunal may award the same interim relief.

In summary, some types of preliminary or interim relief can be granted only by a court, while other types of preliminary or interim relief may be awarded by an arbitrator; however, the enforcement of interim relief is always carried out by a competent court.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

As mentioned above, the power to grant preservation of evidence and property can only be exercised by a People's Court.

Such interim measures will only be granted if the following conditions are met:

(1) The applicant is a party to the arbitration.

(2) For interim preservation of property, "where it may become impossible or difficult to enforce the award due to an act of the other party or other causes" (Article 28, Arbitration Law).

(3) For interim preservation of evidence, "where the evidence may be lost or difficult to obtain at a later time" (Article 46, Arbitration Law).

(4) The subject-matter of the proposed interim measures must be owned by the other party to the arbitration.

(5) The value of the subject-matter of the proposed interim measures must not exceed the amount of the claim.

Applications for interim measures should be made to the arbitration commission. In practice, applications are sometimes made directly to the People's Court and this does not affect the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In practice, the People's Courts normally take a conservative approach to requests for interim relief by parties to arbitration agreements. Parties to arbitration agreements may request for the above-mentioned interim relief from the arbitral tribunal, and the arbitral tribunal will forward such request to the competent People's Court for ruling and enforcement. Usually the People's Court will require the applicant to provide security. Generally speaking, the application will be rejected if the applicant fails to provide security.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Unlike the common law system, the People's Courts of China will not normally issue an anti-suit injunction in aid of an arbitration that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. Where the parties have reached an arbitration agreement, the national courts shall not accept the suit brought by any single party involved, unless the arbitration agreement is invalid or waived by the parties (Article 26, Arbitration Law; Article 271, Civil Procedure Law).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Current Chinese arbitration legislation does not explicitly allow the People's Court or arbitral tribunal to issue an order of security for costs. Generally, the arbitration fee is prepaid by the claimant. The collection of all other expenses reasonably incurred in the proceedings, including attorney fees, relies mainly on the enforcement of the arbitral award.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

As mentioned above, in China, only the People's Court has the power to grant preliminary relief and interim measures (Articles 28, 46 and 68, Arbitration Law). Domestic arbitration tribunals will submit a party's request for such relief or measures under Chinese law to the competent People's Court (Article 23, CIETAC Arbitration Rules). The People's Court does not have any obligation to enforce orders by arbitral tribunals in other jurisdictions. Under Article 5.2 of the 1958 New York Convention, a foreign arbitral award will not be recognised or enforced if the recognition or enforcement of the award would be contrary to the public policy of a country. Article 274 of the Civil Procedure Law also provides for a similar restriction. Since the authority to grant preliminary relief and interim measures is exclusively reserved in the People's Court, the recognition and enforcement of an order by a foreign arbitration tribunal regarding preliminary relief and interim measures may interfere with the judicial sovereignty of China.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The Arbitration Law only gives a general rule regarding evidence applicable to arbitral proceedings. In most cases, the parties bear the burden of proof to provide evidence to support their respective claims. Where an arbitration tribunal deems it necessary to collect evidence, it may collect it on its own initiative. In practice, an arbitration tribunal seldom initiates such collection of evidence due to its lack of statutory power or enforceable authority to do so. CIETAC issued its *Guidelines on Evidence*, which came into effect on 1 March 2015. The Guidelines include a series of guidelines regarding evidence submission, discovery, evidence examination and evidence assessment. CIETAC created the Guidelines with appropriate reference to the *IBA Rules on the Taking of Evidence in International Arbitration* and those of the Chinese principles of evidence in civil litigation that are suitable for use in arbitration. However, the Guidelines are not an integral part of the Arbitration Rules. The application of the Guidelines is subject to the consent of the parties in each case.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Generally, disclosure/discovery is not available under the Chinese litigation or arbitration system. Article 43 of the Arbitration Law provides that the arbitral tribunal may collect evidence itself. However, in practice, it is very rare that an arbitral tribunal collects evidence itself. Both parties usually have to rely on their own evidence. With respect to the attendance of witnesses, the arbitral tribunal does not have any power to require witnesses to attend the hearing. CIETAC's *Guidelines on Evidence* provides for some rules regarding discovery; however, as mentioned above, the Guidelines are not mandatory.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Generally, disclosure/discovery is not available under the Chinese litigation or arbitration system. Therefore, under no circumstance can a national court assist arbitral proceedings by ordering disclosure/discovery. Under the Civil Procedure Law, if a witness refuses to attend the hearing, a national court does not have the power to require the witness to attend the hearing.

CIETAC's *Guidelines on Evidence* provides for some rules regarding discovery; however, as mentioned above, the Guidelines are not mandatory.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The Arbitration Law and rules of arbitration commissions prescribe general rules for the production of written and/or oral witness testimony. Generally speaking, the examination of evidence is a mandatory step of the arbitration proceedings. The rules of arbitration commissions set up the framework of evidence examination. Parties and arbitrators may set up specific rules for a single proceeding.

Articles 8 and 17 of CIETAC's *Guidelines on Evidence* provide for some rules on the production of written and/or oral witness testimony for arbitration. For example, Article 17.1 provides: "[a] witness or an expert shall in principle appear in person at the hearing or by way of video-conferencing, and be questioned by the party who calls him/her ('direct examination') and by the opposing party ('cross-examination')". Witnesses are not required to be sworn in before the tribunal. As stated above, cross-examination is allowed.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

There are no explicit provisions in the Arbitration Law regarding privilege rules in China. However, in the absence of an agreement by the parties, the arbitration tribunal may determine whether or not documents in an arbitral proceeding are subject to privilege. Once a document has been ordered by the arbitration tribunal or submitted by one party, it is generally required to be disclosed to the other party, in which case any privilege is deemed to have been waived. Article 7.3 of CIETAC's *Guidelines on Evidence* provides for some rules regarding privilege, including trade secrets and national secrets, during document production. For example, Article 7.3 provides: "[a]t the request of the other party, the tribunal may dismiss a request to produce for any of the following reasons […] (2) production of the document(s) may result in violation of the applicable laws or professional ethics […]".

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An arbitral award shall be decided by the majority of the arbitrators and the views of the minority can be written down in the record. Where a majority vote cannot be reached, the award shall be decided based on the opinion of the chief arbitrator. The arbitral award shall specify the arbitration claims, the facts in dispute, the reasons for the award, the result of the award, the arbitration expenses and the date the award is given. Where the parties object to the specification of the facts in dispute and the reasons for the ruling, such specification and reasons may be omitted. The arbitral award shall be signed by the arbitrators and affixed with the seal of the arbitration commission. An arbitrator holding a different view may or may not sign the award. In arbitrating disputes, the arbitration tribunal may pass the ruling on part of the facts that have already been made clear. An arbitration tribunal should correct errors involving context or computation and add things that have been omitted in the rulings in the arbitral award. The parties may apply for a correction with the arbitration tribunal within 30 days after the receipt of the award. The arbitral award takes legal effect upon its issuance (Articles 53, 54, 55, 56 and 57, Arbitration Law).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The arbitration tribunal may clarify, correct or amend an arbitral award to the extent of any written or mathematical errors or decided items which are absent in the arbitral award (Article 56, Arbitration Law).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

As noted above, the arbitral award enters into force upon its issuance, which is not subject to appeal. Hence, neither party is entitled to appeal an arbitral award in China.

However, according to Article 58 of the Arbitration Law, if the parties concerned have evidence to substantiate one of the following, they may apply to set aside the arbitral award with the Intermediate People's Court at the place where the arbitration commission resides: (1) there is no agreement for arbitration; (2) the matters ruled on are beyond the scope of the agreement for arbitration or the limits of authority of an arbitration commission; (3) the composition of the arbitration tribunal or the arbitration proceedings violate legal processes; (4) the evidence on which the ruling is based is forged; (5) matters that have an impact on the impartiality of the ruling have been found to be concealed by the opposite party; or (6) arbitrators have accepted bribes, resorted to deception for personal gains or perverted the law in the ruling.

The Civil Procedure Law provides for another basis of challenge for the respondent. Under Article 237 of the Civil Procedure Law, a respondent may apply for the non-enforcement of an arbitral award with the People's Court under the same circumstances mentioned in Article 58 of the Arbitration Law.

In conclusion, the challenge of an arbitral award is allowed under Chinese law.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Parties cannot agree to exclude such basis of challenge. Any basis of challenge against an arbitral award is subject to Article 58 of the Arbitration Law and Article 237 of the Civil Procedure Law, as discussed in question 10.1 above. If, upon request by an aggrieved party, a competent People's Court finds that any of the circumstances mentioned under Article 58 of Arbitration Law above arises, the People's Court may set aside such award. On the other hand, if the respondent can prove to the competent People's Court that any of the circumstances mentioned under Article 237 of the Civil Procedure Law arises, the court may make a ruling of non-enforcement. In exceptional cases, if the arbitral award is against public interests, Chinese law also allows the People's Court to set aside or rule on the non-enforcement of the arbitral award (Article 58, Arbitration Law; Article 237, Civil Procedure Law).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No. As stated in question 9.1 above, an arbitral award is binding and final upon its issuance (Article 57, Arbitration Law). In exceptional cases, the parties may challenge the arbitral award on the grounds mentioned in question 10.1 above.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

As stated in question 9.1 above, an arbitral award is binding and final upon its issuance (Article 57, Arbitration Law). There is no appeal procedure as such. Instead, the procedure through a competent People's Court applies if any of the parties elects to challenge the arbitral award on the grounds mentioned in question 10.1 above.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

China ratified the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* in 1987 by making the following reservations: (a) China will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state; (b) China will apply the Convention only to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under national law; and (c) upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to the Hong Kong Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macau Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention.

The Supreme People's Court issued several judicial interpretations concerning the recognition and enforcement of foreign arbitral awards, e.g., the meaning of "commercial legal relationship (whether contractual or not)", the recognition and enforcement of foreign arbitral awards in the territory of another state that is also a party to the Convention, etc.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

China has made separate arrangements on the reciprocal recognition and enforcement of arbitration awards with the Hong Kong Special Administrative Region in 2000 and the Macau Special Administrative Region in 2007. Other than that, China is not a signatory to any other regional Conventions concerning the recognition and enforcement of arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In accordance with Article 4 of the 1958 New York Convention, the application to the People's Courts in China for the recognition and enforcement of arbitration awards made within the territory of another contracting state shall be filed by a party of the arbitration award. The application of the party shall be accepted by the Intermediate People's Courts in the following places: (1) where the person subject to enforcement is a natural person, it shall be the place where his/her residence is registered or where his/her domicile is located; (2) where the person subject to enforcement is a legal person, it shall be the place where its principal executive office is located; or (3) where the person subject to enforcement does not have residence, domicile or a principal executive office in China but has property in China, it shall be the place where his/her/its property is located.

After the People's Court with jurisdiction receives the application of the party, it shall examine the arbitration award whose recognition and enforcement has been applied for; if the court believes that the circumstances listed in Subparagraphs 1 and 2 of Article 5 of the 1958 New York Convention are not applicable, it will rule that the validity of the award shall be recognised and that the award shall be enforced according to the Civil Procedure Law; if the court holds that any of the circumstances listed in Subparagraph 2 of Article 5 exist, or the evidence provided by the person subject to enforcement proves that any of the circumstances listed in Subparagraph 1 of Article 5 exist, it shall dismiss the application and refuse to recognise and enforce the arbitration award. Any refusal decision regarding a foreign arbitration award must be approved by the Supreme People's Court.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

As noted above, the arbitral award enters into force upon its issuance. The parties concerned shall execute the arbitral award. If one of the parties refuses to execute the award, the other party may apply for enforcement with the People's Court according to the relevant provisions of the Civil Procedure Law. Hence, the arbitration award, once made, precludes the same issue from being re-heard in a national court.

However, if the parties concerned have evidence to substantiate one of the following, they may apply for the non-enforcement of the arbitral award with the competent People's Court: (1) there is no agreement for arbitration; (2) the matters ruled on are beyond the scope of the agreement for arbitration or the limits of authority of an arbitration commission; (3) the composition of the arbitration tribunal or the arbitration proceedings violate legal processes; (4) the evidence on which the ruling is based are forged; (5) matters that have an impact on the impartiality of the ruling have been found to be concealed by the opposite party; or (6) arbitrators have accepted bribes, resorted to deception for personal gains or perverted the law in the ruling.

However, according to Article 237 of the Civil Procedure Law, if the non-enforcement of an arbitral award has been ruled by the People's Court, the parties shall have the right to resort to arbitration again or bring an action before a People's Court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

According to current Chinese laws, the enforcement of an arbitral award may be refused on the grounds of public policy. Under Article 258 of the Civil Procedure Law, if the People's Court determines that the enforcement of the award is against the social and public interests of the country, the People's Court will issue a written order not to allow the enforcement of the arbitral award. Under Article 58 of the Arbitration Law, if the People's Court holds that an arbitral award goes against the social and public interests, the arbitral award shall be cancelled by the court.

However, China maintains a prudent but severe attitude towards the refusal of enforcement of an arbitral award on the grounds of public policy. From a procedural aspect, any case concerning the refusal of enforcement of a foreign arbitral award on the grounds of public policy shall be reported to the Supreme People's Court for approval and only the Supreme People's Court has the final authority to approve such refusal. From a substantive aspect, China holds a very strict view on a determination of whether or not an arbitral award violates public policy. To our knowledge, more than 100 cases were reported to the Supreme People's Court every year after 2000 concerning the refusal of recognition and enforcement of foreign arbitral awards on the grounds of public policy, but only one case since then has been granted the final approval on the grounds of public policy, which case concerned the judicial sovereignty of China.

In that case, the foreign arbitration award tried to invalidate the domestic judgment and property preservation order. The Jinan Intermediate People's Court held that the arbitration award determined a subject-matter that was not capable of a settlement by arbitration under the law of that country and such arbitration award interfered with the judicial sovereignty of China. This decision was supported by the Shandong High People's Court and the Supreme People's Court.

In 2014, the Supreme People's Court approved the Beijing Second Intermediate People's Court's decision to refuse the enforcement of another foreign arbitration award. In that case, the Supreme People's Court held that the enforcement was refused because the arbitration agreement was invalid. However, one reason behind the invalidation is public policy. The Supreme People's Court held that the dispute in that case was a purely domestic dispute and the Arbitration Law and the Civil Procedure Law do not permit any party to settle a purely domestic dispute through an international arbitration. The policy concern is to prohibit domestic parties from getting around the judicial system in China. However, in 2015, a very similar case was heard by the Shanghai First Intermediate People's Court. In that case, the court believed the dispute had a close relationship with foreign investors and was available for arbitration by a foreign arbitration institute. This is an indication that the Chinese judicial system is taking a more restrictive view on public policy and a more liberal view on the recognition and enforcement of foreign arbitral awards.

At the end of 2016, the Supreme People's Court issued the *Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Development of Free Trade Zones* ("Opinion on Providing Judicial Guarantee for FTZ"), which confirmed that disputes between foreign-invested entities in the Free Trade Zone may choose a foreign arbitration institution to settle their disputes and Chinese courts shall recognise and enforce such arbitration award. The trend of taking a more restrictive view on public policy and a more liberal view on the recognition and enforcement of foreign arbitral awards continues. It is expected that the Chinese judicial system will be more cautious when applying public policy to reject the enforcement of a foreign arbitral award.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Generally speaking, arbitral proceedings sited in China are confidential, which is a major advantage of arbitration over litigation.

In accordance with Article 40 of the Arbitration Law, when the parties concerned agree to have the case heard in open sessions, the hearing may be held openly, except in cases that involve state secrets. Hence, such arbitration proceedings are not protected by the confidentiality rule if the parties expressly agree on disclosure or if the disclosure is required by laws and regulations.

Subject to Article 40 of the Arbitration Law, the arbitration tribunal may not hear a case in open sessions.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Under Articles 45, 48 and 58 of the Arbitration Law, the evidence submitted to the arbitration tribunal will be questioned by the other party and the arbitration tribunal in subsequent arbitration proceedings of the same case. The arbitration tribunal shall record the hearings in writing. Where the parties or other people involved

in the arbitration find that something in their statements has been left out in the recording or has been recorded incorrectly, they then have the right to apply for a correction. Where corrections are not made, the application shall be recorded. The written records of the hearings shall be signed or affixed with seals by the arbitrators, minutes' keepers, the parties and other people participating in the arbitration.

Both Article 9 of *Some Provisions of the Supreme People's Court on Evidence in Civil Procedures* and Article 93 of *Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China* state that during a civil litigation, either party is not required to submit evidence to prove a fact that is confirmed by a valid arbitration award. Therefore, information disclosed in arbitral proceedings that is confirmed by arbitration awards may be relied on in subsequent civil litigation. However the Arbitration Law and Guidelines do not have similar rules indicating that information confirmed by arbitration awards can be challenged by parties.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Arbitration Law and the Supreme People's Court Interpretation do not specify the types of remedies (including damages) that are available in arbitration (e.g., punitive damages). Under Chinese legislation, compensation for actual loss is the statutory principle concerning contractual obligations for remedies (including damages). Punitive damages normally will not be supported unless product liability and consumer protection are involved.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The arbitration tribunal will examine the relevant provision(s) stipulating the interest rate in the contract concluded between the parties, and in particular, where the parties do not stipulate the interest rate for delayed payment, the arbitration tribunal has the authority to determine the interest rate. In recent years, the interest rate for delayed payment of a loan stipulated by the People's Bank of China is used as reference thereof. However, subsequent to the implementation of the *Provisions of the Supreme People's Court on the Application of Laws to the Hearing of Private Lending Cases*, the annual interest rate of 24% is used as a reference instead.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Normally, the parties will negotiate the provision stipulating the fees and/or costs related to the arbitration in the arbitration agreement or arbitration clause. Where there is no such stipulation and the case is resolved through the mediation of the arbitration tribunal, the relevant arbitration fee will be borne by both parties through their negotiation thereof, and in the case where the dispute is resolved by the ruling of the arbitration tribunal, the losing party will bear the arbitration fee.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

According to the relevant tax regulations, liquidated damages or loss of profit may be subject to business income tax, enterprise income tax and value-added tax, provided that the roles of the parties in the transaction (such as the buyer or purchaser), the nature and the cause of the liquidated damages comply with the stipulations under the relevant tax laws and regulations. It is prudent for the parties concerned to seek advice from their tax consultants on a case-by-case basis.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

According to Article 22 of the *Regulations for the Administration of Lawyers' Charges*, legal service fees shall be paid directly to the law firm where the lawyer is attached. The lawyer is not allowed to charge the client privately. To date, there are no known funding claims in China.

Contingency fees are legal under the laws of China, but there are some restrictions. According to Article 11 of the *Regulations for the Administration of Lawyers' Charges*, when a lawyer represents a client in a property matter, after the client has been informed of the official recommended legal service fees and the client still chooses the contingency fee model, then the law firm can charge contingency fees, except in the following circumstances: (1) cases related to marital or testament issues; (2) requests for payment of social insurance or minimum living security; (3) requests for payment of alimony, costs of upbringing, pension, relief payment, industrial injury compensation; and (4) requests for payment of wages. According to Article 12 of the *Regulations for the Administration of Lawyers' Charges*, the lawyer is not permitted to charge contingency fees for criminal cases, administrative cases, national compensation cases and class actions. According to Article 13 of the *Regulations for the Administration of Lawyers' Charges*, the maximum amount charged shall not exceed 30% of the value of the dispute when adopting the contingency fee model.

There are no typical "professional funders" active in the market, either for litigation or arbitration.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

China has signed the *Washington Convention on the Settlement of Investment Dispute between States and Nationals of Other States* (1965), which entered into force on 6 February 1993.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

China is a party to more than 130 Bilateral Investment Treaties ("BITs").

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

China does have some noteworthy terms or language that it uses in its investment treaties. For example, China provides that either party to the relevant treaty shall accord to the investors or investor-related activities of the other party no less favourable treatment than it accords to any third parties' investors or investor-related activities. The parties must exhaust all local remedies before they can resort to international arbitration. The intended significance of such terms or language is that China wants to share the benefits accorded to third parties, and to let local authorities handle disputes before resorting to international arbitration.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

In previous BITs, China agreed that only disputes related to eminent domains and nationalisation may be submitted to ICSID, and the national courts shall play an important role in the defence of state immunity, but the recent trend is that China may allow disputes to be submitted to ICSID provided that both governments agree on such matter.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

There have been a few noteworthy legal developments pertinent to arbitration in the last few months.

- **China to establish international commercial courts in three cities**

On 23 January 2018, the Central Leading Group for Comprehensively Deepening Reforms deliberated and adopted the *Opinions on the Establishment of the Belt and Road Dispute Settlement Mechanism and Body* ("Opinions"). The Opinions preliminarily set out that new international commercial courts will be established separately in Beijing, Xi'an and Shenzhen by the Supreme People's Court. This will be one of China's most significant legal developments pertinent to dispute resolution in 2018.

Unlike the other People's Courts, such international commercial courts are mainly responsible for the resolution of disputes related to the Belt and Road Initiative, which also serve as a major body to strengthen the interactive relations between the people's court system and arbitration institutions. Centred on the establishment of such courts, China intends to gradually establish a diversified international dispute settlement mechanism in the trinity of litigation, arbitration and mediation to provide tailored international dispute resolution services for the implementation of the Belt and Road Initiative.

- **People's Court clarify judicial review standards by implementing three judicial interpretations**

For the purpose of strengthening judicial review and support for the development of arbitration in China, the Supreme People's Court issued three judicial interpretations regarding judicial review of arbitration cases, namely the *Provisions of the Supreme People's Court on Issues Relating to the Reporting and Review of Cases Involving Judicial Review of Arbitration,* the *Provisions of the Supreme People's Court on Several Issues Relating to the Hearing of Cases Involving Judicial Review of Arbitration*, and the *Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases of Enforcement of Arbitration Awards by People's Courts*. These Interpretations summarise judicial experience of the People's Courts accumulated in pertinent judicial practice, and set out more detailed and practical stipulations, which will be conducive for the healthy development of arbitration in China.

The most important aspect relating to international arbitration is the stipulation of a reporting mechanism for judicial review of arbitration cases. The People's Courts used to have an internal reporting mechanism in place for arbitration cases in which an application of setting aside or non-enforcement of awards is involved. However, this internal rule is not public information and only practitioners in this area have knowledge of its existence. The Supreme People's Court has not only made such reporting mechanism public now, but has also revised it to make it more maneuverable.

- **China to initiate own platform for international investment dispute settlement**

As China becomes the third-largest recipient of FDI and the second-largest foreign investor across the globe, there is a pressing need for China to establish its own platform to resolve various inbound and outbound investment disputes.

On 19 September 2017, the *China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (2015 version)* ("IAR") was promulgated by CIETAC and has come into force as from 1 October 2017. The IAR is very innovative in four aspects: (1) the tailored application scope, i.e., international investment disputes between an investor and a State or any entity of which the conduct is attributable to a State; (2) the designated panel of arbitrators and the high qualifications of arbitrators; (3) open hearing of proceedings; and (4) recognition of TPF (third-party funding).

- **Steady increase in arbitration cases in China**

In recent years, there has been a fast and steady increase in the number of arbitration proceedings seated in China.

According to statistics released by CIETAC, 2,298 cases were referred to CIETAC in 2017; 2,181 cases were referred to CIETAC in 2016; and 1,968 cases were referred to CIETAC in 2015, making it one of the most active arbitral institutions by number of published cases.

China is also opening its doors to foreign arbitration institutions. The Supreme People's Court has confirmed that foreign arbitration institutions may hold arbitration proceedings in mainland China. However, whether arbitral awards issued by such proceedings are enforceable in China is unclear.

Categories of cases have been further diversified, including sale of goods, joint ventures, cooperation, processing and compensation trades, equity transfers, housing tenancy or sales, construction and building renovation projects, contracting engineering projects, estate construction and developments, contracts for commission, concessions, insurance agreements, trademark licences, takeovers and mergers.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

At the end of 2016, the Supreme People's Court issued the *Opinion on Providing Judicial Guarantee for FTZ*, in which *ad hoc* arbitration is recognised within the Free Trade Zones and purely domestic disputes between foreign-invested entities within the Free Trade Zones is allowed to be submitted to a foreign arbitration institution. China is opening the door for *ad hoc* arbitration. Some Free Trade Zones have issued rules with respect to *ad hoc* arbitration.

Notably, the Zhuhai Arbitration Commission has become the first institution to issue *ad hoc* arbitration rules, i.e., the *Hengqin Pilot Fee Trade Zone Ad Hoc Arbitration Rules* ("Hengqin Ad Hoc Rules"). The Hengqin Ad Hoc Rules attaches great importance to the doctrine of autonomy of will, aimed at establishing a quick and well-organised *ad hoc* arbitration proceeding. The main contents of the Hengqin Ad Hoc Rules can be summarised in four aspects: (1) the scope, which mainly applies to commercial disputes between companies registered in the Hengqin Pilot FTZ and commercial disputes that are allowed to be resolved by *ad hoc* arbitration under the applicable law; (2) the intervention model of designated arbitration institution, which allows designated arbitration organs to step-in in deadlock proceedings; (3) the softening of compulsory rules, which embodies the doctrine of autonomy of will; and (4) a well-planned procedural mechanism for the functioning of proceedings.

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Boss & Young, Attorneys-at-Law ("Boss & Young"), as one of the largest Chinese law firms headquartered in Shanghai, was formed by the merger of the original Boss & Young, Attorneys-at-Law and Shanghai JoinWay Law Firm in January 2014. Boss & Young is a full-scale law firm which has branch offices in Beijing, Nanjing, Wuhan, Chongqing and Hangzhou, with more than 40 senior partners and 200 lawyers. Since its inception, Boss & Young has demonstrated remarkable agility in navigating China's complex legal system, while simultaneously meeting the sophisticated needs and expectations of its predominately foreign clientele.

Boss & Young's main practice areas include inbound and outbound investment, capital market, corporate finance, M&A, restructuring and reorganisation, real estate and construction, international trade, international dispute resolution, intellectual property, banking, trust and insurance, etc. Boss & Young has a team of leading lawyers who are experienced in international dispute resolution, especially in the areas of international commercial transaction, IP rights, finance, real estate development and maritime. Boss & Young's expertise in litigation and arbitration has complemented its corporate and commercial practice to the great satisfaction of its domestic and overseas clients.

Hong Kong

Peter Murphy

Fergus Saurin

HFW

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The only formal requirement under Hong Kong law for an arbitration agreement is that it be in writing (but it need not be signed).

1.2 What other elements ought to be incorporated in an arbitration agreement?

The agreement to arbitrate should:

- set out the scope of disputes to be referred to arbitration;
- state whether the administration is '*ad hoc*' or to be administered by an arbitral institution, such as the Hong Kong International Arbitration Centre (the "**HKIAC**");
- state the seat or place of the arbitration; and
- specify a law for the arbitration clause (as distinct from the choice of substantive law governing the contract).

The parties may also wish to state the number of arbitrators and the language in which the arbitration is to be conducted. Model arbitration clauses can be found on the HKIAC's website at: http://www.hkiac.org/arbitration/model-clauses.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The court takes a pro-enforcement approach to arbitration agreements.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The principal piece of legislation governing the enforcement of arbitration proceedings in Hong Kong is the Arbitration Ordinance, Cap. 609 (the "**AO**").

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

While for certain purposes the AO draws a distinction between domestic and international arbitration, for most purposes the same law governs both types of arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The AO is largely based on the 2006 version of the UNCITRAL Model Arbitration Law, albeit the legislation does contain certain supplemental provisions specific to Hong Kong.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The guiding principle of the AO is that, subject to the observance of safeguards necessary in the public interest, the parties to a dispute should be free to agree on how their disputes should be resolved.

The AO therefore contains relatively few mandatory provisions (i.e. provisions that cannot be excluded by the parties), some of which include:

- the application of the Limitation Ordinance Cap. 347 (the "**LO**") or any other limitation enactments;
- the requirement for the arbitration agreement to be in writing;
- the competence of the arbitral tribunal to rule on its own jurisdiction;
- the requirement that parties must be treated with equality;
- the court's power to order recovery of the tribunal's fees and the tribunal's power to withhold an award for non-payment of the arbitrators' fees and expenses; and
- the court's power to set aside an award.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The following may not be referred to arbitration:

- actions *in rem* against ships;
- criminal charges;
- competition and anti-trust disputes;
- divorce proceedings and relations between parents and children; and

- matters reserved for resolution by state agencies and tribunals (for example, taxation, immigration and national welfare entitlements).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, an arbitral tribunal is permitted to rule on the question of its own jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The court may only refuse to grant a stay if the arbitration agreement is null and void, inoperative or incapable of being performed. Accordingly, provided the defendant can establish a *prima facie* case that there is a valid arbitration agreement applicable to the dispute in question, the court will order a stay of the court proceedings.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Both the tribunal and the court have the jurisdiction to determine issues of jurisdiction. Typically, following an objection by one or other party to its jurisdiction, the tribunal will determine the question as a preliminary issue and then the court, on the application of either party, may review the decision.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Generally speaking, an arbitration tribunal may not assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The LO is the principal piece of Hong Kong legislation prescribing limitation periods and its provisions apply to arbitrations as they do to actions in the court. Typically, contractual claims must be brought within six years from the date that the contractual breach occurs, and tort claims must be brought within six years from the date the damage occurs.

Limitation provisions under the LO are rules of procedure only. As such, if an action is brought in arbitral proceeding in Hong Kong, then wherever the cause of action arose, the period of limitation is governed by the LO, except where foreign law has extinguished the right as well as the remedy.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Where the court has made a winding-up order against a company, or appointed a provisional liquidator over it, all actions and proceedings against that company, including arbitral proceedings, will be automatically stayed. Leave of the court is required to continue any such proceedings. There would be no automatic stay if the winding-up order, or appointment of a provisional liquidator, was made by a foreign court, unless and until that order was formally recognised by the court. The insolvency of the claimant party would have no formal affect on ongoing arbitration proceedings.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The parties have complete autonomy to determine the law applicable to the substance of the dispute, save only that the selection must be *bona fide* and not be contrary to Hong Kong public policy.

Where the law or legal system of a given state is not designated by the parties (e.g. because the contract in question does not contain a governing law clause), the tribunal is empowered to determine the issue. This is not a mechanical process and in determining the applicable law, the tribunal will consider various factors, including the place of performance of the contract, the place of business of the parties, their domicile or residence or the place of arbitration as well as usages of the trade in question.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The guiding principle under Hong Kong arbitration law is that, subject to the observance of safeguards necessary in the public interest, the parties to a dispute should be free to agree on how their disputes should be resolved. Nevertheless, there are certain mandatory provisions that cannot be excluded by the parties (as opposed to provisions that apply in the absence of the parties' agreement). The principal mandatory provisions are listed in the answer to question 2.4.

As to the laws of other jurisdictions (besides that chosen by the parties), Hong Kong law does not expressly stipulate in what circumstances these will prevail and their application will depend on the specific circumstances of the case. However, bearing in mind the tribunal's disposition, if not implied duty, to render an award that is enforceable, in practice the tribunal ought to take due account of any mandatory laws applicable in the state where enforcement will be sought, in order to pre-empt any objection to enforcement on the grounds of non-compliance with those laws.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

In the absence of an express choice of law, there may be several legal systems relevant to a single arbitration agreement, namely: (1) the law which determines whether the parties had capacity to make the arbitration agreement; (2) the law which governs whether the arbitration agreement is formally valid; and (3) the law which determines its substantive validity.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

For all practical purposes, no.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. If the parties fail to agree on the number of arbitrators, the number of arbitrators must be either one or three as decided by the HKIAC on the application of either party.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. The court, on the application of one of the parties to the arbitration agreement, may in certain circumstances remove an arbitrator in the event that she/he fails to comply with her/his general duties of impartiality and/or independence.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

An arbitrator owes the following principal duties to the parties:

- to treat the parties with equality;
- to be independent;
- to act fairly and impartially between the parties, giving them a reasonable opportunity to present their case and to deal with the case of their opponents; and
- to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense, thus providing a fair means for resolving the dispute to which the proceedings relate.

These duties are mandatory and may not be varied by the parties.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Parties are free to agree on the procedural rules for their arbitration. If the parties fail to agree, the arbitral tribunal can conduct the arbitration in the manner that it considers appropriate.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

It is necessary to formally commence the arbitration proceedings by sending a request for that dispute to be referred to arbitration. There are no other procedural steps required by law.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no particular rules that govern the conduct of counsel, albeit they would be expected to behave in a manner consistent with the rules of professional conduct of the jurisdiction in which they are admitted (where applicable) and, in general, with best international practice (as exemplified by, for example, the 2013 IBA Guidelines on Party Representation).

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators have extensive powers to conduct the arbitral proceedings and to determine the disputes placed before them. In the exercise of their powers, the arbitrators must adhere to the duties of impartiality, independence and fairness (see the answer to question 5.4).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are no rules restricting the appearance of lawyers from other jurisdictions from acting in arbitration proceedings in Hong Kong.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

An arbitrator is immune from suit save in respect of acts dishonestly done or omitted to be done in relation to the exercise or performance, or the purported exercise or performance, of the arbitrator's functions.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes, the court has jurisdiction to deal with certain procedural issues arising during the course of an arbitration.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless otherwise agreed by the parties, the tribunal has the power to grant interim relief to:

- maintain or restore the *status quo*, pending determination of the underlying dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

- preserve assets out of which a subsequent award can be satisfied; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

Any interim relief granted is enforceable in the same manner as an order or direction of the court that has the same effect, but only with leave of the court.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes, the court is empowered, on the application of one or other party to the arbitration, to grant preliminary or interim relief in support of proceedings subject to arbitration. It will typically do so: (1) in cases of urgency; and/or (2) where an order of the arbitral tribunal may not be complied with. The court may grant preliminary or interim relief regardless of whether the arbitral tribunal could order the same relief and it is not strictly necessary for a party to first approach the arbitral tribunal before applying to the court.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The court has consistently complied with its obligation to support, rather than interfere with, the arbitral process and a party seeking interim relief in support of arbitration proceedings can expect the court to approach its application with this policy in mind.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

In the absence of strong reasons to the contrary, the court will generally grant an anti-suit injunction in aid of an arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The AO confers on the arbitral tribunal the power to order security for costs. The court may make an order in support of any order for security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

An order for preliminary relief or an interim measure, whether ordered by a tribunal in Hong Kong or in another jurisdiction, is generally enforceable in the same manner as an order or direction of the court that has the same effect, but only with the leave of the court. Leave will only be granted if the party seeking enforcement can demonstrate that it belongs to a type or description of order that may be made in Hong Kong in relation to arbitral proceedings by an arbitral tribunal.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The arbitral tribunal is not bound by the strict rules of evidence that apply in proceedings before the court (it remains bound by rules relating to privilege).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

An arbitration tribunal has the powers conferred by the arbitration agreement and the applicable arbitration rules as agreed by the parties.

The AO also grants arbitral tribunals general powers to amongst other things:

- direct the discovery of documents or the delivery of interrogatories;
- direct the inspection, photographing, preservation, custody, detention or sale of any relevant property; and
- direct samples to be taken from, observations to be made of or experiments to be conducted on any relevant property.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

The court has the power, on the application of the arbitral tribunal or a party with the approval of the arbitral tribunal, to assist in the taking of evidence, to order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Parties are free to agree whether there should be oral or written evidence in arbitral proceedings. Otherwise, the tribunal may decide whether or not a witness or party will be required to provide oral evidence and, if so, the manner in which that should be done and the questions that should be put to, and answered by, the respective parties.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

A party is not required to produce in arbitration proceedings any document or other evidence that the person could not be required to produce in civil proceedings before the court, which would include privileged documents.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An award must be made in writing and signed by the arbitrator or arbitrators. Unless the parties have agreed otherwise, the award must state the reasons upon which it is based. It must also state its date and the place of arbitration and a signed copy must be delivered to each party.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Unless another period of time has been agreed upon by the parties, within 30 days of receipt of the award:

- 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; or
- if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation on a specific point or part of the award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Unless agreed otherwise, an award made by a tribunal under an arbitration agreement is final and binding on the parties.

Challenges to an award may, unless otherwise agreed, only be made on procedural grounds. These are limited to the following circumstances:

- where a party was under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it or that of Hong Kong;
- where 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 case;
- where the award deals with a dispute not contemplated by the terms of the submission to arbitration;
- where the composition of the tribunal or the procedure was not in accordance with the agreement of the parties;
- where the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; and
- where the award is in conflict with the public policy of Hong Kong.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Unless otherwise agreed, the parties do not have the right to appeal an award on a question of law, or to challenge an award on the grounds of serious irregularity. The parties may not exclude the right to challenge an award on the procedural grounds set out above.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Yes, by "opting in" to the applicable provisions, the parties can confer on the court the power to determine:

- a challenge to an award on the grounds of serious irregularity; and
- an appeal against an award on a point of law.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An application to challenge an arbitral award (on procedural grounds or by virtue of serious irregularity under the corresponding opt-in provision), or to appeal it on a question of law (under the corresponding opt-in provision), is made by originating summons to the Judge in charge of the Construction and Arbitration List. However, in order to appeal against an arbitral award on a question of law (where this right has been opted into), the court must also grant leave to appeal, or all the parties to the arbitral proceedings must agree to the appeal.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Hong Kong is not a Contracting State to the New York Convention. However, the government of the PRC extended the territorial application of the New York Convention to Hong Kong, subject to the provisos originally made by the PRC upon accession to the Convention. This means that for all practical purposes, Hong Kong will be treated as a Contracting State under the Convention.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The court is generally pro-recognition and enforcement of awards. The enforcing party must make an application for the recognition and enforcement of the award by way of originating summons supported by an affidavit stating the prescribed particulars and filed with a draft order.

The application is made *ex parte*. If the application is successful, the court will make an order for the recognition and enforcement of the award, but the order will provide that it may not be enforced until after the expiration of 14 days from the date of service or, if the defendant applies within that period to set aside the order, until the application is finally disposed of. The award can then be enforced as a judgment or order of the court.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

A party is prohibited by the doctrine of *res judicata* from seeking to re-litigate an issue which is already the subject of a final binding arbitration award. An attempt to re-open the same issue in further court proceedings would be an abuse of the court process. Issue estoppel arises even if the first proceeding is an arbitration.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The court applies the public policy ground sparingly. The most obvious ground on which the court will refuse enforcement on the public policy ground is where the award has been procured by fraud, criminal, oppressive or otherwise unconscionable behaviour.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Yes. Unless otherwise agreed, no party may publish, disclose or communicate any information relating to the arbitral proceedings under an arbitration agreement or an award made in those arbitral proceedings.

However, a party may publish, disclose or communicate information relating to arbitral proceedings under an arbitration agreement or an award made in those arbitral proceedings if the publication, disclosure or communication is made to:

- protect or pursue a legal right or interest of the party or to enforce or challenge any award;
- any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
- a professional or other adviser of the parties.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Not generally, but see the answer to question 12.1.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Unless otherwise agreed, a tribunal can award the same remedy or relief that can be ordered by the court, including:

- damages;
- specific performance;
- declarations;
- injunctions;
- restitution;
- rectification of a contract;
- interest; and
- costs.

Although a tribunal would have the power to award punitive damages, it would do so rarely and only in exceptional circumstances.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Subject to the agreement of the parties or any applicable institutional rules, the tribunal may award simple or compound interest from the dates, at the rates, and with the rests the tribunal considers appropriate, on any money awarded by the tribunal, on money outstanding at the commencement of the reference but paid during the course of the reference, and on costs awarded or ordered by the tribunal.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Subject to the agreement of the parties or any applicable institutional rules, the tribunal may award costs. In so doing, the tribunal is not obliged to follow the scales and practices adopted by the court on taxation; however, the tribunal must only allow costs that are reasonable having regard to the circumstances of the case. Costs for these purposes, include the costs of the parties' professional advisors and experts, the tribunal's fees and expenses and other costs of the hearing, and may include those of any arbitral institution concerned.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Payment of tax is a matter for the party to whom damages are paid and will depend on, amongst other things, the jurisdiction of incorporation of the recipient of funds.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

On 14 June 2017, Hong Kong's Legislative Council passed a law allowing third parties, including lawyers (but not in relation to their own cases), to fund claims. The law is expected to enter into force during the course of 2018 and a number of third-party funders are already active in the market. Contingency fees are not legal.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Hong Kong is not itself a contracting party to the ICSID Convention. Before 1997, the ICSID Convention was applied to Hong Kong by

the UK. Following the handover, the PRC government notified both the United Nations and the World Bank that the ICSID Convention should apply to Hong Kong. The consequence of this is that a foreign investor seeking to rely on the substantive provisions of any Hong Kong Bilateral Investment Treaty ("**BIT**") would not be able to submit the dispute to arbitration under the ICSID Arbitration Rules if they wanted to establish liability on the part of the Hong Kong Government for the breach of any provisions of the BIT.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Hong Kong has the power to enter into its own international agreements in a number of areas, including investment and trade. Hong Kong is a party to 18 BITs, these are listed at https://www.doj.gov.hk/eng/laws/table2ti.html. Hong Kong also concluded a BIT with Chile, albeit it has not yet come into force. And a further BIT has also been signed with the Members States of the Association of Southeast Asian Nations ("**ASEAN**"), but has also yet to come into force.

The PRC has also entered into at least 127 BITs (amongst the highest number of BITs concluded by any individual state). The extent to which any PRC BIT will confer protection on Hong Kong investors will depend on the circumstances of the case and the specific terms of the BIT in question.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Yes, the BITs include all the substantive protection standards habitually included in modern investment treaties, e.g. most favoured nation treatment, no unreasonable or discriminatory treatment, fair and equitable treatment, no expropriation without compensation and security and protection.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Foreign states enjoy absolute immunity from enforcement and jurisdiction in Hong Kong. As such, an arbitral award against a foreign state cannot be enforced in Hong Kong unless the foreign state expressly waives immunity from the jurisdiction of the court. Even if there is a waiver clause in the underlying contract, the court will in all likelihood decline jurisdiction over the foreign state unless at the time of appearing before the court, the foreign state expressly waives immunity.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The HKIAC's 2017 caseload demonstrates continued growth of arbitration and supports the international nature of arbitration in Hong Kong: 72.3% of new administered arbitrations were international. Corporate finance, maritime, construction, banking and international trade make up approximately 80% of the disputes administered by the HKIAC. Recent developments have seen an increasing awareness of opportunities for Hong Kong as a 'super connector' for the Belt and Road initiative as it gathers pace with Hong Kong being a regional dispute resolution hub. Recognising Hong Kong's relevance, the ICCA Congress, the largest dedicated international arbitration conference will take place in Hong Kong in 2022.

On 14 June 2017, legislation was enacted to, amongst other things, make clear that third-party funding is permissible for arbitrations. These amendments are anticipated to come into effect in 2018, and after an appropriate funder code of conduct is in place. When the legislation enters into force, it is anticipated that it will generate considerable opportunities for third-party funders. As of 1 January 2018, when the Hong Kong Arbitration (Amendment) Bill 2017 came into effect, Hong Kong confirmed that disputes over intellectual property rights ("**IPR**") can be resolved by arbitration. Hong Kong looks to develop further as a leading centre for the resolution of IPR disputes.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The HKIAC has over recent years made many innovative steps to promote the efficient and cost-effective management of arbitral references. In the context of investor-state arbitrations, the HKIAC has launched a 'free hearing space' concept to provide free-of-charge hearing facilities to parties in an HKIAC-administered arbitration involving a state listed on the OECD list of development assistance states. And 70% of the Belt and Road jurisdiction countries are on this OECD DCA list of ODA assistance. And the HKIAC has just unveiled a dedicated online Belt and Road programme. Costs also remain a key focus for the HKIAC, an updated report on costs and case duration was released recently. The HKIAC compares well to other leading institutions. Other relevant HKIAC developments include a tribunal secretary service to assist tribunals in the conduct of significant disputes and a fund holding service (e.g. for security for costs). Further, the 2013 HKIAC Administered Arbitration Rules (the "**Rules**") are expressly designed to facilitate tribunals handling large multi-party disputes and provide for the consolidation, joinder and commencement of a single arbitration under multiple contracts. In addition, the Rules include an innovative choice of fee structure for arbitrators' fees which can reduce costs.

Finally, keen to keep the Rules relevant, the HKIAC is currently undertaking a comprehensive public consultation on potential amendments to the Rules.

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Peter is a responsive, results-driven partner with over 20 years' experience on the ground in the Asia-Pacific region.

Peter's focus is on international arbitration and dispute resolution, litigation, contentious insolvency, asset recovery and enforcement. His key work sectors include international trade, commodities, shipping, energy and resources, and commercial.

Peter has considerable experience of arbitrations in Hong Kong, London and Singapore, and assists clients in managing arbitrations and court proceedings across the Asia-Pacific region, including Indonesia, the PRC, the Philippines, Australia, India, Pakistan, Vietnam and Taiwan. His arbitration experience includes LMAA, ICC, HKIAC, SIAC, SCMA, FOSFA, GAFTA, CIETAC and LCIA arbitrations.

Chambers Asia-Pacific 2018 reports that "*Peter Murphy continues to command respect for his busy practice, which includes charter party, bill of lading and international trade disputes".* Known to be "*very client-focused*", Peter Murphy has "*excellent legal knowledge*" of pure shipping disputes (including those relating to bills of lading and charterparties), as well as commodities and maritime trade matters (*The Legal 500 2018*). Peter is also a Recommended Lawyer for Litigation (*The Legal 500 Asia-Pacific 2017*).

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Fergus specialises in the international trade, energy, resources and commodities sectors, with a particular focus on international arbitration and international arbitration-related litigation.

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Fergus is qualified in England & Wales and Hong Kong, and is a frequent contributor to arbitration publications and a member of various arbitration institutions. Before joining the Hong Kong office, Fergus worked in HFW's London and Piraeus offices and has also been seconded to the firm's Singapore office.

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HFW is a sector-focused law firm with offices in 17 cities across Asia, Australia, the Middle East, Europe and the Americas.

Our International Arbitration team focus on disputes in a number of core sectors including energy, trade and commodities, shipping, aviation, insurance/reinsurance, banking and financial services and construction. With its legacy as an international trade firm, HFW offers specialist arbitration teams in almost all of the world's major international arbitration centres.

Arbitration as a form of dispute resolution has grown exponentially in Hong Kong over recent years. With a modern arbitration law, which in large part adopts the UNCITRAL Rules, a supportive judiciary, and a well-resourced local arbitration institution, the Hong Kong International Arbitration Centre (HKIAC), Hong Kong is increasingly chosen by international parties as a preferred forum within which to resolve their disputes. HFW has significant experience of working with the HKIAC and other regional and international arbitral institutions. We are also very familiar with the rules of the various arbitral centres and the requirements of handling cases under the rules of specific trade bodies such as GAFTA, LCIA and LMAA.

India

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

No particular form is required by law. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement need not necessarily use the word "arbitration" or "arbitral tribunal" or "arbitrator". The agreement, however, must be in writing. The arbitration agreement shall be deemed to be in writing if it is contained in an exchange of letters or other means of communication which provide a record of the agreement. Further, the agreement need not be signed and an unsigned agreement affirmed by the parties' conduct would be valid as an arbitration agreement. An arbitration agreement would also be considered to be in writing if there is an exchange of a statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. By an amendment to the Arbitration Act (not applicable to arbitrations which have commenced prior to 23 October 2015), it stands clarified that such agreements can also include communication through electronic means. [Section 7 of the Arbitration and Conciliation Act, 1996 ("Act").]

1.2 What other elements ought to be incorporated in an arbitration agreement?

From an Indian point of view, the most significant element would be the seat of arbitration, for that would determine which part of the Act would apply to the proceedings and the court which would have jurisdiction in relation thereto. Domestic arbitrations are governed by Part I of the Act, while off-shore arbitrations are governed by Part II of the Act. While Part I contains a comprehensive scheme for the conduct of arbitration (based on the Model Law), Part II is essentially confined to the enforcement of foreign awards (on the basis of the New York Convention). A long-ranging controversy in India has been whether Indian courts can grant interim relief in relation to foreign arbitrations (in the absence of any enabling statutory provisions in Part II). This now stands as settled, with the 2015 amendment to the Act clarifying that courts would have jurisdiction to grant interlocutory relief (in aid of foreign-seated arbitrations), as well as assistance in summoning witnesses, production of documents, etc.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Section 8 of the Act states that a judicial authority before which an action is brought, in a matter which is the subject matter of an arbitration agreement, shall refer the parties to arbitration – the only condition being that the party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute. In the meantime, the arbitration proceedings may commence and continue, and an award can be rendered. The Supreme Court of India has held in *Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.* – (2006) 7 SCC 275 that once the conditions of the Sections are satisfied, the judicial authority is "statutorily mandated" to refer the matter to arbitration. Section 5 supplements this and provides, through a non-obstante clause, that in matters governed by the Act, no judicial authority shall interfere except where so provided for. This position stands further affirmed by the 2015 amendment to the Act which nullifies certain judgments which had created inroads into Section 8. The Section now has a non-obstante clause requiring the Court to refer the parties to arbitration, unless it finds that *prima facie* no valid arbitration agreement exists. However, Section 8 applies only to arbitrations where the seat is in India. Agreements for off-shore arbitrations are governed by Section 45 of the Act, which is somewhat differently worded. Here it is provided that a judicial authority, when seized of any matter where there is an arbitration agreement, shall refer the parties to arbitration – "*unless it finds that the said agreement is null and void, inoperative or incapable of being performed*". The latter part is borrowed from Article 8 of the Model Law. Thus, India has retained court intervention (to the extent permitted by the Model Law) only in relation to foreign arbitrations. An issue arose in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* – (2005) 7 SCC 234, as to whether a ruling by court (in relation to off-shore arbitrations) on the validity or otherwise of an arbitration agreement is to be on a *prima facie* basis or is to be a final decision. If it were to be a final decision, it would involve a full dress trial and, consequently, years and years of judicial proceedings, which would frustrate the arbitration agreement. Keeping this and the object of the Act in mind, the Supreme Court, by a 2:1 decision, held that a challenge to the arbitration agreement under Section 45 on the ground that it is "*null and void, inoperative or incapable of being performed*" is to be determined on a *prima facie* basis.

At the same time, an issue would remain as to what is to be done in cases where the court does in fact come to a conclusion that the arbitral agreement is null and void, inoperative or incapable of being performed. A decision to this effect is appealable under Section 50 of the Act. Thus, a ruling on a *prima facie* view alone would not be

satisfactory. One of the judges addressed this and held that if the court were to arrive at a *prima facie* conclusion that the agreement is in fact null and void, it would have to go ahead and hold a full trial and enter a final verdict (in order that it can be appealed if need be). Therefore, in such a situation, a foreign arbitration may well come to a halt pending final decision from an Indian court, but otherwise Section 45 proceedings would not have any significant impeding effect on progress of a foreign arbitration.

A recent case of seminal importance is *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.* – (2013) 1 SCC 641. Here, the court was faced with a situation where parties to a joint venture had entered into several related agreements – some with different entities from amongst their group. These agreements had diverse dispute resolution clauses: some with ICC arbitration in London; some with no arbitration clause; and one agreement with an AAA arbitration clause with Pennsylvania (USA) as its seat. The Supreme Court strongly came out with a pro-arbitration leaning stating that the legislative intent is in favour of arbitration and the Arbitration Act "*would have to be construed liberally to achieve that object*". The Court held that non-signatory parties could be subjected to arbitration provided the transactions were within the group of companies and there was a clear intention of the parties to bind non-signatories as well. It held that subjecting non-signatories to arbitration would be in exceptional cases. This would be examined on the touchstone of direct relation of the non-signatory to the signatories, commonality of the subject matter and whether multiple agreements presented a composite transaction or not. The situation should be so composite that performance of the "*mother agreement*" would not be feasible without the aid, execution and performance of the supplemental or ancillary agreements.

Further, the Supreme Court in *Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd.* – (2017) 2 SCC 228 held that a two-tier appellate arbitration clause allowing parties to prefer an appeal before the same or a fresh tribunal against the first award is a valid arbitration agreement under the Act.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration and Conciliation Act, 1996 (as amended by the Arbitration and Conciliation (Amendment Act), 2015) governs the enforcement of arbitration proceedings relating to domestic and international commercial arbitration conducted in India as well as reference of foreign awards. On 7 March 2018, the Union Cabinet approved the Arbitration and Conciliation (Amendment) Bill, 2018 which will now be tabled before the Parliament.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

India has a composite piece of legislation governing both domestic and international arbitration. The Act has two main parts. Part I deals with any arbitration (domestic, as well as international), so long as the seat of arbitration is in India. Part II deals mostly with enforcement of foreign awards.

"International commercial arbitration" is defined as an arbitration where at least one of the parties is a national or habitual resident in any country other than India or a body corporate which is incorporated in any country other than India or a company or association of an individual whose "central management and control" is exercised in any country other than India or the Government is a foreign country (Section 2 (1) (f) of the Act). However, the Supreme Court of India in *TDM Infrastructure Private Limited v. UE Development India Private Limited* – (2008) (2) Arb LR 439 (SC), has held that if both parties are incorporated in India, then even if the control and management is from outside India, the arbitration would be "domestic" and not "international". The difference between domestic and international arbitration (conducted in India) is discussed below.

The first difference is that if there is a failure of the parties' envisaged mechanism for the constitution of the arbitral tribunal, the appointment shall be made, in the case of a domestic arbitration by the High Court and in the case of international arbitration by the Supreme Court of India.

The second difference is in relation to governing law. In international commercial arbitration, the arbitral tribunal shall decide on the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute and, failing any such designation, the rules of law the tribunal considers appropriate given all the circumstances. In domestic arbitration (arbitration between Indian parties), however, the tribunal can only apply the substantive law for the time being in force in India.

The third difference is that in domestic arbitrations an additional ground for setting aside the award on "patent illegality" has been inserted by the 2015 amendment to the Act. This is not available in international arbitrations seated in India.

The fourth difference after the recent amendment is that any application to the court in an international commercial arbitration shall lie to the High Court, whereas in cases of domestic arbitration it will lie to a court which has original jurisdiction in relation to the matter.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The law governing international arbitration is based faithfully on the UNCITRAL Model Law and the UNCITRAL Rules 1976 (amended in 2010, but which has not yet been adopted by the Indian Legislature). There are a couple of departures designed to keep out court intervention. Thus, for instance, Section 8 of the Act departs from the Model Law in as much as it does not permit a court to entertain an objection to the effect that the arbitration agreement is "*null and void, inoperative or incapable of being performed*". (See also question 1.3 above.)

Section 16 (corresponding Article 16 of the Model Law) also makes a slight departure. Unlike the Model Law, no interim court recourse is permissible if the tribunal declares that it has jurisdiction. In such case, the challenge is permissible only once the final award is passed.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

International arbitration proceedings taking place in India are governed by the same set of provisions as domestic arbitrations.

See question 2.2 above.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The Act states that the relationship between the parties need not be contractual. Hence, disputes in tort (relating to the contract) can also be referred to arbitration. "Generally and traditionally all disputes relating to rights *in personam* are considered to be amenable to arbitration; and all disputes relating to rights *in rem* are required to be adjudicated by courts and public tribunals." *Booz Allen & Hamilton Inc. v. SEBI Home Finance Ltd.* – (2011) 5 SCC 532. Examples of non-arbitrable disputes are: disputes relating to a criminal offence; matrimonial disputes; child custody; guardianship; insolvency; winding up; and testamentary matters. The Supreme Court in a recent decision in *Shri Vimal Kishor Shah & Ors v. Mr. Jayesh Dinesh Shah & Ors*; *AIR* (2016) SC 3889, has now carved out a new category of non-arbitrable disputes, namely disputes arising out of trust deeds and the Trust Act 1882 (i.e. relating to private trusts). This is on the ground of implied exclusion in view of a complete and comprehensive code for dispute resolution under the provisions of the Trust Act, which envisages recourse to civil courts in this regard.

Another (court-sanctioned) approach to determine arbitrability is to see whether the parties can make a settlement regarding their dispute a subject matter of a private contract. (*Olympus Superstructures v. Meena Khetan* – (1999) 5 SCC 651.) The court here relied on Halsbury's Laws of England stating that the differences or disputes which can be referred to arbitration must consist of "*...a justiciable issue, triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction*". (4th Edition, volume 2, para. 503.)

Where serious fraud was alleged, the dispute was considered to be non-arbitrable (*N.Radhakrishnan v. Maestro Engineers*, (2010) 1 SCC 72) and courts refused to refer the parties to arbitration under Section 8 of the Act. The law seemed to take a turn in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*, pronounced on 24 January 2014, when the Supreme Court departed from *N. Radhakrishnan* and held that in the case of foreign-seated arbitrations (covered by Section 45 of the Act), the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the grounds that allegations of fraud or misrepresentation are involved. Another decision of the Supreme Court in *Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi* – (2014) 6 SCC 677 held *N. Radhakrishnan* to be *per incuriam* and that allegations of serious fraud are arbitrable even in relation to domestic arbitrations. The controversy, however, remains. In a recent case decided by the Supreme Court in *Ayyasamy v. A. Paramasivan and Ors.*, (2016) 10 SCC 386, the Supreme Court clarified that *Swiss Timing* could not have overruled *Radhakrishnan* (as the former was a Section 11 ruling which does not have precedential value). Moreover, while it held that a mere allegation of fraud may not be a ground to nullify an arbitration agreement, there may be cases where a criminal offence is made out or the issue is so complex that it can only be decided by a civil court on appreciation of voluminous evidence which needs to be produced. The Judgment, thus, sets the clock back, at least for domestic-seated arbitrations, and gives room to allow a civil suit to be filed and proceeded with, bypassing the arbitration agreement.

High court decisions pending confirmation by the Supreme Court on the issue of arbitrability include judgments from the High Court of Bombay holding copyright disputes as arbitrable while shareholders' "oppression and mismanagement" disputes are not (again, on the ground of specific statutory remedy being provided for). The Delhi High Court has taken a liberal view, holding that debt restructuring disputes may be referred to arbitration despite the existence of a tribunal set up specifically to decide such matters. At the same time, the Supreme Court has (somewhat unfortunately) also held that disputes under the Trust Act (i.e. pertaining to private or family trusts) would not be arbitrable under any circumstance. This is because (according to the Court) there is a specified mechanism under the Trusts Act for resolution of disputes. Hence, there is a lack of consistency in the way courts have approached the issue of arbitrability. (*GTDT Guide*, 2018.)

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

An arbitral tribunal is permitted to rule on its own jurisdiction. This is provided for in Section 16 of the Act, which corresponds to Article 16 of the Model Law. (Also see question 2.3 above.)

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

See question 1.3 above.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

See questions 1.3 and 2.3 above.

Additionally, the issue of jurisdiction can be raised by a party before the court by way of an appeal under Section 37 (2) (a) on the arbitral tribunal refusing jurisdiction. On the other hand, if the tribunal's finding is that it has jurisdiction, it can only be challenged after the award is rendered.

Indian courts have not yet determined the standard of review in respect of a tribunal's decision regarding its own jurisdiction. The likelihood is that challenge to jurisdiction will be unhampered by the otherwise narrow grounds under Section 34, provided it is not a disguised challenge on merits.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

A landmark Supreme Court decision, *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.* (2013) 1 SCC 641, states the circumstances under which the arbitral tribunal would have jurisdiction over non-signatories to the arbitration. Please see the latter part of question 1.3 above.

Section 8 (as amended by the 2015 amendment to the Act) clarifies that a person claiming "through or under" a party to an arbitration agreement also has locus to ask for dismissal of judicial proceedings initiated in court and seek reference of the dispute to arbitration.

Indian courts have also taken a liberal view as to the consolidation of arbitrations. A Supreme Court decision in *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, (2012) 1 SCC 594 held, *inter alia*, "*if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C*".

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Limitation Act, 1963 applies to arbitrations in the same way as it does to proceedings in court (Section 43 of the Act). For these purposes, arbitration proceedings are deemed to have commenced (unless the parties have agreed otherwise) on the date on which a request for the dispute to be referred to arbitration is received by the respondent (Section 21 of the Act). The Limitation Act provides that the party invoking the arbitration has three years from the date of commencement of arbitration proceedings to seek appointment of the arbitral tribunal. The courts consider the limitation period as part of the substantive law.

Once time has started to run, no subsequent inability to bring the action stops the time running. However, well-known exemptions apply if:

- In good faith, proceedings are started in a court without jurisdiction.
- The case is based on subsequently discovered fraud or mistake.
- Any document necessary to establish the claimant's right has been fraudulently concealed from him.
- There is written acknowledgment of liability.
- There is a part payment of the debt.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Earlier, the provisions for winding up were dealt with under the Companies Act. Recently, in May 2016, the Ministry of Law and Justice in India introduced the Insolvency and Bankruptcy Code, 2016 ("Code"). The Code seeks to consolidate the laws relating to insolvency and bankruptcy resolution for corporates, limited liability partnerships, partnership firms, individuals, etc. The Code has established an Insolvency and Bankruptcy Board of India ("Board").

Where the insolvency process has been initiated by the creditors/company, the Code prescribes a moratorium against any new or ongoing proceedings.

Where a liquidation order has been made or a provisional liquidator or an official liquidator has been appointed, no suit or other legal proceeding shall be commenced or shall be proceeded with by or against the corporate debtor (subject to prior approval on behalf of the company by the Adjudicating Authority).

However, recent decisions by the Supreme Court and the Delhi High Court have cast ambiguity on the question of whether all legal proceedings shall be barred during the moratorium period under the Code. The Supreme Court in *Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudavan Pvt. Ltd.* ("*Alchemist*") (delivered on 23 October 2017) observed that no arbitration proceeding can be initiated after the commencement of the moratorium period under the Code. However, the *Delhi High Court in Power Grid Corporation of India Ltd. v. Jyoti Structures* ("*Power Grid*") (delivered on 11 December 2017) held that the Code only prohibits initiation of debt recovery proceedings against a corporate debtor, and that other proceedings which may benefit or enhance the financial position of the corporate debtor may still be initiated by the corporate debtor during the moratorium period.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

In case of domestic arbitrations, Indian parties can only apply Indian law to the substance of the dispute. In other cases, the parties may either make an express choice of law or the proper law may be inferred from the terms of the contract and surrounding circumstances. It is the law with which the contract is most closely connected. Factors such as the nationality of the parties, the place of performance of the contract, the place of entering into the contract, the place of payment under the contract, etc., can be looked at to ascertain the intention of the parties.

The proper law of the arbitration agreement is normally the same as the proper law of the contract. Where, however, there is no express choice of the law governing the contract as a whole, of the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But this is only a rebuttable presumption. (*NTPC v. Singer Co.* – (1992) 3 SCC 551.)

See also question 2.2, last paragraph.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In respect of procedural matters relating to the arbitration proceedings, the laws of the seat of jurisdiction shall prevail. The court may, invoking the principle of comity of nations, apply the mandatory laws of another jurisdiction if the contract is in breach of that law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The proper law of arbitration (i.e., the substantive law governing arbitration) determines the formation and legality of arbitration agreements. Please see question 4.1 above.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The law does not impose any limits on the parties' autonomy to select arbitrators. The number of arbitrators, however, cannot be an even number. An arbitrator need not have any special qualification or training or be a member of the Bar.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

There is a default provision provided for *vide* Section 11 of the Act. The default provisions are triggered if:

- The parties cannot agree on the appointment of an arbitrator within 30 days of receipt of a request to do so.
- Two appointed arbitrators fail to agree on the third arbitrator within 30 days of the date of their appointment.
- The arbitration is to be heard by one arbitrator and the parties fail to agree on that arbitrator within 30 days of receipt of a request to agree on the appointment.
- The parties' mechanism for the appointment of an arbitrator fails.

If the default is in relation to an international commercial arbitration, the appointment shall be made by the Supreme Court of India. In domestic arbitrations, the appointment shall be made by the High Court which has jurisdiction in relation to the matter (determined by where the cause of action arises; or the respondent resides or carries on its business).

The Amendment of 2015 states that the Supreme Court/High Court can delegate powers to any person or institution to appoint arbitrators. (So far there is no delegation of the power to any person or institution.)

An application under Section 11 now has to be disposed of by the Supreme Court or High Court as expeditiously as possible and an endeavour must be made to dispose it within 60 days from the date of service of notice on the opposite party (Section 11 (13), Act). Impliedly overruling a 7 Bench decision in *SBP v. Patel Engineering Ltd.*, AIR 2006 SC 450, the 2015 amendment to the Act states that the courts' role at this stage will be restricted to only *prima facie* examination of the existence of an arbitration agreement (Section 11 (6) A).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court can intervene only in a default situation (see question 5.2 above).

After the arbitral tribunal is constituted, the jurisdiction of the court can be invoked only if an arbitrator has become *de jure* or *de facto* unable to perform his functions or fails to act without undue delay. If there is any controversy as to these circumstances, a party may apply to the court for a decision on the same.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Like Article 12 of the Model Law and Article 10 of the UNCITRAL Rules 1976, the Act also requires the arbitrators (including party-appointed arbitrators) to be independent and impartial and make full disclosure in writing of any circumstance likely to give rise to justifiable doubts on the same (Section 12 of the Act).

Schedule V to the Act lists the kind of relations between an arbitrator and a party/advocate/subject matter of the dispute, which give rise to justifiable doubts regarding an arbitrator's independence.

Schedule VII to the Act lists the kinds of relations between an arbitrator and a party/advocate/subject matter of the dispute, which would, notwithstanding any prior agreement between the parties, disentitle a person from acting as an arbitrator, unless post the dispute arising, parties expressly waive such a conflict.

Schedules V and VII can be said to be along the lines of the IBA Guidelines on Conflicts of Interest.

An arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or if he does not possess the qualifications agreed to by the parties. Subject to any agreement between the parties, any challenge shall be made within 15 days of a party becoming aware of the constitution of the tribunal or becoming aware of the circumstances leading to the challenge. The arbitral tribunal shall decide on the challenge. The court has no role at that stage and if a challenge is rejected, the arbitral tribunal shall continue with the proceedings and render its award. It would be open to the party challenging the arbitrator to take any wrongful rejection of challenge as a ground for setting aside the award.

The Indian courts have held that "the apprehension of bias must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision". (*International Airports Authority of India v. K.D Bali* – (1988) 2 SCC 360.)

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The arbitrators are masters of their own procedure and, subject to the parties' agreement, may conduct the proceedings "in the manner it considers appropriate" (Section 19). This power includes "the power to determine the admissibility, relevance, materiality and weight of any evidence" (Section 19). The only restraint on them is that they shall treat the parties with equality and each party shall be given a full opportunity to present its case, which includes sufficient advance notice of any hearing or meeting. Neither the Code of Civil Procedure, 1908 (CPC) nor the Indian Evidence Act, 1872 (Evidence Act) applies to arbitrations. Unless the parties agree otherwise, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for arguments or whether to conduct the proceedings on the basis of documents or other material alone. However, the arbitral tribunal shall hold oral hearings if a party so requests (unless the parties have agreed that no oral hearing shall be held).

The arbitrators have the power to proceed *ex parte* where the respondent, without sufficient cause, fails to communicate his statement of defence or appear for an oral hearing or produce evidence. However, such failure shall not be treated as an admission of the allegations and the tribunal shall determine the matter on evidence, if any, before it. If the claimant fails to communicate his statement of claim, the tribunal shall be entitled to terminate the proceedings.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

See question 6.1 above. The other procedural steps are mostly as envisaged under the Model Law and UNCITRAL Rules, 1976.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The conduct of Indian registered advocates is governed by the Rules of the Bar Council of India and the Advocates Act, 1961. These also govern the conduct of Indian advocates in arbitral proceedings sited elsewhere. There are no provisions guiding the conduct of foreign counsel in arbitrations sited in India.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Apart from the provisions envisaged under the Act, the arbitrators are bound by the fundamental principles of natural justice and public policy in conducting the arbitration proceedings.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Foreign lawyers have no right of audience before Indian courts. However, they can appear and represent clients in arbitration proceedings. This is not an absolute right. They are not permitted to set up offices in India and can only appear in arbitrations on a fly-in, fly-out basis. Further, the arbitration must be one governed by the Indian Arbitration Act (i.e. commercial disputes).

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are none.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

No, the courts have no such jurisdiction. In relation to both India-seated and foreign-seated arbitrations, parties can, with the approval of the arbitral tribunal, seek the court's assistance in taking evidence. The court may issue summons to witnesses or order that evidence be provided directly to the arbitral tribunal (Section 27).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

This is provided for *vide* Section 17 of the Act. A party may, during the arbitral proceedings or at any time after the making of the award but before it is enforced, apply to the tribunal for grant of interim measures. Prior to the 2015 amendment, the orders of the tribunal were not enforceable without recourse to a separate court proceeding. However, the new Act states that the tribunal shall have the same power as is available to a court under Section 9 and an interim order passed by an arbitral tribunal would be enforceable in the same manner as if it were an order of the court. Any disobedience of such order can result in contempt of court.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Section 9 of the Act enabled a party to approach a competent court for any interim relief before or during the arbitral proceedings or even after the award is pronounced, but before it is enforced. The Model Law, in fact, has a more restrictive provision – it does not contemplate recourse to a court for an interim measure after the award is pronounced (Article 9). This, however, now stands curtailed as explained below.

After the Amendment of 2015, the court is retrained from entertaining an application under Section 9 once the tribunal has been constituted, unless circumstances exist which may not render the remedy provided for under Section 17 efficacious (Section 9 (3), Act). The aim is to empower the tribunal and keep court intervention out.

The Supreme Court, in the case of *Sundaram Finance v. NEPC* (1999) 2 SCC 479, held that if a court is approached before the arbitral proceedings are commenced, the applicant must issue a notice to the opposite party invoking the arbitration clause or, alternatively, the court would have to be first satisfied that the applicant shall indeed take effective steps to commence the arbitral proceedings without delay. Further, the court would have to be satisfied that there exists a valid arbitration agreement between the parties.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Usually a three-fold approach is followed: (i) existence of a *prima facie* case in favour of the applicant; (ii) irreparable hardship, i.e. which cannot be compensated in terms of money; and (iii) balance of convenience.

Indian courts are somewhat liberal in granting interim relief and rarely hold an applicant to terms such as security or costs.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Injunctive relief is governed by the provisions of the Specific Relief Act and an interlocutory relief in relation thereto is governed by the provisions of the Code of Civil Procedure. Interlocutory relief is granted on the principles highlighted in question 7.3 above. The same principles would apply to an anti-suit injunction. The leading case is *Modi Entertainment Network v. W.S.G. Cricket Pte Ltd.* (2003) 4 SCC 341. The Supreme Court here crystallised the principles for granting an anti-suit injunction. The court must be satisfied that the party against whom the injunction is sought is amenable to the personal jurisdiction of the court. Further, if the injunction is declined, the ends of justice will be defeated. The court will also take into account the principles of comity.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The arbitral tribunal can order security for costs (by way of deposit) that it expects to be incurred in relation to the claim or counterclaim (Section 38, Act).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Under the amended Act, the tribunal shall have the same powers that are available to a court under Section 9 and the interim orders passed by an arbitral tribunal would be enforceable in the same manner as if it were an order of the court. Hence, subject to any stay an aggrieved party may obtain from an appellate court, the interim measures ordered by an arbitral tribunal are to take immediate effect and be enforced through court process (should the need so arise). There is no precedent so far as to the scope of judicial review insofar as the appellate court is concerned. See question 7.1 above.

There is, however, no parallel provision for enforcement of interim measures ordered by a foreign-seated tribunal.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Section 19 of the Act states that the arbitral tribunal shall not be bound by the provisions of the Evidence Act. However, decided cases have held that certain provisions of the Evidence Act, which are founded on fundamental principles of justice and fair play, shall apply to arbitrations.

Hence, "fundamental principles of natural justice and public policy" would apply, though the technical rules of evidence contained under the Indian Evidence Act would not apply (*State of Madhya Pradesh v. Satya Pal* – AIR 1970 MP 118).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Section 27 of the Act provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence, including any disclosure, discovery or attendance of witnesses. Hence (unless the parties voluntarily comply), disclosure/discovery/attendance of witnesses can only be ordered through the court and in accordance with the provisions of the CPC.

Indian courts do not encourage wide requests for discovery. Generally, courts would order discovery if satisfied that the same is necessary for a fair disposal of the matter or for saving costs.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Please see question 8.2 above.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The Indian Oath's Act, 1969 extends to persons who may be authorised by consent of the parties to receive evidence. Thus, this Act encompasses arbitral proceedings as well. Section 8 of the said Act states that every person giving evidence before any person authorised to administer an oath "shall be bound to state the truth on such subject". Thus, witnesses appearing before an arbitral tribunal can be duly sworn by the tribunal and be required to state the truth on oath, and, upon failure to do so, commit offences punishable under the Indian Penal Code. Witnesses are generally required to give evidence by sworn affidavits (witness statements). However, a mere irregularity in the administration of an oath or affirmation does not invalidate the proceedings (Section 7, Indian Oaths Act, 1969).

The right of cross-examination would necessarily have to be granted as a principle of fairness. If cross-examination is not possible (say, due to subsequent death of a witness), the affidavit is disregarded.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The arbitral proceedings or record is not privileged. Indian law under the Indian Evidence Act, 1872 (Sections 122–129) recognises the following as privileged: (i) lawyer-client communications; (ii) unpublished official records relating to affairs of the State if detrimental to public interest; (iii) communications between husband and wife (during and even when the marriage is over); and (iv) communications made to a public officer in official confidence when he considers that it would be detrimental to public interest. All of the above are capable of waiver by the party affected.

Indian law provides that no attorney shall be asked to disclose any communication made to him by his client in the course of and for the purpose of his employment. There are some exceptions to this rule. For instance, there is no privilege if the communication is made in furtherance of an illegal purpose or if the attorney observes that some crime or fraud has occurred after commencement of his employment.

Privilege cannot be extended to in-house counsel, as a lawyer is required to give up his certificate of practice (the same is suspended) so long as he is in full-time employment. (The relationship switches from a lawyer/client one to an employer/employee one.)

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An arbitral award must be in writing and signed by the arbitrators (or a majority of them) and state the date and place of arbitration. It shall state reasons upon which it is based, unless the parties have agreed otherwise (Section 31, Act).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The arbitral tribunal's powers to clarify, correct or amend an arbitral award are limited. The arbitral tribunal may, on its own initiative or on application of a party, correct any computation, clerical, typographical or any other errors of a similar nature occurring in the award within 30 days from the date of the award (Section 33(4), Act). A time limit of 30 days is prescribed in this regard.

Parties may by agreement request the tribunal to give an interpretation of a specific point or part of the award, or request for an additional award as to claims presented in the proceedings but omitted from the award. The time limit for such an application is also 30 days.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

A challenge to an arbitration award would lie under Section 34 of the Act, corresponding to Article 34 of the Model Law. To paraphrase, an award can be set aside if:

(a) the party making the application was under incapacity;

(b) the arbitration agreement was not valid under the law agreed to by the parties (or applicable law);

(c) the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(d) the award deals with a dispute not contemplated by or falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions to arbitration;

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

(f) the subject matter of the dispute was not capable of settlement by arbitration; or

(g) the arbitral award is in conflict with the public policy of India.

The Amendment of 2015 has clarified that an award is said to be in "conflict with the public policy of India" only if:

i) the making of the award was induced or affected by fraud or corruption or was in violation of Sections 75 and 81 (pertaining to breach of confidentiality of constitution or settlement proceedings);

ii) it is in contravention with the fundamental policy of Indian law; or

iii) it is in conflict with the most basic notions of morality or justice.

Prior to the amendment, the Supreme Court in *ONGC v. Saw Pipes* (2003) 5 SCC 705 had held that a domestic award can be set aside if it is "patently illegal", i.e., if the award is contrary to the terms of the contract entered into between the parties or the substantive law. The amendment has narrowly construed the "public policy" ground as stated above. Further, it stands clarified that the ground of "patent illegality" is not available in an international commercial arbitration (seated in India). Secondly, an award can be set aside for being patently illegal only if the same is apparent on the face of the award. Thirdly, a challenge on the ground of public policy and whether an award contravenes the "fundamental policy of Indian Law" will not entail a review on the merits of the dispute (thus overruling the controversial Saw Pipes Judgment). It has also clarified that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

Prior to the amendment, the mere filing of a Section 34 Application to set aside the award would result in automatic stay of the enforcement of an award. However, under the new Act this is not the case. A separate application is now required to be made to stay the enforcement of the award during the pendency of the Section 34 proceeding.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Though the Act is silent on the point, in law it may be possible to exclude certain grounds of challenge, but judicial review as such cannot be excluded as that would be contrary to the public policy of India and would be considered to be a restraint on legal proceedings (which is prohibited in law).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, the courts cannot assume a new jurisdiction (which it otherwise does not have) on the basis of the parties' agreement.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An application for setting aside a domestic award can be filed under Section 34 of the Act. Such application must be made within three months from the date of receiving of the award. The court, if satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, may condone a delay of a further period of 30 days but not thereafter. There is no provision to set aside a foreign award (the only provision being to enforce or refuse to enforce the same on the New York Convention grounds). The Supreme Court in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* (*supra*) has overruled an earlier controversial decision which permitted Indian courts in certain circumstances to entertain and set aside application of foreign awards.

The 2015 amendment to the Act calls for expeditious disposal of a challenge to the award and in any event within one year from the date on which notice has been issued to the other party (Section 34 (6), Act). It remains to be seen how this will work out in practice.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. The relevant legislation is the Arbitration and Conciliation Act, 1996. India has made the "reciprocity" and "commercial" reservations under Article I of the New York Convention. As a result, the Central Government of India must further notify the foreign territory as a territory to which the New York Convention applies in order for the foreign award to be enforced. However, an award made in Ukraine after the breakup of the USSR was held to be an enforceable foreign award even in the absence of a separate notification recognising the new political entity as a reciprocating territory (*Transocean Shipping Agency (P) Ltd. v. Black Sea Shipping* (1998) 2 SCC 281).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The general approach is to support the arbitral award – see *Bilendra Nath v. Mayank* (1994) 6 SCC 117. The Supreme Court has held that "the court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal".

In the case of a foreign award, a party seeking enforcement would have to file an application before the High Court where the defendant resides or has assets along with the original award, or a copy duly authenticated, original arbitration agreement, or a duly certified copy, and such evidence as may be necessary to prove that the award is a foreign award (Section 47(1) of the Act). After the amendment, it is only the High Court which has jurisdiction for all matters concerning international commercial arbitration.

See also question 11.5 below.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Subject to any challenge to the arbitral award, the same is enforceable as a decree and in such a situation, the principles of *res judicata* would apply.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

There are two different regimes under the Indian Act for enforcement of an arbitral award. The domestic law regime is covered under Section 34 of the Act, which is based on Article 34 of the Model Law. Enforcement of a foreign award is governed by Section 48 of the Act, which is based on the New York Convention. Section 34 stipulates that an award can be set aside if it is in conflict with the public policy of India. See question 10.1.

Section 48 stipulates that a foreign award will not be enforced if the enforcement would be contrary to the public policy of India.

Indian courts have applied different standards in construing the "public policy" ground in the aforesaid sections. In relation to domestic awards, the Supreme Court in *ONGC v. Saw Pipes* (*supra*) has held that an award will be contrary to public policy "if it is patently illegal" (i.e., an award can be challenged on merits on the public policy ground). However, insofar as foreign awards are concerned, the public policy ground has been narrowly construed. In *Renusagar Power Co. v. General Electric Corporation* (1994) Suppl. 1 SCC 644, the Supreme Court held that "*public policy*" shall be confined to "*the fundamental policy of Indian law or the interest of India or justice or morality*". The rationale for this diversity in approach is noted in the *Saw Pipes* case, *viz*. a foreign award may be questioned in the country in which or under the laws of which it was made. Hence a domestic award would have undergone a more vigorous judicial scrutiny before its enforcement in India.

A recent Supreme Court decision (*Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263 has narrowly explained the expression "fundamental policy of Indian law" (as a ground to set aside an arbitral award as sanctified by *Saw Pipes*). In the *Western Geco* the Supreme Court illustratively explained this expression included three concepts: first, the tribunal must adopt a judicial approach; secondly, it must adhere to the principles of natural justice; and thirdly, the decision should not be so perverse or irrational that no reasonable person would have arrived at the same. The court has clarified that these are not an exhaustive enumeration of what would constitute the "fundamental policy of Indian law".

The Amendment Act of 2015 clarifies that a merit-based challenge is no longer available (see question 10.1 above).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The law does not require arbitral proceedings to be confidential. If confidentiality is required, it must be provided for in the parties' agreement. However, it is doubtful that such agreement would be effective or valid where large corporate entities or government companies are involved as they must act transparently. However, the Arbitration and Conciliation (Amendment) Bill, 2018 proposes to introduce an amendment which would mandate the tribunal and the arbitral institutions to maintain confidentiality as regards all matters pertaining to the arbitration, except the arbitral award.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes, it can, there is no bar.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Arbitrators can grant declaratory relief and order specific performance. Damages can only be compensatory in nature. Liquidated damages must also fulfil the test of reasonableness. Punitive damages are not permitted. (Sections 73 and 74 of the Indian Contract Act, 1872.)

13.2 What, if any, interest is available, and how is the rate of interest determined?

Subject to the parties' agreement, the arbitral tribunal may award interest as it deems reasonable from the date of the award to the date of payment. Prior to the amendment, the default rate of post-*pendente lite* interest was 18%. However, now, unless otherwise directed by the tribunal, the award shall carry interest at 2% higher than the current rate of interest (prevalent on the date of award) from the date of the award until the date of payment (Section 7 (b), Act). The provision shall apply only to awards rendered in India.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Costs mean:

- Reasonable costs relating to the fees and expenses of the arbitrators, courts and witnesses.
- Legal fees and expenses.
- Any administrative fees of the institution supervising the arbitration.
- Other expenses incurred in connection with the arbitral proceedings and the arbitral award.

Normally the court or tribunal will follow the general rule while awarding costs, which is that the unsuccessful party will be ordered to pay the costs of the successful party. If the court or tribunal makes a different order, the reasons are to be recorded in writing.

The circumstances under which costs are to be determined are:

i) the conduct of the parties;

ii) whether a party has succeeded partly in the case;

iii) whether the party had made a frivolous counter-claim leading to a delay in the disposal of the arbitral proceedings; and

iv) whether any reasonable offer to settle the dispute is made by a party and refused by the other party. (Section 31-A(3).)

The court or tribunal can order that a party shall pay:

i) a proportion of another party's costs;

ii) a stated amount in respect of another party's costs;

iii) costs from or until a certain date only;

iv) costs incurred before proceedings have begun;

v) costs relating to particular steps taken in the proceedings;

vi) costs relating only to a distinct part of the proceedings; or

vii) interest on costs from or until a certain date.

The tendency of Indian courts and domestic arbitral tribunals has been not to award actual costs. It is to be seen if this will change following the 2015 amendment.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

A domestic award is required to be stamped. The stamp duty depends on the amount involved in the award and varies from state to state. An award relating to immovable property must be registered under the Registration Act, 1908 within four months of its date. Registration fees also vary from state to state and are *ad valorem*.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The Bar Council of India Rules prohibits lawyers from charging contingency fees or any fees dependent on the outcome of a matter. Hence, there have been no professional funders in the market so far. Investor associations that wish to file class action suits can approach the Central Government through the Ministry of Corporate Affairs for funding.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

No, it has not.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Since 1994, India has signed a total of 84 BITs. Recently, the Government of India has allowed 58 BITs to lapse (subject to the 15-year sunset clause for investments made prior to the termination). For 25 BITs, the Government of India has issued Joint Interpretative Statements in order to align it with the 2015 Model BIT of India (http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560).

India plans to negotiate any further BITs on the basis of the 2015 Model BIT and has recently approved a BIT with Cambodia on the basis of the new Model BIT.

India is not a party to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The 2015 Model BIT of India has done away with the "most favoured nation" clause. Rather, it has introduced a provision that a breach of a separate international agreement would not constitute the breach of the Standard of Treatment India is obligated to provide to its investors.

Further, the 2015 Model BIT includes a clause for "exhaustion of local remedies". Broadly stated, the investor has to diligently pursue all judicial or domestic legal remedies for a period of five years before submitting a notice of dispute for initiation of arbitration against India.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The defence of State immunity is all but disregarded by the national courts in India.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Civil courts in India are typically bogged down with delays. Arbitrations are thus popular and indeed necessary for commercial dispute. Traditionally, arbitrations are more commonplace in shipping, construction contracts, joint venture agreements and cross-border commercial contracts.

The enactment of the Arbitration and Conciliation (Amendment) Act, 2015 is the most recent noteworthy development. The amendment seeks to restrain judicial intervention and tackle inordinate delays with court-related matters. Many controversial rulings have been watered down or overruled by the amendment including the *Saw Pipes Judgment* (please see also question 10.1 above).

The Union Cabinet, on 7 March 2018, approved for presentation before Parliament an Arbitration and Conciliation (Amendment) Bill, 2018. The Bill aims to strengthen institutional arbitration by establishing an independent body to lay down standards of practice in arbitration, make the arbitration process more cost-effective and ensure timely disposal of arbitrations. Prior to the aforesaid Cabinet decision, the New Delhi International Arbitration Centre Bill, 2018 was introduced in the Lok Sabha (Lower House of the Parliament of India) on 5 January 2018. This Bill proposes the establishment of an autonomous and independent institution, namely the New Delhi International Arbitration Centre (NDIAC) for effective management of institutional arbitrations in India.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

LCIA India has, in the past, published a set of "Notes for Arbitrators" to provide guidance to arbitrators conducting arbitrations under its Rules, including on issues relating to management of time and costs. However, LCIA India has now wound up.

On 8 October 2016 the Mumbai Centre for Arbitration (MCIA) was launched with support from the Maharashtra State Government. The MCIA Arbitration Rules include mechanisms for expedited proceedings and interim and emergency relief (including emergency arbitrators). The Rules provide an accelerated procedure for low value or simple disputes, where the Chairman determines whether the expedited procedure is appropriate. The fee structure is in proportion to the value of the sum in the dispute.

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Chapter 11

Indonesia

Sahat A.M. Siahaan

Ulyarta Naibaho

Ali Budiardjo, Nugroho, Reksodiputro

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The primary source of the arbitration law under Indonesian law is found in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (the "**Arbitration Law**"), which was promulgated on 12 August 1999. Pursuant to the Arbitration Law, an arbitration agreement must be made in writing and signed by the parties and may be in the form of: (i) an arbitration clause contained in a written agreement made prior to the dispute; or (ii) an agreement specially made out by the parties after the onset of the dispute. Alternatively, the parties may make the separate arbitration agreement in notarial deed form.

Additionally, if the arbitration agreement is made prior to the dispute, Article 2 of the Arbitration Law requires the agreement to clearly state that all disputes which arise or may arise from the legal relationship between the parties shall be settled by means of arbitration.

If the arbitration agreement is made after the dispute arises, Article 9 paragraph (3) requires the agreement to include the following:

a. the subject matter of the dispute;
b. the full names and addresses of the parties;
c. the full name(s) and residential address(es) of the arbitrator or the members of the tribunal;
d. the place where the arbitrator or the tribunal shall make its/their award;
e. the full name of the secretary to the arbitrator or the tribunal;
f. the time period in which the arbitration is to be completed;
g. a statement from the arbitrator(s) accepting appointment as such; and
h. a statement from the disputing parties that they will bear all costs of the arbitration.

An arbitration agreement is also considered to be already agreed when the agreement is contained in an exchange of letters made by means of communication which provides a record of their content; however, the dispatch of the letters by telex, telegram, facsimile, email or other telecommunications facilities must be accompanied by a note of receipt by the parties.

1.2 What other elements ought to be incorporated in an arbitration agreement?

In practice, the following elements are also suggested to be incorporated into an arbitration agreement:

1. the arbitration rules to be followed;
2. the number of arbitrators;
3. the language to be used in the arbitral proceedings;
4. the place of arbitration;
5. a waiver of Article 48 paragraph (1) of the Arbitration Law which requires the examination of disputes to be finished not later than 180 (one hundred and eighty) days as of the constitution of the tribunal. This is, however, optional and is suggested given the fact that, in practice, arbitration may run for more than 180 (one hundred and eighty) days; and
6. whether the award must be made on the basis of strict rules of law or *ex aequo et bono* (fairness and appropriateness).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Indonesian law recognises *pacta sunt servanda* principle under Article 1338 of the Indonesian Civil Code. This concept ensures that the relevant parties are free to determine their choice of forum *in their respective* contracts. Once parties have chosen arbitration as their choice of forum, the parties and other third parties, including the government and/or judicial institution that may have been affected in the future by such agreement, must honour the parties' choice. Hence, while parties in dispute refer to the arbitration agreement incorporated in contracts, the court is compelled to honour the elected forum and declare that it does not therefore have the authority to try the case.

Indonesian Arbitration Law has integrated the principle of *pacta sunt servanda* and further reinstated its position towards the enforcement of arbitration agreements at the national courts. Article 3 and Article 11 of the Arbitration Law basically repudiate the national courts' competence to try a case which has clearly been referred to arbitration, and rules that national courts must reject and will not be involved in disputes that should have been settled by means of arbitration. This has also been affirmed by jurisprudences of the Supreme Court of Indonesia; for example, in case number 3179 K/PDT/1984 dated 4 May 1988.

However, in practice – *although not common* – there are several court cases where a court accepts jurisdiction despite the parties having chosen arbitration as their choice of forum in the contract. In those cases, the party filing the case to the court usually argues the case as a tort claim instead of breach of contract. The argument of filing the case under a tort claim (instead of breach of contract) is used in order to avoid the application of the arbitration clause in the contract. This has of course raised controversy, as it invites further questions on the distinction of a case under 'tort' and 'breach of contract'.

Nevertheless, the party who seeks to rely on the arbitration clause may raise a jurisdictional challenge to the court. This jurisdictional challenge under Indonesian law is regulated in Article 134 of the Indonesian Civil Procedural Law (*Herziene Inlands Reglement*) (*Staatsblad 1941 No. 44*) or "**HIR**".

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The procedure for the enforcement of an arbitral award under Indonesian law is governed by the Arbitration Law.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Arbitration Law only provides the procedures for domestic arbitration proceedings. Basically, the Arbitration Law does not govern express distinction in defining what 'domestic' and 'international' arbitration proceedings are. The reference to the 'international' element is only stipulated in Article 1 paragraph (9) of the Arbitration Law, which defines an international arbitral award as "*an award handed down by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which under the provisions of laws of the Republic of Indonesia is deemed as an international arbitration award*". Nonetheless, the Arbitration Law is receptive to the option of international arbitration proceedings. It imparts the selection of domestic or international proceedings under Article 34 of the Arbitration Law. In addition, the Arbitration Law only stipulates the procedure of recognition and enforcement of international arbitration awards in Indonesia.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

No, the Arbitration Law is not based on the UNCITRAL Model Law. There are several significant differences which distinguish the Arbitration Law from the UNCITRAL Model Law, such as:

Unless the parties agree otherwise, under the Arbitration Law the default language will be in the Indonesian language, regardless of the language of the documents involved.

Under the Arbitration Law, a case is decided on documents unless the parties or the arbitrators wish to have hearings, while the UNCITRAL Model Law requires hearings unless the parties agree otherwise.

The grounds for annulment of Indonesian awards only consist of fraud, forgery or concealed material documents, which are clearly far more restricted than those set out in the UNCITRAL Model Law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Article 34 of the Arbitration Law governs the parties' freedom to choose the national or international arbitration institution they wish to submit their disputes to. In such case, the rules of such institution will apply unless otherwise decided.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Under Article 5 paragraph (2), the disputes which cannot be resolved by arbitration are those for which, according to regulations having the force of law, no amicable settlement is possible; for example, criminal matters, bankruptcy, adoption, etc.

The general approach in determining 'arbitrability' is regulated under Article 5 paragraph (1), which states that a dispute can be settled by means of arbitration by seeing if the disputes are of a commercial nature and involving the rights of the disputed parties.

A rather explicit indication of what constitutes disputes of a commercial nature is confirmed in the elucidation of Article 66 of the Arbitration Law, which quotes "*[i]nternational arbitration awards as contemplated in item (a) above, are limited to awards which under the provision of Indonesian law fall within the scope of commercial law*". This has clarified that the scope of commercial law includes, among others, activities in the following areas:

- commerce;
- banking;
- finance;
- investment;
- industry; and
- intellectual property rights.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Although the Arbitration Law does not provide specific provisions regarding the *kompetenz-kompetenz* doctrine, Articles 3 and 11 of the Arbitration Law, which prohibit Indonesian courts to involve itself in arbitration, impliedly suggest that the arbitral tribunal has the authority to determine its own jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The recent court cases showed that the national courts will generally refuse to try a case of breach of contract if the contract contains an arbitration clause. This approach is in line with the provision of Article 11 of the Arbitration Law.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

A national court can address the issue of the jurisdiction and competence of an arbitral tribunal at the time an application is made to the Chairman of the relevant District Court for an *exequatur* (an order to enforce an arbitral award). Such application may be filed after the award is registered with the Clerk of the District Court in the event that the parties do not voluntarily comply with the award (see Article 61 of the Arbitration Law).

The standard of review by the Chairman of the District Court prior to deciding whether an award is enforceable is to consider whether the arbitration case is of a commercial nature and is arbitrable, and that the award is not contrary to public policy.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

According to Article 30 of the Arbitration Law, third parties outside the arbitration agreement may participate and join themselves into the arbitral process, if they have related interests and their participation is agreed to by the parties in dispute and by the arbitrator or arbitration tribunal that examines the relevant disputes.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no specific rules in the Arbitration Law stipulating a limitation period for the commencement of arbitration. However, the general terms of such statute of limitation for civil matters are provided in the Indonesian Civil Code, which provides for a limitation period of 30 (thirty) years.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Under Indonesian Bankruptcy Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Repayments (the "**Bankruptcy Law**"), in the event where a debtor has been declared bankrupt, any legal proceedings initiated by the debtor may, at the request of the defendant, be suspended so as to give the liquidator the opportunity to assume control of the proceedings and determine whether to continue them. This is regulated under Article 28(1) of the Bankruptcy Law. Although the Bankruptcy Law does not clearly stipulate whether this provision applies to arbitration; in practice, Indonesian court judges may choose to apply the provision.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The law applicable to the substance of the disputes is determined under the choice of law rules. Article 1338 of the Indonesian Civil Code gives freedom to the parties to choose their own governing law to the disputes. The parties' choice of law may, however, be challenged if it violates Indonesian law or is contrary to public morals or public policy.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

To the extent of the applicability of Indonesian law as mandatory laws (of the seat of the arbitration), Indonesian law prevails over the law chosen by the parties provided that the law chosen by the parties is contrary to Indonesian law or to public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The law governing the formation, validity and legality of arbitration agreements is the law that the parties have expressly chosen. If, however, the Arbitration Law applicable is the law of the seat of the arbitration, then the Arbitration Law will govern the formation, validity and legality of the arbitration agreement.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The limitations to select arbitrators are:

- Pursuant to Article 12 paragraph (1) of the Arbitration Law, the person who can be appointed or assigned to become an arbitrator shall fulfil the following requirements:
  a. capable of undertaking legal actions;
  b. being at least 35 years old;
  c. having no relations by blood or marriage to the second degree with either party to the dispute;
  d. having no financial interests or other interests in the decision of the arbitration; and
  e. having experience and actively mastering the field for at least 15 years.
- Pursuant to Article 12 paragraph (2) of the Arbitration Law, judges, prosecutors, secretaries and other officials of court cannot be appointed or designated as arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, there are default procedures provided under the Arbitration Law:

- pursuant to Article 13 paragraph (1) of the Arbitration Law, in the case of parties failing to reach an agreement on the choice of arbitrators, or if no terms have been set concerning the appointment of arbitrators, the Chairman of the District Court shall be authorised to appoint the arbitrators or arbitration tribunal;
- pursuant to Article 13 paragraph (2) of the Arbitration Law, in the case of *ad hoc* arbitration, where there is any disagreement between parties with regard to the appointment of an arbitrator, the parties can file applications to the Chairman of the District Court to appoint one or more arbitrators for the resolution of such disputes;
- pursuant to Article 14 paragraph (3) of the Arbitration Law, in the case where parties have agreed to a sole arbitrator but the parties have not reached any agreement within 14 (fourteen) days after the respondent receives the claimant's proposal, then at the request of one of the parties, the Chairman of the District Courts may appoint the sole arbitrator; and
- pursuant to Article 15 paragraph (3) of the Arbitration Law, in the case where one of the parties has failed to appoint a person as a member of an arbitration panel within no more than 30 (thirty) days after the receipt of notification by the other party, then the arbitrator appointed by the other party shall act as the sole arbitrator and any decision of the sole arbitrator shall be binding upon both parties.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes, a court can intervene in the selection of arbitrators in the following situations:

- pursuant to Article 13 of the Arbitration Law, if the parties do not reach an agreement or no terms have been set concerning the appointment of arbitrators; and
- pursuant to Article 25 of the Arbitration Law, in the case a recusal filed by one of the parties is not consented to by the other party and the arbitrator concerned is unwilling to resign, the party concerned may submit its request for recusal to the Chairman of the District Court, whose decision binds the two parties and shall not be subject to appeal.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The parties must consider the following requirements when appointing arbitrators:

- pursuant to Article 12 paragraph (1)(c) of the Arbitration Law, the arbitrator must not have any relations by blood or marriage to the second degree with any of the parties in dispute;
- pursuant to Article 12 paragraph (1)(d) of the Arbitration Law, the arbitrator must not have any financial interests or other interests in the arbitral award;
- pursuant to Article 12 paragraph (2) of the Arbitration Law, judges, prosecutors, clerks of court and other officials of court may not be appointed or designated as arbitrators;
- pursuant to Article 18 paragraph (1) of the Arbitration Law, a prospective arbitrator asked by one party to sit on the arbitration panel shall be obliged to advise the parties on any matter which could influence his independence or give rise to bias in the award to be rendered;
- pursuant to Article 22 of the Arbitration Law, a demand for recusal may be submitted against an arbitrator if sufficient cause and authentic evidence is found to give rise to suspicions that such arbitrator will not perform his/her duties independently and will be biased in rendering an award. A request for the recusal of an arbitrator may also be made if it is proven that there is a family-related matter, financial or employment relationship with one of the parties or its legal representative; and
- pursuant to Article 26 paragraph (2) of the Arbitration Law, an arbitrator may be dismissed from his/her mandate in the event that he/she is shown to be biased or demonstrates disgraceful behaviour which must be proven through legal proceedings.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Parties are entitled to determine any arbitration rules to be applied in their proceeding provided that it does not conflict with the Arbitration Law. The Arbitration Law itself also governs the procedure of arbitration sited in Indonesia.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Yes, under the Arbitration Law, there are particular procedural steps that are required to be conducted in arbitration proceedings, such as the appointment of arbitrators, challenges to arbitrators, submission of a statement of claim, matters that should at least be inserted into a statement of claim, enforcement of arbitral awards and challenges to the enforcement of the arbitral award.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There is no particular rule that governs the conduct of counsel from Indonesia in arbitral proceedings sited in Indonesia.

However, in general, the profession of legal counsels in Indonesia is regulated under Law No. 18 of 2003 on Advocates ("**Advocates Law**"). Hence, Indonesian counsels and non-Indonesian counsels are to adhere to the Advocates Law when practising or acting as an attorney in Indonesia.

Separately, the guidelines on the conduct of an Indonesian counsel had been referred to the Ethic Code of Advocates, which is issued by Indonesian advocates associations.

It should be noted that the term legal counsel in Indonesia under the Advocates Law refers to a practising lawyer who has been admitted to practise in Indonesia.

Having the clarifications in mind, set out below are the responses to the two questions above:

(i) On the question: do those same rules also govern the conduct of counsel from Indonesia in arbitral proceedings sited elsewhere?

Yes. The provisions of the Advocates Law and the Ethic Code of Advocates govern the conduct of Indonesian counsels in arbitral proceedings sited outside Indonesia as well.

(ii) On the question: do those same rules also govern the conduct of counsel from countries other than Indonesia in arbitral proceedings sited in Indonesia?

Provided that the foreign counsels are engaged or hired as employees or experts in the relevant foreign law by an Indonesian law office as permitted by the government and recommended by an advocates association, i.e. the Indonesian Advocates Association (*Perhimpunan Advokat Indonesia* or "**PERADI**"), then the same rules govern and apply to foreign counsels as well.

It should be noted that although a foreign counsel is admitted to practise in his/her home country, he/she must follow the procedure under the Advocates Law in order to be able to provide his/her legal services in Indonesia; for example, he/she must be associated with a local counsel.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The Arbitration Law imposes powers and duties upon arbitrators as follows:

- pursuant to Article 17 paragraph (2) of the Arbitration Law, an arbitrator or arbitrators shall render the award fairly, justly and in accordance with the law;
- pursuant to Article 32 paragraph (1) of the Arbitration Law, based on an application of one of the parties, the arbitrator or arbitration tribunal can make a provisional award or other interlocutory decision to regulate the running of the examination of the disputes, such as security attachments, deposit of goods with third parties, or selling of perishable goods;
- pursuant to Article 33 of the Arbitration Law, the arbitrator or arbitration tribunal has the authority to extend its terms of office: (a) if a request is made by one of the parties in special circumstances; (b) as a consequence of the provisional award or other interim decision being made; or (c) if the arbitrator or arbitration tribunal deems it necessary in the interest of the hearing;
- pursuant to Article 35 of the Arbitration Law, the arbitrator or arbitration tribunal may order any document or evidence to be accompanied by a translation copy in the language determined by the arbitrator or arbitration tribunal;
- pursuant to Article 37 paragraph (1) of the Arbitration Law, the arbitrator or arbitration tribunal can determine the venue of the arbitration unless agreed by the parties;
- pursuant to Article 37 paragraph (2) of the Arbitration Law, the arbitrator or arbitration tribunal may hear witness testimonies or hold meetings if deemed necessary in a certain place outside the venue of arbitration;
- pursuant to Article 37 paragraph (4) of the Arbitration Law, the arbitrator or arbitration tribunal may conduct a local inspection of goods in dispute or other matters connected with disputes, at the location of such property, and if deemed necessary, the parties shall be properly summoned so that they may also be present at such examination;
- pursuant to Article 46 paragraph (3) of the Arbitration Law, the arbitrator or arbitration tribunal shall be empowered to require the parties to provide such supplementary written submissions of explanations, documentary or other evidence as deemed necessary within such time limitation determined by the arbitrator or arbitration tribunal;
- pursuant to Article 49 paragraph (1) of the Arbitration Law, upon the order of the arbitrator or arbitration tribunal or the request of the parties, one or more witnesses or expert witnesses may be summoned to give testimony; and
- pursuant to Article 50 paragraph (1) of the Arbitration Law, the arbitrator or arbitration tribunal may request the assistance from one expert witness or more to provide a written report concerning any specific matter relating to the merits of the dispute.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are no specific rules restricting the appearance of lawyers from other jurisdictions in legal matters in Indonesia. The Advocates Law only states the prohibition of lawyers from other jurisdictions from practising law in Indonesia (see Article 23 (1) of the Advocates Law). However, it is not clear whether this prohibition applies to appearances in arbitration proceedings.

Please also refer to our response to question 6.3 above.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Article 21 of the Arbitration Law regulates that the arbitrator or arbitration tribunal may not be held legally responsible for any action taken during the proceedings to carry out the function of an arbitrator or arbitration tribunal, unless it is proven that there was bad faith in the action. However, if the arbitrators or arbitration tribunal without valid reasons fail to render an award within the specified period, such arbitrator(s) may be ordered to pay the parties compensation for the costs and losses caused by the delay.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes, pursuant to the Arbitration Law, the national courts have jurisdiction on the nomination of arbitrators and dismissal of arbitrators due to impartiality or conflict of interest. These matters are regulated under, among others, Articles 13, 15 and 25 of the Arbitration Law.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes, Article 32 paragraph (1) of the Arbitration Law gives the entitlement to the arbitral tribunal, at the request of one of the parties, to issue a preliminary award or interim relief. Such relief deals with the manner of running the examination of the dispute, including decreeing a security attachment, ordering the deposit of goods with third parties or the sale of perishable goods.

There is no requirement in the Arbitration Law that the arbitrator must seek the assistance of the court to issue such award. The assistance of the court is only required during the enforcement of the award.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

No, the court is not entitled to grant preliminary or interim relief in proceedings subject to arbitration.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The court has no jurisdiction in a case subject to a legally binding arbitration clause or arbitration agreement. Therefore, it also does not have the jurisdiction for requests for interim relief by parties to arbitration agreements.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Indonesian law does not recognise an anti-suit injunction in aid of an arbitration. However, they are obliged by the Arbitration Law to refer the parties to arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The Arbitration Law or Indonesian civil procedural laws do not explicitly provide any provisions relating to security for costs. However, it is possible for an arbitrator to mutually agree on such matter with the parties for, e.g., advance payment for the cost, pursuant to Article 17 (1) of the Arbitration Law, as the appointment of the arbitrator may be seen as a contract between the arbitrator and the parties.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Although the Arbitration Law acknowledges preliminary relief and interim measures ordered by arbitral tribunals, it does not stipulate a specific procedure for the enforcement of interim measures or preliminary relief. Thus, similar to arbitral awards, such interim measures or preliminary relief have taken the assumption to follow the same procedures of arbitral awards in order to be enforceable, i.e. they must be registered to obtain a writ of execution. However, the finality and binding power requirements necessary under the Arbitration Law for the recognition and enforcement of these interim measures and preliminary reliefs may cause difficulty regarding the implementation of this scheme. As yet, we are not aware of any ruling by an Indonesian court on the finality and enforceability of both domestic and international arbitral interim measures and preliminary relief.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Pursuant to Article 1865 of Indonesian Civil Code, the party claiming a certain right shall be the one proving such right. The general principle of rules of evidence applicable in Indonesian law is regulated in Articles 162–177 of HIR, which is also relevant to the arbitration proceedings. In an *ad hoc* arbitration proceeding, the parties to the arbitration are provided with an equal opportunity to explain their positions in writing and to submit evidence necessary to support their stance based on Article 46 of the Arbitration Law. In addition, evidence may also be made verbally with the approval of the parties concerned or if deemed necessary by the arbitrators or arbitration tribunal pursuant to Article 36 paragraph (2) of the Arbitration Law.

Arbitration institutions in Indonesia, such as BANI, have their own regulations regarding rules of evidence. For example, the general rules of evidence under the BANI Rules are as follows:

i. each of the parties has the burden to explain its position, to submit evidence substantiating that position and to prove the facts relied upon it in support of its Statement of Claim or Reply (Article 23 paragraph 1 of the BANI Rules);

ii. the tribunal may, if it considers it appropriate, require the parties to address any enquiry or present any documentation the tribunal deems necessary, and/or to present a summary of all documents and other evidence which that party has presented and/or intends to present in support of the facts in issue set out in its Statement of Claim or Reply, within such time limits as the tribunal shall deem appropriate (Article 23 paragraph 2 of the BANI Rules);

iii. the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered (Article 23 paragraph 3 of the BANI Rules); and

iv. if the tribunal considers it necessary, and/or at the request of either party, expert or factual witnesses may be summoned who may be required by the tribunal to present testimony first in a written statement, and on the basis of the written testimony the tribunal may determine, on its own or upon request of either party, whether oral testimony is required (Article 23 paragraph 4 of the BANI Rules).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Article 46 paragraph (3) of the Arbitration Law stipulates that the arbitrator has the authority to request the parties to produce additional written explanations, documents or other evidence deemed necessary within a time period as determined by the arbitrator. Further, regarding the attendance of witnesses, Article 49 stipulates the attendance of witnesses can be based on the arbitral tribunal order or at the request of the disputing parties.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

The Arbitration Law does not provide any provision that permits court intervention in the matter of disclosure/discovery. In practice, a certain exception may be given by the tribunal to the parties to disclose matters in dispute, which are requested by a government institution including a court for either a compliance mandate or any other legal matters. Further, the principle of compulsory discovery is not recognised under Indonesian Civil Procedural Law.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The Arbitration Law provides, under Article 49 paragraph (1) of the Arbitration Law, that fact witnesses and expert witnesses may be summoned by the tribunal or the parties. Before giving testimonies, under Article 49 paragraph (3), all witnesses must be sworn before the tribunal.

Please note that, under Article 37 paragraph (3) of the Arbitration Law, it is regulated that the general principle of examination of witnesses in arbitration is in accordance with the provisions generally applicable in HIR.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Under Article 19 paragraph (2) of the Advocates Law, advocates are entitled to the protection of privilege of all communications means between them and their client. However, the scope of the protection itself is not specified in detail.

The privilege is deemed to have been waived only if the Law provides otherwise. Article 19(1) of the Advocates Law further provides that advocates are obliged to keep all information obtained from their client confidential, unless the Law provides otherwise.

In addition, the Indonesian Advocates Code of Ethics provides that correspondence among the counsels may not be shown to a judge if it is marked "Sans Prejudice", and discussions or correspondence in the framework of settlement negotiations between advocates that have not reached a conclusion may not be used as evidence in court.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 54 paragraph (1) of the Arbitration Law stipulates that an arbitral award must contain the following requirements:

(i) the statement "*Berdasarkan Keadilan yang Berdasarkan Ketuhanan Yang Maha Esa*" (For the Sake of Justice based on the Almighty God), written at the top of the award;

(ii) the full names and addresses of the parties;

(iii) a brief description of the dispute;

(iv) the positions of the respective parties;

(v) the full names and addresses of the arbitrators;

(vi) considerations and conclusions of the tribunal concerning the entire dispute;

(vii) the opinion of each of the respective arbitrators if there is a difference of opinion within the tribunal;

(viii) the holdings of the award;

(ix) the place and date of the award; and

(x) the signatures of the members of the tribunal. The failure of an arbitrator to sign an award, because of illness or death, if noted in the award itself, will not affect the enforceability of the award (Article 54(2) of the Arbitration Law).

Furthermore, Article 54 paragraph (3) of the Arbitration Law provides that the award shall set forth a time period within which the award must be implemented.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Under Article 58 of the Arbitration Law, arbitral tribunals' power to correct awards is limited only to administrative mistakes and/or adding or reducing a claim in such award. Such power comes to effect only if the parties request a correction within 14 (fourteen) days after the award is received.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The only available actions to challenge an arbitral award based on the Arbitration Law are the request for annulment for arbitration sited in Indonesia and refusal to enforce an international arbitral award.

Article 70 and Article 71 of the Arbitration Law provide that parties can file an application for the annulment of an arbitral award to the Central Jakarta District Court where the defendant resides in case the decision being challenged contains the following elements:

a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered;

b) after the award has been rendered, documents are found which are decisive in nature and which were deliberately concealed by the opposing party; or

c) the award was rendered as a result of fraud committed by one of the parties to the dispute.

The elucidation of Article 70 of the Arbitration Law further states that the above reasons must be proven by a court's decision. However, the length of time in obtaining a final and binding decision in Indonesia itself may take approximately 5 (five) years or more.

Meanwhile, the enforcement of an arbitral award may be refused if the award violates public policy as contemplated in Article 66(c) of the Arbitration Law. Under Article 4(2) of the Supreme Court Regulation No. 1 of 1990, public policy is defined as the fundamental principles of the Indonesian legal system and society. This definition is indeed very general. Yet, no further elaboration is provided. In practice, the court has and will often exercise wide discretion to interpret this term on a case-by-case basis. The Central Jakarta District Court has jurisdiction over the recognition and enforcement of international arbitration awards, including to refuse the arbitral award if it is deemed to not comply with Indonesian public policy.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The basis of a challenge against an arbitral award cannot be excluded by agreement since the provisions of the challenge itself do not permit any waiver from the parties to exclude such basis of the challenge.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Based on the elucidation of Article 60 of the Arbitration Law, it is provided that an arbitral award constitutes a final decision and, therefore, it is not possible to appeal an arbitral award. As such, the agreement of the parties will not be able to expand any provisions related to the appeal of an arbitral award under Indonesian law.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

As elaborated above, an arbitral award is not subject to appeal under the Arbitration Law. Nonetheless, the decision of the court rejecting the enforcement of an award can be appealed to the Supreme Court and must be decided by the Supreme Court within 90 (ninety) days as of the registration of the appeal. A decision approving the enforcement of the award cannot be appealed.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Indonesia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by virtue of Presidential Decree Number 34 1981, on 5 August 1981.

Indonesia agreed to ratify the New York Convention with the following reservations:

i. international arbitral awards which may be recognised and enforced in Indonesia are only those relating to commercial disputes; and

ii. the recognition of awards has to be on the basis of reciprocity, i.e., rendered in a country which, together with Indonesia, is a party to an international convention regarding the recognition and enforcement of foreign arbitral awards.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, Indonesia has not signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Although, in general, the national courts in Indonesia honour the recognition and enforcement of arbitration awards in the same way as a court judgment, the practice of the recognition and enforcement of arbitration awards, especially for international arbitration awards, varies.

If a party intends to enforce an award, firstly it has to be identified whether the award is a domestic or international arbitration award under the Arbitration Law (see question 2.2 above on the definition of an international arbitral award). In the case of a domestic arbitral award, the procedure for enforcement is as follows:

a. the tribunal or its authorised proxy must deliver and register the original or an authentic copy of the award to the Clerk of the District Court within 30 (thirty) days of the award's issuance (Article 59 paragraph (1) of the Arbitration Law);

b. failure to register the arbitration award pursuant to the above requirement shall render the award unenforceable (Article 59 paragraph (4) of the Arbitration Law);

c. in the event that the losing party fails to perform its obligations under the arbitral award, the award shall be enforced by order of the Chief Judge of the District Court at the request of the winning party (Article 61 of the Arbitration Law);

d. the order of the Chief Judge shall be rendered within 30 (thirty) days following the filing of the request for execution with the Clerk of the District Court (Article 62 paragraph (1) of the Arbitration Law). In practice, however, the issuance of such order may take longer – it may take approximately 2 (two) months;

e. the Chief Judge of the District Court must firstly examine the arbitral award to determine that it is based on a valid arbitration agreement and that the dispute is arbitrable as a matter of law and that the award is consistent with good morals and public policy (Article 62 paragraph (2) of the Arbitration Law);

f. a decision of the Chief Judge of the District Court that an award is not enforceable for the above reasons may not be appealed (Article 62 paragraph (3) of the Arbitration Law);

g. the Chief Judge of the District Court must not examine the reasoning of the arbitral award (Article 62 paragraph (4) of the Arbitration Law); and

h. once endorsed for enforcement by the Chief Judge of the District Court, the award may be executed in the same manner as a final and binding court decision in a civil case.

Under Articles 65 and 66 of the Arbitration Law, the enforcement of an international arbitral award must be applied to the Central Jakarta District Court. The award concerned must fulfil the following requirements:

a. the award is issued by an arbitrator or arbitral tribunal in a country with which Indonesia has a treaty, whether bilateral or multilateral, regarding the recognition and enforcement of an international arbitral award;

b. the award is in the domain of commercial law according to Indonesian law; and

c. the award does not violate Indonesian rules of public policy.

The award can be enforced by an *exequatur* (a writ of execution) from the Chairman of the Central Jakarta District Court. The Arbitration Law requires, as a prerequisite to the issuance of an *exequatur*, the registration of the award directly by the arbitrator(s) or by the disputing parties who have been given the authority to represent the arbitrator(s) by power of attorney. In practice, the latter is commonly chosen as it is more practicable. The power of attorney must be notarised and further legalised by the Indonesian Consulate/Embassy having jurisdiction over the arbitrator or arbitration institution (in case of institutional arbitration). The following documents must be submitted when registering the award:

a. an original or authentic copy of the international arbitral award and a sworn translation in the Indonesian language;

b. an original or authentic copy of the arbitration agreement and a sworn translation in the Indonesian language;

c. an official statement from the diplomatic representative of the Republic of Indonesia in the country where the international arbitral award was issued, certifying that the country where the arbitral award was issued is a party to bilateral and multilateral agreements on the recognition and execution of international arbitration decisions (the New York Convention) with Indonesia;

d. a notarised and legalised Power of Attorney (PoA) from the arbitrator(s) to the disputing parties to register and enforce the award at the Central Jakarta District Court; and

e. a notarised and legalised Substitution Power of Attorney from the party who wishes to enforce the award to its legal representative (in the case where the party is represented by lawyers) to register and enforce the award at the Central Jakarta District Court.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The Arbitration Law is clear that arbitral awards are final and binding. They may not be appealed, although they may be annulled, and the Chief Judge of the relevant District Court may refuse to order the enforcement of a domestic arbitral award, or the Chief Judge of the Central Jakarta District Court may refuse to order the recognition and enforcement of an international arbitral award. To this extent, they are *res judicata* (or *ne bis in idem*, to follow the terminology preferred in Indonesia).

That said, in practice, it is not uncommon for parties facing an unfavourable arbitral award or the likelihood of an unfavourable arbitral award to attempt to commence court proceedings grounded on theories of an unlawful act (similar to common law theories of tort). Since an unlawful act gives rise to remedies as a matter of law, rather than contract, some courts will hold that the tort claims falls outside of the scope of the contract to which an arbitration

clause pertains. In more sophisticated forms, the claim may be that the contract itself is the result of fraud or another unlawful act. In these circumstances, some Indonesian courts will accept jurisdiction and try the matter without regard to the arbitral award or ongoing arbitral proceedings.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The Arbitration Law does not provide further elaboration of the definition of public policy or public order. Article 66 section c of the Arbitration Law only provides that the international arbitral award can only be enforced in Indonesia to the extent that the award is not contradictory to public policy. However, Article 4(2) of the Supreme Court Regulation No. 1 of 1990 defines public policy as the fundamental principles of the Indonesian legal system and society. This definition is indeed very general.

There is no guideline in the interpretation of the public policy itself since court judgments refusing enforcement of international arbitral awards based on public policy grounds vary depending on the nature of the case. Thus, it is not possible to infer a definite interpretation of what public policy is for refusing the enforcement of an arbitral award.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The confidentiality clause governed in the Arbitration Law is stipulated in Article 27 of the Arbitration Law. It states that hearings of arbitration disputes shall be closed to the public. In its elucidation, the purpose of this Article is to protect the confidentiality of the arbitration proceeding itself.

There is no stipulation with regards to the exclusion of the confidentiality of an arbitration proceeding. There is no specific law that governs the confidentiality issue except for the Arbitration Law mentioned above.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The Arbitration Law does not provide further elaboration as to whether disclosed information in arbitral proceedings can be referred to and/or relied on in subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Arbitration Law does not specify the types of remedies (including damages) that are available in arbitration. In general, the types of damages awarded in arbitration are the same in the Indonesian Civil Court. Furthermore, the concept of punitive damages is not available under Indonesian law.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The Arbitration Law does not specifically regulate the application of interest to a monetary award. However, as a matter of legal practice, court-imposed interest is 6% *per annum*; this is based on Staatsblad No. 22 1848. A different rate of interest may be imposed if provided in the contract on which the claim is based.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Article 77, paragraphs (1) and (2), of the Arbitration Law regulates the arbitration fee to be charged to the losing party. However, in the event that the claim is only partially granted, the arbitration expenses shall be charged to the parties in equal proportions. Costs and expenses do not include legal counsels' fees and expenses. Legal counsel expenses are not permitted to be charged to the losing party under Article 379 of HIR.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An arbitration award is not subject to tax law.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There is no regulation on restrictions on third parties, including lawyers, funding claims. There is also no prohibition on contingency fees; however, this is an uncommon practice in Indonesia. To our knowledge, "professional" funders for litigation or arbitration are uncommon in Indonesia.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, Indonesia has ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), or the ICSID Convention, by virtue of Law No. 5 of 1968 on Investment Dispute Settlement between State and Foreign Nationals.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Pursuant to UNCTAD's IIA Navigator and Sixteenth Report on G20 Investment Measures on 10 November 2016, Indonesia is currently party to 71 BITs with other states even though only 27 are currently in force. Additionally, Indonesia is also a party to 18 treaties containing investment provisions. The status of the remaining BITs

and investment treaties can be seen on: http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

No; there is no standard terminology or model language that has been adopted in Indonesian investment treaties. Nevertheless, all investment treaties to which Indonesia is a party choose arbitration as their dispute settlement resolution. Most BITs stipulate ICSID Arbitration, but some refer to *ad hoc* arbitration under UNCITRAL Arbitration Rules.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Theoretically, state immunity will be waived in the event that Indonesia has positioned itself as a party with regards to jurisdiction and execution. However, there have not been any examples of a case where the issue of state immunity has been raised in the national courts of Indonesia.

Do note that if it concerns a request for the enforcement of an international arbitration award, Article 66(e) of Arbitration Law provides that it must be requested to the Supreme Court which is later transferred to the Central Jakarta District Court. Once the enforcement and recognition are successful, execution may follow.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The Indonesian government is currently drafting a new government regulation on a dispute settlement mechanism for investment disputes between the Indonesian government and investors. The regulation aims to provide a more precise procedure, timeframe and alternative when an investor intends to seek remedy to protect its investment. However, to date, this government regulation draft is not yet finalised and there is a possibility that the provisions in the draft might be altered.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

To the best of our knowledge, the arbitration institutions in Indonesia have not adopted any significant changes to their rules or arbitration procedures that might be relevant in dealing with the current arbitration issues.

Acknowledgment

The authors would like to acknowledge the assistance of their colleague Ms. Eva Fatimah Fauziah in the preparation of this chapter.

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Japan

Yoshimasa Furuta

Anderson Mori & Tomotsune

Aoi Inoue

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

An arbitration agreement must be in writing (Art. 13.2 of the Japanese Arbitration Act, Act No. 138 of 2003, as amended, the "Arbitration Act"). (Unless otherwise indicated, article and chapter numbers referred to in this chapter are those of the Arbitration Act.) An arbitration agreement is in writing when the agreement is reduced to: (i) the documents signed by the parties; (ii) the correspondence exchanged by the parties, including those sent by facsimile transmissions and other communication devices which provide written records of the communicated contents to the recipient; and (iii) other written instructions. Additionally, electromagnetic records (i.e. email transmissions) are deemed to be in writing (Art. 13.4).

1.2 What other elements ought to be incorporated in an arbitration agreement?

The Arbitration Act does not stipulate specific elements to be incorporated in an arbitration agreement. In practice, the elements usually incorporated are: (i) the parties; and (ii) the scope of the submission to arbitration. In addition, the following elements should be included: (i) applicable arbitration rules; (ii) applicable rules of evidence; (iii) place of arbitration; (iv) number of arbitrators; (v) language to be used in the procedure; (vi) required qualification and skills of the arbitrator(s); (vii) waiver of sovereign immunity; and (viii) confidentiality agreement.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Japanese courts are friendly to arbitration agreements in general. Unlike the UNCITRAL Model Law, Japanese courts do not directly refer the case to arbitration, but dismiss the lawsuit in favour of an arbitration agreement. To this end, the defendant should file a motion to dismiss prior to the first court hearing (Art. 14.1).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act governs the enforcement of arbitration agreements in Japan. It was enacted in 2003 and became effective on March 1, 2004. The English translation of the Arbitration Act is available at the following website (please note that this English translation may not reflect the amendments made after 2003): http://www.japaneselawtranslation.go.jp/law/detail/?id=2155&vm=04&re=02.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes. The Arbitration Act applies equally to both domestic and international arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the Arbitration Act is basically in line with the UNCITRAL Model Law, but there are a couple of differences on the following points:

Enforcement of Arbitration Agreement (Art. 14.1). The national court will dismiss a case brought before it if it finds that the parties' arbitration agreement is valid. The court will not order the case to be submitted to arbitration. Please see question 1.3 above.

Promotion of Settlement (Art. 38.4). The Arbitration Act stipulates that the tribunal may attempt to settle the dispute. Generally speaking, Japanese practitioners, including arbitrators, prefer to settle the dispute rather than to make an arbitration award. This provision requires the parties' consent for the tribunal's attempt to settle, to avoid the situation that arbitrators place unnecessary pressure upon the parties for settling the case. Parties may withdraw their consent at any time until the settlement is reached.

Arbitrator's Fee (Art. 47). Unless otherwise agreed to by the parties, arbitrators can determine their own fees, while the UNCITRAL Model Law does not have such provisions. Since the fee schedules of arbitration institutions are usually applied to institutional arbitrations; in practice, this provision only applies to *ad hoc* arbitration.

Deposit for Arbitration Costs (Art. 48). Unless otherwise agreed to by the parties, arbitrators may order that the parties deposit an amount determined by the arbitral tribunal as the preliminary arbitration costs.

Consumer Dispute Exception (Supplementary Provision Art. 3). The Arbitration Act confers consumers a unilateral right to terminate the arbitration agreement entered into between a consumer and a business entity. Arbitration proceedings may be carried on if: i) the consumer is the claimant of the arbitration; or ii) the consumer explicitly waives the right to discharge after the arbitral tribunal explains about the arbitration procedure to the consumer at an oral hearing.

Employment Dispute Exception (Supplementary Provision Art. 4). An arbitration agreement between an employer and an employee with respect to future disputes over employment is invalid.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Under the Arbitration Act, there are no mandatory rules specifically governing international arbitration proceedings sited in Japan.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

"Arbitrability" is broadly defined in Japan to cover a variety of civil and commercial disputes. Unless otherwise provided by law, civil and commercial disputes that may be resolved by settlement between the parties (excluding that of divorce or separation) are "arbitrable" (Art. 13.1). However, a matter is not "arbitrable" if the final decision of the dispute may be binding on third parties. Although there are few laws which explicitly deny "arbitrability", the following subject matters are generally considered to NOT be "arbitrable": (i) validity of intellectual property rights granted by the government, e.g. patents, utility models and trademarks; (ii) shareholders' action seeking revocation of a resolution of the shareholders' meeting; (iii) administrative decisions of government agencies; and (iv) insolvency and civil enforcement procedural decisions. In addition, Art. 4 of Supplementary Provisions to Arbitration Act provides that, for the time being until otherwise enacted, any arbitration agreements concluded on or after March 1, 2004, the subject of which constitutes individual labour-related disputes that may arise in the future, shall be null and void.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. The Arbitration Act has adopted the *Kompetenz-Kompetenz* rule, and Art. 23.1 provides that: "[t]he arbitral tribunal may rule on assertion made in respect of the existence or validity of an arbitration agreement or its own jurisdictions (which means its authority to conduct arbitral proceedings and to make arbitral awards)".

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The court will dismiss the lawsuit if the defendant files a timely motion to dismiss. If the defendant fails to file a timely motion to dismiss, the court will proceed to hear the merits of the case. See also question 1.3 above.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Based on the *Kompetenz-Kompetenz* rule (Art. 23.1; see also question 3.2 above), the arbitral tribunal will primarily review its own jurisdiction. If the arbitral tribunal affirms its jurisdiction, either party, within 30 days of the receipt of the ruling, may request the relevant court to review such ruling (Art. 23.5).

In addition, courts may address the issue of jurisdiction of the arbitral tribunal at the stage of enforcement and/or enforceability of an arbitration award.

The court will conduct the *de novo* review of the tribunal's decision in respect of its jurisdiction. In other words, the court will not be bound by the tribunal's decision itself, and will review the tribunal's jurisdiction case independently from the tribunal's own decision.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

As a principle, an arbitration agreement is binding only upon the parties to the arbitration agreement. In the case of a joint venture, the participants to the joint venture may be bound to the arbitration agreement to which the joint venture is a party. Furthermore, the court extended the scope of an arbitration agreement with respect to the parties to the arbitration proceedings as a result of applying New York law (which was chosen by the parties as governing law) to the interpretation of the arbitration agreement. *K.K. Nihon Kyoiku Sha v. Kenneth J. Feld*, 68 Hanrei Jiho 1499 (Tokyo H. Ct., May 30, 1994); appeal to the Supreme Court denied, 51 Minshu 3709 (Sup. Ct., Sep. 4, 1997).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There is no provision related to limitation periods for the commencement of arbitrations. Under Japanese law, the rules of limitation periods are substantive rather than procedural. Accordingly, parties may choose the law of limitation pursuant to the conflict of laws in Japan (namely, the Act on General Rules of Application of Laws (Act No. 78 of 2007)).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Neither the Arbitration Act nor the Bankruptcy Act provides any specific provisions as to how ongoing arbitration proceedings will be affected by insolvency proceedings with respect to the parties to the arbitration. In addition, there is no particular case law on this point. Thus, it is difficult to define the effect in Japan of pending insolvency proceedings upon arbitration proceedings, while an academic authority argues that the arbitration proceedings shall be suspended upon the commencement of insolvency proceedings on the parties and shall be resumed once a bankruptcy trustee is appointed.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Primarily, the arbitral tribunal shall apply the law agreed by the parties as applicable to the substance of the dispute. If the parties

fail to agree on the applicable law, the tribunal shall apply such law of the state with which the dispute is most closely connected (Arts. 36.1 and 36.2). Notwithstanding these provisions, the tribunal shall decide *ex aequo et bono* when the parties have expressly authorised it to do so (Art. 36.3). In addition, in the case of a contract dispute, the tribunal shall decide in accordance with the terms of the contract and shall take into account the applicable usages, if any (Art. 36.4).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Generally speaking, in those cases where regulatory issues (e.g. issues relating to labour law, antimonopoly law and patent law) are involved, mandatory laws may prevail over the laws chosen by the parties to the arbitration.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

According to Art. 44.1[2] of the Arbitration Act, validity of an arbitration agreement should be subject to the law agreed by both parties as an applicable law, or in case of failing, to the laws of Japan.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are no specified limits to the selection of arbitrators, i.e. parties may agree on the number, required qualification and skills of arbitrators, and the methods of the selection.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. The Arbitration Act provides a default procedure for selecting arbitrators, which is basically the same as that of the UNCITRAL Model Law.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. Courts can select arbitrators upon the request of either party if there is no agreement between the parties with respect to the selection of arbitrators, or the parties and/or party-appointed arbitrators fail to select arbitrators. In selecting arbitrators, the court shall take into account the following factors: (i) the qualifications required of the arbitrators by the agreement of the parties; (ii) the impartiality and independence of the appointees; and (iii) whether or not it would be appropriate to appoint an arbitrator of a nationality other than those of the parties (Art. 17.6).

In a maritime dispute case between a Japanese company and an Indian distributor, the court selected an attorney listed in the candidate list of the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange ("TOMAC") as the sole arbitrator. Although the court seemed to have considered the nationalities of the parties, it chose a Japanese arbitrator on the basis that all listed candidates of TOMAC were Japanese nationals and that the foreign party did not mention its preference on the nationality of the arbitrator during the proceeding. Case No. Heisei 15 (wa) 21462, 1927 Hanrei Jihou 75 (Tokyo D. Ct., Feb. 9, 2005).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Reasonable doubt as to the impartiality and independence of the arbitrators can be the grounds for challenging them (Art. 18.1[2]). In order to secure the effectiveness of such a 'challenge' system, both arbitrator candidates and arbitrators are obliged to disclose all the facts which may raise doubts as to their impartiality or their independence (Arts. 18.3 and 18.4).

The "IBA Guidelines on Conflicts of Interest in International Arbitration" are widely recognised among international arbitration practitioners in Japan. Further, the Japan Association of Arbitrators ("JAA") published a "Code of Ethics for Arbitrators" in 2008. The JAA's Code of Ethics provides a standard for compliance with regard to the neutrality and impartiality of arbitrators.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Yes, but, in principle, the Arbitration Act allows parties to have broad autonomy and the arbitral tribunal to have broad discretion (Art. 26). The mandatory rules concerning "equal treatment of parties", "due process" and "public order" (Arts. 25 and 26.1). In addition, the Arbitration Act provides "default rules" with respect to the procedure, including: waiver of right to object (Art. 27); place of arbitration (Art. 28); commencement of arbitral proceedings and interruption of limitation (Art. 29); language (Art. 30); time restriction on parties' statements (Art 31); procedure of hearings (Art. 32); default of a party (Art. 33); an expert appointed by an arbitral tribunal (Art. 34); and court assistance in taking evidence (Art. 35).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Yes. In arbitration proceedings, certain procedural steps are required under the Arbitration Act, which include: equal treatment and due process (Art. 25); tribunal's authority (*Kompetenz-Kompetenz*) (Art. 23.1); time limitation for arguing the tribunal's jurisdiction (Art. 23.2); prior notice of oral hearings (Art. 32.3); accessibility to the other party's brief and all of the evidence (Art. 32.4); form of awards (Art. 39); and completion of arbitral proceedings (Art. 40). The Arbitration Act further provides rules for arbitration proceedings which involve a court's intervention and/or assistance (Art. 35).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Except for those general rules that govern legal practice in Japan,

there are no particular rules that govern the conduct of counsel from Japan in arbitral proceedings sited in Japan.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The Arbitration Act provides the arbitral tribunal with a wide range of powers with respect to arbitral proceedings. For example, the party who intends to request the court to assist with the examination of evidence, e.g. witnesses, expert witnesses and written evidence, shall obtain the tribunal's prior consent (Art. 35.2). The Arbitration Act also gives the arbitral tribunal powers to determine on its jurisdiction (*Kompetenz-Kompetenz*) (Art. 23.1) and to render interim measures (Art. 24).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Attorney Act (Act No. 205 of 1949) strictly prohibits non-lawyers (including lawyers admitted in foreign jurisdictions) from performing legal business in Japan (The Attorney Act, Art. 72). A foreign lawyer registered in Japan may handle some legal business in Japan, but only to the extent that the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986, the "Foreign Lawyers Act") allows them. On the other hand, the Foreign Lawyers Act explicitly sets out an exception to those restrictions, saying that lawyers admitted in foreign jurisdictions (whether registered in Japan or not) may represent in international arbitration proceedings, including settlement procedures (Arts. 5-3 and 58-2 of the Foreign Lawyers Act).

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no statutory laws or rules providing for arbitrator immunity in Japan.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

No. Courts may intervene or support arbitration proceedings only when requested by the parties to the arbitration. Once the arbitral tribunal is composed, procedural issues arising during the arbitration procedure should be handled by the tribunal (Art. 23.1).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes (Art. 24). The arbitral tribunal can award preliminary and interim relief when it considers it necessary. Usually, preliminary relief is used to maintain the *status quo*. The tribunal can exercise such powers without any assistance of the court. However, the preliminary relief rendered by the arbitral tribunal shall not be recognised or enforced by courts.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes (Art. 15). Upon request of a party to the dispute, courts can grant preliminary relief at any time before or during the arbitral proceedings, in respect of any civil dispute subject to arbitration.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The courts will assess whether the requirements for the granting of preliminary or interim relief as stipulated in the Civil Provisional Remedies Act (Act No. 91 of 1989, "CPRA") have been satisfied. In order for the courts to grant preliminary or interim relief, (i) the right or relationship of rights to be preserved, and (ii) the necessity for preliminary or interim relief must be evidenced by making a *prima facie* showing. Further, the courts may order either party to provide appropriate security for the preliminary or interim relief. In practice, the arbitral tribunal's ability to order its own effective interim measures may influence the court's decision as regards to the necessity requirement of (ii) above.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Japanese courts will not issue an anti-suit injunction in aid of arbitration under any circumstances.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Yes. Both courts and arbitral tribunals may order either party to provide appropriate security for interim measures (Art. 24.2 and relevant provisions of the CPRA).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The Arbitration Act does not provide for the enforcement of preliminary relief and interim measures ordered by arbitral tribunals. It is generally considered that Japanese courts will not enforce preliminary relief and interim measures ordered by arbitral tribunals in Japan or in other jurisdictions.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The Arbitration Act does not provide any specific rules of evidence. Instead, it gives arbitral tribunals the authority to determine the admissibility of evidence, necessity for taking evidence and probative value of evidence (Art. 26.3). Generally speaking, most

practitioners in Japan, including both attorneys and arbitrators, usually follow Japanese evidence rules, which do not include fully-fledged discovery. In the meantime, the "IBA Rules on the Taking of Evidence in International Arbitration" are being widely acknowledged by Japanese practitioners of international commercial arbitration.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The Arbitration Act provides the arbitral tribunal with a wide range of powers with respect to arbitral proceedings, including disclosure of documents and examination of witnesses (Arts. 26.2 and 26.3). Under Japanese law, however, since arbitrators do not have subpoena powers, they must request the assistance of national courts if they wish to compel the production of documents in possession of third parties, or to compel the attendance of witnesses. See also question 8.3.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Unless otherwise agreed by the parties, courts can assist with taking evidence upon request of the tribunal or of a party (Art. 35.1). The requesting party shall obtain the tribunal's consent prior to the request. The court's assistance, including a document production order, examination of witnesses and obtaining expert opinions, is subject to the Code of Civil Procedure (Act No. 109 of 1996, as amended, "CCP").

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

It is left up to the arbitral tribunal's discretion to decide how it handles evidence and testimony, unless otherwise agreed by the parties (Art. 26.3). As long as the tribunal finds it necessary and appropriate, written testimony may be admitted. If such testimony is admitted, the tribunal usually allows the other party to cross-examine the witness in the hearing.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Under Japanese law, there is no clear categorical concept of "attorney-client privilege" with respect to the production of documents. As long as the tribunal follows Japanese rules of evidence, attorney-client privilege rarely poses an issue because fully-fledged discovery is rarely conducted. However, if the arbitral proceedings give rise to such issue, arbitrators will usually respect attorney-client privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Arbitral awards must be in writing. The majority of arbitrators must sign the award. If one or more arbitrator(s) cannot sign the award, reasons must be provided as to why they cannot. Reasons for conclusions, the date, and the place of arbitration must be included in the award (Art. 39). Where the settlement of parties is reduced to the form of an arbitral award, the arbitral tribunal should explicitly mention such background information (Art. 38). There is no requirement under the Arbitration Act that the arbitrators must sign every page.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Under the Arbitration Act, the arbitral tribunal has the power to correct any miscalculation, clerical error or any other similar error in the arbitral award, upon the request of the parties or by its authority (Art. 41). The arbitral tribunal may also interpret a specific part of the arbitral award upon request by a party (Art. 42). If a party requests the correction or interpretation of an award, the request must generally be made within 30 days from the date of the receipt of notice of the arbitral award (Art. 41(2), Art. 42(3)). Unlike the UNCITRAL Model Law, there is no time restriction with respect to corrections made by the arbitral tribunal on its own authority.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Parties are entitled to request the court to "set aside" an arbitral award on the following basis: (i) the arbitration agreement is not valid; (ii) the party making the application was not given notice as required under Japanese law during the proceedings to appoint arbitrators or during the arbitral proceedings; (iii) the party making the application was unable to defend itself in the proceedings; (iv) the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings; (v) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of Japanese law (or where the parties have otherwise reached an agreement on matters concerning the provisions of the law that is not in accordance with public policy); (vi) the claims in the arbitral proceedings relate to disputes that cannot constitute the subject of an arbitration agreement under Japanese law; or (vii) the content of the arbitral award is in conflict with the public policy or the good morals of Japan (Art. 44.1).

Regarding (iii) above, a recent court decision articulated that "unable to defend" shall mean that there was a material procedural violation in the arbitration proceedings (i.e. the opportunity to defend was not given to the party throughout the proceedings). With respect to (vii) above, the same court also said that merely claiming that the factual findings or ruling of the arbitration tribunal were unreasonable should not be regarded as a valid basis for setting aside the award. *In re American International Underwriters, Ltd.*, 1304 Hanrei Taimuzu 292 (Tokyo D. Ct., July 28, 2009).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

There are no explicit provisions in the Arbitration Act which allow parties to agree to exclude any grounds for challenging an arbitral award. It is generally considered that the parties may not waive their rights to set aside arbitral awards.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Probably not. There are no explicit provisions in the Arbitration Act which restrict parties from expanding the grounds for appealing or challenging the arbitral award. However, the court, in *obiter*, rejected the parties' argument to set aside the award based on an additional ground set out in the mutual agreement by the parties. *Descente Ltd v. Adidas-Salomon AG et al.*, 123 Hanrei Jiho 1847 (Tokyo D. Ct., Jan. 26, 2004).

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

No appeal is allowed against an arbitral award; however, a party can file with a competent district court a motion to set aside the award. Such motion should be made within three months upon the receipt of the arbitration award or before the enforcement decision has become final and conclusive (Art. 44.2).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Japan acceded to the New York Convention on June 20, 1961. The New York Convention became effective in Japan from September 18, 1961, with a reservation of reciprocity. Since the New York Convention has direct effect in Japan, there is no domestic statute implementing the New York Convention. On the other hand, foreign awards of a non-signatory country/region to the New York Convention, such as Taiwan, can be enforced according to the relevant provision of the Arbitration Act (Art. 46).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No. Although several bilateral treaties refer to commercial arbitration, none of them provides simpler enforcement procedures than that of the New York Convention.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

As the New York Convention has a direct effect in Japan, parties can simply follow the procedural requirements stated in the New York Convention. As required in the New York Convention, parties need to prepare a Japanese translation of the award if it is written in a foreign language.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Arbitral awards, irrespective of whether or not the arbitration took place in the territory of Japan, shall have the same effect as a final and conclusive judgment (Art. 45.1). This provision is generally understood to mean that an arbitral award shall be pled as *res judicata*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

As per Art. 45.2[9] of the Arbitration Act, Japanese courts will consider if the enforcement of the award will be in conformity with the laws of Japan, whether it is procedural law or substantive law. This standard is basically the same as the one used to set aside an arbitral award (Art. 44.1[8]).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Arbitration Act does not have a particular provision with respect to confidentiality. It is entirely up to the parties' agreement or the relevant institutional rules for arbitration rules applied to the procedure. At the same time, the rules of most arbitration bodies in Japan, such as the Japan Commercial Arbitration Association ("JCAA") and TOMAC, have provisions in respect of confidentiality. As confidentiality of arbitration proceedings relies on the rules of each arbitration organisation, the confidentiality of arbitration proceedings has the same protection as an ordinary confidentiality agreement.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The Arbitration Act does not explicitly prohibit parties from referring to information disclosed in the course of arbitral proceedings. Accordingly, unless otherwise agreed by the parties, or provided for in the relevant institutional rules for arbitration, parties may refer to the information disclosed in the previous arbitration in subsequent court proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

No. However, "punitive damages" that exceed compensatory damages might not be enforced by Japanese courts, as courts may

find that the concept of punitive damages is against the "public policy" in Japan. Under the New York Convention (Art. 2(b)) and the Arbitration Act (Arts. 45 and 46), courts may reject the enforcement of an award if is contrary to the "public order" of Japan. A foreign judgment which contained punitive damages, claimed separately from compensatory damages, has been rejected by the court on the grounds that the enforcement of which would be contrary to "public order". *Mansei Industrial K.K. v. Northcon* [I], 51 Minshu 2530 (Sup. Ct., Jul. 11, 1997).

13.2 What, if any, interest is available, and how is the rate of interest determined?

It is up to the relevant provisions of the applicable substantive law. Where Japanese law applies to the merits of the case, the arbitral tribunal will award such interest as stipulated in the contract, or in the Japanese statute (which is 6% *per annum* in commercial matters and 5% *per annum* in other civil matters).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The Arbitration Act provides for the rules with respect to the costs of the arbitration proceedings. As a general rule, each party to the arbitration shall bear the costs it has disbursed in the arbitral proceedings, unless otherwise agreed by the parties (Art. 49.1). If it is so indicated by the agreement of the parties, the arbitral tribunal may, in an arbitral award or in an independent ruling, determine the apportionment between the parties of the costs (Art. 49.2). The ruling on the cost by the tribunal shall have the same effect as an arbitral award (Art. 49.3).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Payment made pursuant to an arbitral award may be subject to relevant taxes in Japan. The basis of such may differ depending on the nature of the payment and the underlying dispute.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

In general, funding by a third party is not specifically prohibited. However, attorneys are not allowed to lend money to their client unless there are special circumstances, such as in the event of an emergency, which require the advance payment of litigation costs. "Professional" funders are not active in the market for litigation or arbitration.

Contingency fee arrangements are not specifically prohibited. However, attorneys' fees must always be appropriate and contingency fee arrangements might be considered inappropriate if they result in the amount of the attorneys' fees becoming extremely high in comparison to the benefit obtained by their clients.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes. Japan signed it on September 23, 1965 and ratified it on August 17, 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Japan has entered into 43 BITs (including Economic Partnership Agreements with investment sections) as of April 2017, most of which explicitly allow parties to resort their disputes to the ICSID. Also, Japan is a member country of the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Japan does not have standard terms or model language that it uses in its investment treaties. As to what types of protection are available and what conditions have to be satisfied under the investment treaty, the provisions of the relevant treaty must be carefully examined.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Supreme Court of Japan ruled that, while sovereign activities shall be immune from liability, liabilities which arose from non-sovereign activities, such as commercial transactions, of the foreign government will not be exempt. *Tokyo Sanyo Trading K.K. v. Islamic Republic of Pakistan*, 60 Minshu 2542 (Sup. Ct., Jul. 21, 2006). New legislation with respect to the immunity of a foreign state, which came into effect on April 1, 2010, basically traces the above Supreme Court ruling.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

In June 2017, the Cabinet of Japan approved "Basic Policy on Economic and Fiscal Management and Reform 2017", which aimed to "develop a foundation to activate international arbitration" in Japan as one of the important policies of the Japanese Government. Under the cooperation of the public and private sectors, in February 2018, the Japan International Dispute Resolution Center ("JIDRC")

was established. On May 1, 2018, the Japan International Dispute Resolution Center (Osaka) (JIDRC-Osaka), the state-of-the-art facilities dedicated to resolving international disputes (international arbitration and ADR), started its operations. Also, the JIDRC plans to establish the same facilities for a hearing of arbitration and other types of ADR in Tokyo, the JIDRC-Tokyo, in 2019.

As to international commercial arbitration in Japan, disputes related to distribution agreements, licence agreements and joint-venture agreements are typically referred to arbitration under the JCAA rules. Further, maritime (domestic or international) and construction (mostly domestic) are major areas in which arbitration procedures are frequently used to resolve disputes.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Recently, the JCAA thoroughly amended the Commercial Arbitration Rules. The amended Rules came into force on February 1, 2014. The changes are generally in line with recent trends in amendments to the arbitration rules of other major international arbitral institutions. The key changes include enhancing the expeditious and proper conduct of arbitral proceedings by the arbitral tribunal. For instance, Rule 39.1 provides that the arbitral tribunal must use reasonable efforts to render an arbitral award within six months of the date on which it is constituted. Rule 39.2 provides that the arbitral tribunal must consult the parties and make a procedural schedule of the arbitral proceedings to the extent necessary and feasible as early as practicable. Moreover, the amended Rules introduced the provisions for interim measures by an emergency arbitrator (Rules 70 to 74).

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ANDERSON MŌRI & TOMOTSUNE

Anderson Mori & Tomotsune has a wide-ranging litigation, arbitration and dispute resolution practice that encompasses the many facets of business in Japan. We have extensive experience in areas that closely reflect the international nature of our client base and the international experience and diversity of our people. Our firm is able to provide a complete dispute resolution service to our clients, ranging from preliminary advice aimed at early resolution and prevention of disputes to the conduct of complex trials. Our attorneys have experience working in overseas jurisdictions and include among their ranks former judges including a former Supreme Court Justice. In addition to engaging in the day-to-day conduct of dispute resolution, some of our attorneys are also actively involved in imparting their experience and expertise to the next generation of law students through university lecturing.

We have extensive experience in international arbitration having represented clients in arbitrations concerning capital and business alliances, joint ventures, M&A, construction projects, infrastructure projects and intellectual property transactions such as licences, distributorship/agency agreements and sales under the rules of major arbitral institutions such as the ICC, the JCAA, the AAA/ICDR, the LCIA, the SIAC, the HKIAC and the CIETAC.

Korea

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Under Article 8 of the Arbitration Act of the Republic of Korea ("Korea") as last amended in May 2016 ("KAA"), an arbitration agreement must be in writing and it may be in the form of either a separate agreement or an arbitration clause in a contract. In this respect, an arbitration agreement is deemed to be made in writing where (i) the content of an arbitration agreement is recorded in any form without regard to whether the arbitration agreement has been made orally, by conduct, or by other means, (ii) an arbitration agreement is contained in an electronic communication exchanged by telegram, telex, fax, electronic mail, or other means of telecommunication (only if accessible), or (iii) the existence of an arbitration agreement is alleged by one party in an exchange of statements of claim and defence and not denied by the other party. The KAA does not adopt Option II of Article 7 of the UNCITRAL 2006 Amendment.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Other than the writing requirement as explained above, there is no other express requirement of an arbitration agreement under the KAA. However, under the Korean arbitration practice, an arbitration agreement is recommended to include, in addition to clear language designating arbitration as the form of dispute resolution, the applicable arbitration rule/institution, the number of arbitrators, the place of arbitration and the language to be used in arbitral proceeding.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Korean courts generally enforce a written arbitration agreement if they find in such agreement a clear intention for arbitration as the form of dispute resolution.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The KAA governs the enforcement of arbitration proceedings in Korea, in general, while there are other special statutes for media arbitration, medical arbitration and labour arbitration.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes. The KAA does not distinguish between domestic and international arbitration proceedings, and therefore it applies to both proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The KAA is based on the UNCITRAL Model Law on International Commercial Arbitration including the 2006 Amendment. There are some significant differences between the two, which will be discussed in the relevant sections of this chapter.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The parties are free to decide on how to proceed with the arbitration proceedings unless it is contrary to the mandatory rules of the KAA (Article 20). Most of the provisions of the KAA are not mandatory, except for certain rules applicable to international arbitration proceedings, including Article 7 (competent courts), Article 9 (claim before court in breach of arbitration agreement), Article 13 (challenging an arbitrator) and Article 19 (equal treatment of parties).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

By the definition of "arbitration" under the KAA, arbitrable disputes are (i) any dispute over property/monetary rights, and (ii) any dispute over non-property/non-monetary rights if the parties are allowed settle the dispute (Article 3). Therefore, any disputes which can be disposed by the parties are to be subject to arbitration.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. An arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of an arbitration agreement (Article 17).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

In case an action is brought before a court in a matter which is the subject of an arbitration agreement, the court is required to dismiss the action if the other party so requests prior to the first hearing on the merits (unless the arbitration agreement is found to be non-existent, null and void, inoperative, or incapable of being performed) (Article 9).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Korean courts will address the issue of the jurisdiction and competence of an arbitral tribunal when (i) a party so requests within 30 days of its receipt of notice of the arbitral tribunal's ruling on the issue of jurisdiction (Article 17), (ii) the arbitral award is challenged to be set aside on the ground of lack of jurisdiction, or (iii) enforcement of arbitral award is argued by the losing party on the ground of lack of jurisdiction. The court interprets the scope of an arbitration agreement rather broadly in reviewing a tribunal's decision as to its own jurisdiction.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The court held that the joint venture company is subject to an arbitration agreement of the Shareholders' Agreement if it attested the Agreement. It is generally understood that a non-party to an arbitration agreement may be held subject to the arbitration in certain types of cases, such as a non-party parent company when its subsidiary is a party and not separate in substance, and a successor which is regarded as an assignee or a trustee.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no limitation periods for the commencement of arbitrations in Korea. The laws of limitation periods are considered substantive, and such limitation periods depend on the nature of the claim. Commercial claims are subject to a five-year limitation period in general.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

It is understood that the ongoing arbitration proceedings are to be stayed by the pending insolvency proceedings and the trustee takes over the case. Any contested insolvency claims are determined by a separate confirmation proceeding.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The parties may choose the law applicable to the substance of a dispute. In the absence of such law, the law of the country which has the closest connection to the subject matter of the dispute will be applicable (Article 29).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In the light of the purpose of legislation, irrespective of the applicable laws, the mandatory laws of the Republic of Korea prevail over the foreign law chosen by the parties (Article 7 of PILA). Mandatory laws of a third country which has a close connection to the dispute are also generally respected in practice.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The KAA does not explicitly address this question. However, in deciding on the formation, validity and legality of arbitration agreements, the Korean courts have applied the law of the country selected by the parties and, in the absence of such law, the law of the seat of the arbitration.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There is no limit placed on the parties' autonomy to select arbitrators under the KAA. Unless otherwise agreed by the parties, an arbitrator may be selected without regard to his or her nationality (Article 12).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. Despite an appointment procedure agreed upon by the parties, a court shall select an arbitrator upon a party's request in the case where (i) the other party fails to select an arbitrator pursuant to the agreed procedure, (ii) the parties or their arbitrators are unable to select an arbitrator pursuant to the agreed procedure, or (iii) a third party, including an institution, fails to select an arbitrator (Article 12, Para. 4).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. In the absence of an appointment procedure agreed upon by the parties, a court shall select an arbitrator upon request of a party if an arbitrator cannot be selected pursuant to default procedures under the KAA (Article 12, Para. 3).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Arbitrators or arbitrator candidates are obligated to, without delay, give notice to the parties of any circumstances likely to give rise to doubts as to their impartiality or independence (Article 13). Under Article 13 of the International Arbitration Rules of the Korean Commercial Arbitration Board ("KCAB Rules"), any challenged arbitrator may comment on the challenge in writing within 15 days of receipt of the challenge, and such comment must be communicated to the Secretariat, each of the parties and the other arbitrators.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Yes. The KAA governs and applies to all arbitral proceedings in Korea.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

No. While the KAA allows the parties to agree on the procedures to be followed in arbitral proceedings unless contrary to mandatory rules, it only provides various default procedural steps in the absence of such agreement by the parties. Such procedural steps include those with respect to the place of arbitration, commencement of arbitration proceedings, language, hearing proceedings and evidence gathering procedures.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no particular rules that govern the conduct of counsel for arbitral proceedings in Korea. However, the parties are free to apply the IBA Guidelines on Party Representation in International Arbitration.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

In the absence of the parties' agreement on arbitral procedures, arbitrators may, subject to the KAA, conduct the arbitration in the manner as it deems appropriate; and, in such case, they will have the power to determine the admissibility, relevance and weight of any evidence (Article 20).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Lawyers admitted in a foreign country are generally prohibited from engaging in legal matters in Korea, including representation in arbitration cases (Article 109 of the Lawyers Act). However, Foreign Legal Consultants registered in Korea may represent in international arbitration cases in Korea (Article 24 of the Foreign Legal Consultants Act).

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The KAA is silent on the issue of arbitrator immunity, and there has been no court cases addressing the same issue. However, Article 44 of the KCAB Rules explicitly provides the immunity for arbitrators unless any wilful misconduct or recklessness is found on the part of arbitrators.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The national courts may not intervene in arbitration procedures unless explicitly allowed by the KAA (Article 6). Upon request of the parties or arbitrators, the court may render its services for the facilitation of the arbitration procedure.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitral tribunal may grant interim measures as it deems necessary unless otherwise agreed by the parties (Article 18). Such interim measure includes any temporary measure by which, at any time prior to the issuance of its final award, an arbitral tribunal orders 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 (Article 18). The arbitrators need not seek court assistance to do so. The tribunal, however, has no power to grant preliminary orders as provided in the UNCITRAL Model Law.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The parties to an arbitration agreement may request the court a

preliminary or interim relief before or during arbitral proceedings (Article 10). Such request has no effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The Korean courts are cooperative with the parties in granting interim relief.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The Korean courts dismiss the cases which are subject to arbitration. They may issue an anti-suit injunction in aid of arbitration if the case is clearly subject to arbitration, although no case thereon has yet been found.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

At the KCAB arbitration, the arbitral tribunals and Korean courts need not order security for costs since the parties must pay the costs prior to commencement of the arbitration proceedings (Article 51 of the KCAB Rules). At an *ad hoc* arbitration, the arbitral tribunals may order security for costs as an interim measure and the order may be enforced by the court.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

An interim measure issued by an arbitral tribunal shall be recognised as binding and enforced upon application to the competent court unless such recognition or enforcement of an interim measure may be refused under the KAA (Articles 18-7 and 18-8).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The KAA provides that the arbitrators have the power to determine the admissibility, relevance and weight of any evidence (Article 20, Para. 2). The KCAB Rules further provide special rules on evidence (Article 26). The parties are free to apply the IBA Rules on the Taking Evidence in International Arbitration.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The arbitrators do not have powers to order disclosure/discovery and require the attendance of witness, but they may appoint an expert and require him/her to attend (Article 27). In practice, they, from time to time, require the parties to clarify certain issues or facts and submit relevant evidence. At KCAB proceedings, the arbitrators have broad powers in taking evidence (Article 26 of the KCAB Rules).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

An arbitral tribunal may, *ex officio* or at the request of a party, request from a competent court assistance in taking evidence, including by way of ordering the attendance of witnesses before the tribunal or submission of necessary documents to the tribunal (Article 28).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

There are no special laws, regulations or professional rules which apply to the production of written and/or oral witness testimony in Korea. Although the witnesses may not be sworn in before the tribunal, cross-examination is practically guaranteed.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

In Korea, the attorney-client privilege is not allowed regardless of outside counsel or in-house counsel. The claims of the attorney-client privilege by foreign attorneys are generally respected by arbitrators.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An arbitral award shall be made in writing and be signed by the arbitrator(s) (Article 32). Further, an arbitral award shall state (i) its date, (ii) the place of arbitration, and (iii) the reasons upon which it is based unless the parties have agreed otherwise or the award is an award on agreed terms by the parties (Article 32).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

An arbitral tribunal is required to decide on the request of a party to (i) correct in the arbitral award any errors in computation, any clerical or typographical error, or any errors of similar nature (this can be done *ex officio* by the tribunal), (ii) give an interpretation of a specific point or part of the award, and (iii) make an additional award as to claims presented in the arbitral proceedings but omitted from the award (Article 34).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Any party to an arbitration may successfully challenge an arbitral award in the competent court if the party making the challenge provides proof that: (i) a party to the arbitration agreement was under

some incapacity, or the said agreement is not valid; (ii) the party making the challenge was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present this 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; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the mandatory rules of the KAA, or, failing such agreement, was not in accordance with the KAA (Article 36).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

No case law on this point. However, there are no persuasive grounds to invalidate the parties' agreement to settle the disputes without recourse to the court by excluding a basis of challenge against an award that would otherwise apply as a matter of law.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties are understood not to be allowed to agree to expand the scope of appeal of an arbitral award beyond the grounds available under the KAA. Despite such agreement between the parties, Korean courts would not apply the expanded grounds to set aside.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The only way to appeal an arbitral award in Korea is to file a lawsuit with the competent court to set aside the arbitral award (Article 35). The KAA did not adopt the system of review by the arbitration tribunal during the setting-aside proceedings as provided by the UNCITRAL Model Law.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Korea has ratified the New York Convention with the commercial and reciprocity reservations. Article 39 of the KAA provides the basis for the recognition and enforcement of a foreign arbitral award in accordance with the New York Convention.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Korean courts routinely recognise and enforce both domestic and foreign arbitration awards unless refused under the grounds as provided in the KAA. At the time of filing the application for recognition or enforcement, the applicant party is only required to supply the original award or a copy thereof along with a Korean translation if the award is made in a foreign language (Article 37).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award carries the same effect between the parties as a final and conclusive judgment of a court (Article 35), and therefore is generally deemed to have *res judicata* effect in Korea. Also, issue preclusion effect may be recognised if such issue is clearly dealt in the reasons of the arbitral award.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Koran courts have applied a strict standard for denying the enforcement of an arbitral award based on public policy. Korean courts adopt the concept of "international public policy" and exclude the violation of the mandatory rules of Korea therefrom. In fact, most arguments based on public policy violations have been rejected by the courts.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The KAA does not have an explicit provision regarding the confidentiality of arbitral proceedings. Therefore, such confidentiality remains up to the parties' agreement under general laws. The KCAB Rules, however, place confidentiality obligations on the members of arbitral tribunals and the parties, including their representatives. The exceptions thereto are (i) where disclosure is consented to by the parties, required by law or required in court proceedings, and (ii) where the award was redacted, the names, places, dates and any other identifying information in relation to the parties or the dispute by the KCAB unless the parties do not explicitly object to such disclosure within the time limit determined by the KCAB.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes. Unless otherwise agreed by the parties or obligated to keep confidential under applicable institutional rules, information disclosed in arbitral proceedings can be used in subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Under the Korean law, there are no limits on the types of remedies available in arbitration. Not only damages but also specific performance or injunctions are available for remedies. However, punitive damages are not available as it is deemed as against public policy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Unless otherwise agreed by the parties, an arbitral tribunal may award interest on arrears as it deems appropriate under all of the circumstances of the case (Article 34-3). In case no rate of interest is agreed by the parties, the tribunal applies the statutory interest rate of 5% *per annum* for general civil matters and 6% for commercial activities, plus, at the discretion of the tribunal, 15% from the date of the arbitral award.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Unless otherwise agreed by the parties, an arbitral tribunal may determine the allocation of costs of arbitration between the parties taking into account all the circumstances of the case (Article 34-2). In practice, under the KCAB Rules, arbitration costs, including filing fees, administrative fees, and arbitrators' fees and expenses, are borne by an unsuccessful party (unless allocated between the parties at the arbitral tribunal's discretion), while the necessary expenses, including the fees for attorneys, experts, interpreters and witnesses, are borne by each party subject to the allocation determined by the arbitral tribunal.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Any payment made under an arbitral award (principle and interest) may be subject to income tax under the Korean income tax law, since such payment is classified as "other miscellaneous income".

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no specific restrictions on third parties funding claims under any law or regulation in Korea. However, Korean-licensed lawyers are prohibited from lending money to or otherwise engaging in a financial transaction with their clients by using their position unfairly. Contingency fees may be allowed under the general prohibition of an unfairly excessive compensation in light of the level of expertise involved. Any active professional funder is not currently known in Korea for either litigation or arbitration.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes. Korea signed the ICSID Convention on April 18, 1966 and ratified it on February 21, 1967, which took effect on March 23, 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Korea is a party to 87 BITs and four FTAs with investment provisions. Korea is an observer to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The Korean government has harmonised the language used in recent investment treaties. Notably, those treaties clarify in a footnote that the MFN treatment shall not apply to ISDS mechanisms. Most of Korea's BITs and FTAs include national treatment and MFN provisions. Typically, the equality of treatment applies to investments, returns of investments and investors of the contracting states and/or third-party states, or to the operation, management, maintenance, use, enjoyment or disposal of investments. Also, with respect to "fair and equitable treatment" and "full protection and security", the treaties make sure that the foregoing concepts do not require treatment in addition to or beyond the customary international law minimum standard of the treatment of aliens. For most of Korea's BITs, the right to commence arbitration is contingent on the exhaustion of local remedies. The Mexico and Vietnam BITs and the China-Korea FTA provide that the investor must waive the right to initiate a claim under any other dispute settlement procedure before commencing arbitration.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Korean Supreme Court held that Korean courts may exercise jurisdiction over a foreign state if their activities in Korea are of a commercial nature unless such activities are within the sovereign activity or are closely related thereto and, therefore, exercise of the jurisdiction over the state causes unfair interference with the state's sovereignty or other special circumstances exist.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

A new legislation entitled "The Arbitration Industry Promotion Act"

took effect on June 28, 2017 to promote arbitration as a mechanism for the resolution of both domestic and international disputes. In particular, the new law mandates the Ministry of Justice to formulate a policy and engage in activities to promote Korea as a more attractive place for international arbitrations.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

On April 20, 2018, the KCAB opened the Seoul International Arbitration Center under the auspice of KCAB International. The new management and the expanded facility for international arbitration will support the growing number of international arbitration cases in Korea.

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The arbitration agreement must be in writing (i.e., contained in a document signed by the parties or in any 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). An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The 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 (Department of Justice Circular No. 98 ("ADR Act IRR"), Article 4.7).

1.2 What other elements ought to be incorporated in an arbitration agreement?

The arbitration agreement must clearly state the intention of the parties to submit any dispute to arbitration.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

A Philippine court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall (a) if at least one party so requests not later than the pre-trial conference, or (b) upon the request of both parties thereafter, refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed (Republic Act No. 9285 ("ADR Act"), sec. 24).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Arbitration in the Philippines is governed principally by the ADR Act, which was enacted on February 4, 2004.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes. The ADR Act primarily adopted Republic Act No. 876 ("RA 876"), to govern domestic arbitration, and the 1985 Model Law on International Commercial Arbitration ("Model Law"), to govern international commercial arbitration. Some provisions of the Model Law were also made applicable to domestic arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes. The ADR Act primarily adopted the Model Law to govern international commercial arbitration.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Such arbitration proceedings would be primarily governed by the rules agreed upon by the parties, and supplemented by the ADR Act and ADR Act IRR.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Labour disputes, the civil status of persons, the validity of a marriage, the ground for legal separation, the jurisdiction of courts, future legitime, criminal liability, questions on the validity of legal separation, and future support may not be referred to arbitration (Civil Code of the Philippines (1949) ("Civil Code"), Articles 5, 1306 and 2035, in relation to ADR Act, sec. 6).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, arbitral tribunals are accorded the first opportunity to rule on the issue of its own jurisdiction, including any objection with

respect to the existence and validity of the arbitration agreement (A.M. No. 07-11-08-SC ("Special ADR Rules"), Rules 2.2 and 2.4).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Courts will generally stay litigation and shall refer the parties to arbitration if a party objects to the litigation and there is a valid arbitration agreement covering the dispute (ADR Act, sec. 24). Court proceedings may be set aside if the proceedings continue despite the court having been notified of the existence of an arbitration agreement between the parties (*Koppel, Inc. v. Makati Rotary Club Foundation, Inc.,* G.R. No. 198075, September 4, 2013).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Any party to the arbitration may petition a Regional Trial Court for judicial relief from the ruling of the arbitral tribunal on the preliminary question of jurisdiction (Special ADR Rules, Rule 3.12). The burden is on the petitioner to prove that the arbitral tribunal erred in upholding or declining its jurisdiction. The petition may not be filed when the tribunal defers its ruling on its jurisdiction until the final award (Special ADR Rules, Rule 3.20).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Contracts take effect only between the parties, their assigns and heirs (Civil Code, Article 1311). Generally, a third party to the arbitration agreement shall not be bound by the arbitration agreement, and the arbitral tribunal may not assume jurisdiction over that entity.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Limitation periods are considered substantive law under Philippine law, and the parties are free to agree as to the limitation period for the commencement of the arbitration. Absent any such agreement, the dispute must be commenced within 10 years from the time the dispute arose (Civil Code, sec. 1144).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

In case rehabilitation proceedings are instituted, the Philippine court will issue a stay order which suspends all actions or proceedings for the enforcement of claims against the debtor (Financial Rehabilitation and Insolvency Act, sec. 16(q)(1)). In case insolvency proceedings are instituted and a liquidation order is issued by the court, any action for the collection of an unsecured claim shall be transferred to the Liquidator for him to accept and settle or contest (*Id.*, sec. 113(d)).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The law governing the substance of a dispute will depend on the choice-of-law provision of the parties in the contract. Absent any such agreement, the arbitral tribunal shall apply the law determined by the conflict of laws rules, which it considers applicable (ADR Act, Article 4.28(b)). Generally, Philippine courts would apply the law which they determine to have the most substantive connection with the contract or transaction.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

If the law chosen by the parties does not have any substantive connection with the contract or transaction subject of the dispute, Philippine courts may apply the law that it deems has the most substantive connection with such contract or transaction.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The formation of an arbitration agreement shall be governed by the law of the place of its execution. Meanwhile, the validity and legality of arbitration agreement shall be determined by the law agreed upon by the parties in the arbitration agreement. In the absence of such agreement, Philippine courts shall apply the law of the place where the arbitration agreement was executed.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to agree on the number of the arbitrators (Model Law, Article 10(1) and their qualifications (Model Law, Article 11(5)).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Any party may request the Appointing Authority to take the necessary measure to appoint an arbitrator (ADR Act IRR, Article 4.11(d)).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. The Regional Trial Court shall: (a) act as the Appointing Authority when so petitioned by an interested party in the instances enumerated in the Special ADR Rules, which generally include instances where there is a failure or refusal to appoint the arbitrator/s or the method of selecting an arbitrator is ineffective (Special ADR Rules, Rule 6.1); and (b) rule on a challenge to the appointment of an arbitrator when (i) an arbitrator is challenged before the arbitral tribunal and the challenge is not successful, and (ii) the Appointing Authority is asked to rule on the challenge, but fails or refuses to act on the challenge (Special ADR Rules, Rule 7.2).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Any person who may possibly be appointed as an arbitrator shall disclose any circumstance likely to give rise to justifiable doubts as to his/her impartiality or independence. An arbitrator, from the time of his/her appointment and throughout the arbitral proceedings, shall, without delay, disclose any such circumstance to the parties (ADR Act IRR, Article 4.12).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Absent any agreement between the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. Unless the arbitral tribunal considers it inappropriate, the UNCITRAL Arbitration Rules shall apply in the conduct of the proceedings (ADR Act IRR, Article 4.19). The arbitral tribunal of an international commercial arbitration seated in the Philippines may also apply Chapter 4 of the ADR Act IRR, in default of any agreement of the parties on the applicable rules (*Id.*, Article 4.1(b)).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

No. This is pursuant to the policy of the State to "actively promote party autonomy in the resolution of disputes or the freedom of a party to make their own arrangements to resolve their disputes" (ADR Act, sec. 2).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

No. The professional standards generally required of Philippine lawyers as set in the Code of Professional Responsibility of the Philippines shall (a) be applicable to Philippine lawyers who act as counsel in arbitration proceedings in and outside the Philippines, and (b) not be applicable to non-Philippine lawyers in arbitration proceedings seated in the Philippines.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators are mandated to: (a) maintain their impartiality or independence; (b) disclose to the parties any circumstance likely to give rise to justifiable doubts as to their impartiality or independence (ADR Act IRR, Article 4.12); and (c) give each party a full opportunity to present its case (*Id.*, Article 4.18). Further, arbitrators have the power to (a) rule on their own jurisdiction (*Id.*, Article 4.12), (b) issue interim measures of protection (*Id.*, Article 4.17), (c) correct any errors in computation, any clerical or typographical errors, or any errors of similar nature (*Id.*, Article 4.33(a)(i)), (d) determine the admissibility, relevance, materiality and weight of any evidence (*Id.*, Article 4.19(c)), (e) interpret a specific point or part of the award (*Id.*, Article 4.33(a)(ii)), and (f) render an additional award as to claims presented in the arbitral proceedings but omitted from the award (*Id.*, Article 4.33(d)).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Philippine Constitution limits the practice of all professions, including the legal profession, to Filipino citizens (1987 Philippine Constitution, Article 12, sec. 14). However, under the ADR Act, a party may be represented by any person of his choice in an arbitration conducted in the Philippines (ADR Act, secs. 22 and 33), which includes non-Philippine lawyers. Such non-Philippine lawyer shall not be authorised to appear as counsel in any Philippine court, or any other quasi-judicial body, whether or not such appearance is in relation to the arbitration in which he appears.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators shall not be civilly liable for acts done in the performance of their duties, unless there is a clear showing of bad faith, malice or gross negligence (ADR Act, sec. 5, in relation to sec. 38(1), Chapter 9, Book I of the Administrative Code of 1987).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

No. This is consistent with the policy of the State to respect party autonomy with the least intervention from the courts (Special ADR Rules, Rule 2.1). However, a Philippine court may set aside an international commercial award if the arbitral procedure was not in accordance with the parties' agreement (unless in conflict with a provision of Philippine law from which the parties cannot derogate) or, in the absence of such agreement, Philippine law (Special ADR Rules, Rules 12.4(a)(iv) and 13.4(a)(iv)).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless otherwise agreed upon by the parties, the arbitral tribunal may, at the request of a party: order any party to take such interim measures as the arbitral tribunal may consider necessary to prevent irreparable loss or injury; provide security for the performance of any obligation; produce or preserve any evidence; and compel any other appropriate act or omission. These may include preliminary injunction directed against a party, appointment of receivers, or detention, preservation and inspection of property that is the subject of the dispute in arbitration (ADR Act, secs. 28, 29).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Philippine courts may issue interim measures before the constitution of the arbitral tribunal, and after its constitution, only to the extent that the arbitral tribunal has no power to act or is unable to act effectively (ADR Act, sec. 28(a)). Any court order granting or denying interim measures is without prejudice to the subsequent grant, modification, amendment, revision or revocation by the arbitral tribunal as may be warranted (Special ADR Rules, Rule 5.13).

A Philippine court has the power to issue interim under similar circumstances enumerated in our response to question 7.1. The interim measure may be issued *ex parte* if it determines that the relief prayed for shall become illusory because of prior notice (Special ADR Rules, Rule 5.9).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

A Philippine court is directed to balance the relative interests of the parties and inconveniences that may be caused by an interim relief (Special ADR Rules, Rule 5.9).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

A party to an arbitration agreement may petition a Philippine court to issue an interim measure in aid of arbitration to compel any appropriate act. This may include an order enjoining the other party from proceeding with court litigation or different arbitration proceedings if in violation of the arbitration agreement of the parties (ADR Act, sec. 24).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

There is no law that expressly authorises a Philippine court or arbitral tribunal to order security for costs. However, a party to an arbitration agreement may petition a Philippine court to issue an interim measure of protection in aid of arbitration to compel any appropriate act (ADR Act, sec. 28(b)), which may include an order for security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Philippine courts may assist in the enforcement of an interim measure granted by an arbitral tribunal, which the arbitral tribunal cannot enforce effectively (Special ADR Rules, Rule 5.6).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

In the absence of any agreement between the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence (ADR Act IRR, Article 4.19).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The arbitral tribunal has the power to require any person to attend a hearing as a witness, subpoena witnesses and documents and require the retirement of any witness during the testimony of any other witness (ADR Act IRR, Article 4.27). Applying the UNCITRAL Arbitration Rules, the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine (UNCITRAL Arbitration Rules, Article 27(3)).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

A Philippine court may assist in the taking of evidence in an arbitral proceeding and may direct any person to comply with a subpoena, appear as a witness for the taking of his deposition, allow the physical examination of the condition of persons, or the inspection of things or premises, and to allow the recording and/or documentation of condition of persons, things or premises, allow the examination and copying of documents, and perform any similar acts (Special ADR Rules, Rule 9.5).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The parties are free to agree on the procedure for the production of witness testimony. Applying the UNCITRAL Arbitration Rules, statements by witnesses may be presented in writing and signed by them, unless otherwise directed by the tribunal (UNCITRAL Arbitration Rules, Article 27(3)). Further, witnesses may be heard and examined in the manner set by the tribunal (*Id.*, Article 28(2)), which may include cross-examination.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of, or with a view to, professional employment. Neither can an attorney's secretary, stenographer or clerk be examined, without the consent of the client and his employer, concerning any fact the knowledge of which has been acquired in such capacity (Rules of Court, Rule 130, sec. 24). The privilege is deemed waived when the party claiming the privilege presents privileged communication in evidence (*Orient Insurance Company v. Revilla, et al.*, G.R. No. 34098, September 17, 1930).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The award shall (a) be made in writing, (b) be signed by the arbitrator/s, (c) 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, and (d) state its date, and the place of arbitration (ADR Act IRR, Article 4.31).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Unless a different period has been agreed upon by the parties, a party may, within 30 days from receipt of the award, request the arbitral tribunal to (a) correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature, (b) give an interpretation of a specific point or part of the award, and (c) render an additional award as to claims presented in the arbitral proceedings but omitted from the award. The arbitral tribunal may also correct the award on its own initiative within 30 days from the date of the award (ADR Act IRR, Article 4.33).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

An international commercial arbitral award may be set aside by a Philippine court on the special grounds set out in the New York Convention, including the incapacity of a party, an invalid arbitration agreement, improper notification of a party as to the arbitration proceedings, an award dealing with a dispute not contemplated by or not failing within the terms of the submission to arbitration, the composition of the arbitral tribunal or the arbitral procedure not in accordance with the parties' agreement, or the subject matter of the dispute not being capable of settlement by arbitration under the Philippine laws, or an award in conflict with the public policy of the Philippines (Special ADR Rules, Rules 12.4 and 13.4).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The Philippine arbitration laws do not expressly prohibit parties from agreeing to exclude any basis of challenge against an arbitral award, and Article 2044 of the Civil Code provides that any stipulation that the arbitrators' award or decision shall be final is valid, except when there is, among others, a mistake, fraud, violence, intimidation, undue influence or falsity of documents. Nonetheless, parties may not exclude any basis to challenge an arbitral award under the New York Convention, and adopted under the ADR Act. This issue, however, has not been resolved by the Philippine Supreme Court.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No. A petition to set aside the arbitral award is the exclusive recourse against the award (Special ADR Rules, Rule 19.7). However, an arbitral award rendered in a construction dispute that has been referred to the Philippine Construction Industry Arbitration Commission ("CIAC") may be appealed on the merits to the Court of Appeals (CIAC Revised Rules of Procedure Governing Construction Arbitration, Rule 18.2).

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Please see our response to question 10.3.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The Philippines is a party to the Convention, and signed the Convention on the basis of reciprocity on July 6, 1967. However, the protections accorded by the Convention are also available to non-convention States on grounds of comity and reciprocity (ADR Act, sec. 43).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, our jurisdiction has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

A party may seek the (a) confirmation of an award rendered by an arbitral tribunal seated in the Philippines, and the (b) recognition and enforcement of an arbitral award rendered by an arbitral tribunal not seated in the Philippines by filing a petition under Rules 11, 12 and 13 of the Special ADR Rules, respectively. A petition for confirmation, and for enforcement and recognition, of an arbitral award may be filed any time from the receipt of the award. It is presumed that an arbitral award was made and released in due course and is subject to enforcement by the court. Philippine courts may refuse confirmation, and recognition and enforcement, of the arbitral award on specific grounds set out in Rules 12.4 and 13.4 of the Special ADR Rules.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award is final and binding on the parties, and should bar the parties from re-litigating the same issue in a Philippine court when there is an identity of parties, subject matter, and cause of action between the arbitration proceeding and the court case.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

We are not aware of any case law where the Supreme Court refused to recognise and enforce an arbitral award on the ground of public policy. But, public policy has been defined as "that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good" (*Ferrazzini v. Gsell*, G.R. No. L-10712, August 10, 1916). In Philippine contract law, public policy is violated if the contract is "injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, ends (sic) to interfere with the public welfare or society" (*Suan v. Regala*, G.R. No. L-9506, June 30, 1956). Consequently, that "which is neither prohibited by law nor condemned by judicial decision, nor contrary to public morals, contravenes no public policy" (*Gabriel v. Monte de Piedad*, G.R. No. L-47806, April 14, 1941). The Philippine Supreme Court has determined (a) labour protection (*Cadalin v. POEA*, G.R. No. L-104776, December 5, 1994), (b) enforcement of the extraordinary due diligence of common carriers (*Guzman v. Court of Appeals*, G.R. No. L-47822, December 22, 1988), (c) strict adherence to the principles, rules and regulations of public bidding (*Agan v. PIATCO*, G.R. No. 15501, May 5, 2003), (d) exemption of public funds from execution and garnishment (*De La Victoria v. Burgos*, G.R. No. 111190, June 27, 1995), and (e) the doctrine of finality of judgments (*Gesulgon v. NLRC*, G.R. No. 90349, March 5, 1993), as among the Philippine public policies that should not be contravened.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Yes. The confidentiality extends to all information that was disclosed by a party, counsel or witness who disclosed the information relative to the subject of the arbitration under circumstances that would create a reasonable expectation that the information shall be kept confidential. However, the publication of the foregoing information may be allowed when the parties consent to the publication, or for the limited purpose of disclosing to the court, where resorting to court is allowed (ADR Act, sec. 23; Special ADR Rules, sec. 10.1).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information obtained through arbitration proceedings may be disclosed to a Philippine court in cases where resorting to the court is allowed (ADR Act, sec. 23).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The arbitral tribunal shall decide the dispute in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction (ADR Act IRR, Article 4.28(d)). Further, the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so (*Id.*, Article 4.28(c)).

13.2 What, if any, interest is available, and how is the rate of interest determined?

Under Philippine law, when the obligation breached consists of the payment of a sum of money (e.g., forbearance of money), the interest due should be that which may have been stipulated in writing. The interest due shall itself earn interest from the time it is judicially demanded (*Eastern Shipping Lines, Inc. v. Court of Appeals*, G.R. No. 97412, February 8, 2010). In the absence of stipulation, the legal rate of 6% *per annum* shall apply (Civil Code, Article 2209; BSP Circular No. 799, series of 2013). When an obligation is breached which does not constitute a forbearance of money, an interest on the amount of damages awarded may be imposed at the rate of 6% *per annum*.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Generally, arbitration costs shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable (ADR Act IRR, Articles 4.46(d) and 5.46 (e); RA 876, sec. 20).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An arbitral award, at least to the extent it may be considered an income, would be subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no restrictions on the use of contingency or alternative fee arrangements or third-party funding for arbitration conducted in the Philippines. However, any champertous agreement by a lawyer is against public policy. A contingent fee contract, on the other hand, is permitted. Currently, there are no professional funders active in the market.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, the ICSID was ratified by the Philippines on December 17, 1978.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The Philippines is party to 32 BITs that are currently in force, and

five BITs that are signed but not yet in force. The Philippines is also party to 17 treaties with investment provisions and 22 investment-related instruments.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Generally, investment treaties include the most favoured nation clause in order to ensure that each Contract State or Member treats the other Contract State or Member equally as "most-favoured" trading partners.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Sovereign/State immunity is recognised and may be asserted as defence subject to certain exceptions or waiver by the State.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

One problematic issue involves construction disputes. Under Executive Order No. 1008 (1985) ("EO 1008"), the CIAC shall have original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof, when the parties have agreed to arbitration (sec. 4). The Philippine Supreme Court has consistently interpreted EO 1008 as to provide an alternative arbitration, i.e., CIAC arbitration, in case parties to a Philippine construction dispute agree on arbitration, regardless of the choice of arbitration institution. Thus, regardless of the choice of arbitration rules or institution, a party to an arbitration agreement may opt to refer a construction dispute to the CIAC, and the CIAC will take jurisdiction over the Philippine construction dispute if the parties have not referred the dispute to the arbitration institution that may have been named in the arbitration agreement. Having said that, there has been no Supreme Court decision ruling on the confirmation or recognition of a non-CIAC arbitral award on a construction dispute where one of the parties may have objected to the non-CIAC arbitration proceedings on the basis of EO 1008.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Office of the Alternative Dispute Resolution, the agency which recommends to Congress the necessary statutory changes to develop, strengthen and improve ADR practices in accordance with world standards, has created a Technical Working Group on arbitration to recommend amendments to the ADR Act, which are anticipated to be considered by Congress in 2018.

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He is an accredited arbitrator of the PIArb, PDRC, the Construction Industry Arbitration Commission, the Intellectual Property Office of the Philippines and the Philippine Wholesale Electricity Spot Market. He is also an accredited arbitrator of the Asian International Arbitration Centre, the Vienna International Arbitral Centre, the Korean Commercial Arbitration Board and the National Arbitration and Mediation (New York).

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SyCip Salazar Hernandez & Gatmaitan

SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) was founded in 1945. It is the largest law firm in the Philippines. It has offices in Makati City, the country's business and financial centre, as well as Cebu, Davao and the Subic Freeport.

SyCipLaw offers a broad and integrated range of legal services, covering the following fields: banking, finance and securities; special projects; corporate services; general business law; tax; intellectual property; employment and immigration; and dispute resolution. SyCipLaw has specialists in key practice areas such as mergers and acquisitions, energy, power, infrastructure, natural resources, transportation, government contracts, real estate, insurance, international arbitration, mediation, media, business process outsourcing and technology.

SyCipLaw represents clients from almost every industry and enterprise, and the firm's client portfolio includes local and global business leaders. SyCipLaw also acts for governmental agencies, international organisations and non-profit institutions.

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Singapore

Paul Aston

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The only formal requirement for an arbitration agreement to be enforceable in Singapore is that it be in writing (but it need not be signed). An arbitration agreement is considered to be in writing if its content is recorded in any form (e.g. an exchange of emails) and whether or not the underlying agreement or contract has been concluded orally, by conduct or by other means. The terms of the arbitration agreement, like any other agreement, must also be certain if the arbitration agreement is to be valid. However, the court will take a relatively lenient view when considering arbitration agreements so as to give effect to them where at all possible.

A new Section 2A of the International Arbitration Act Cap 143A (IAA) introduced in 2012 maintains the requirement that arbitration agreements must be in writing, but relaxes this written requirement to include arbitration agreements "*recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means*".

This amendment effectively adopts Option 1 of Article 7 of the 2006 Amendments to the 1985 UNCITRAL Model Law on International Commercial Arbitration (http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf). So, for example, if two parties verbally agree to refer a dispute to arbitration and they document this by way of an audio recording, this now falls within the IAA's definition of an arbitration agreement.

1.2 What other elements ought to be incorporated in an arbitration agreement?

An arbitration agreement may contain:

a) the scope of disputes to be referred to arbitration (such as all disputes arising out of or in connection with the relevant contract);

b) state whether the arbitration is to be administered by an arbitral institution, such as the Singapore International Arbitration Centre (SIAC) or the Singapore Centre for Maritime Arbitration (SCMA);

c) state the seat of the arbitration;

d) specify a law for the arbitration clause (as distinct from the choice of substantive law governing the contract; if the arbitration agreement does not contain this, usually the default position will be the law of the seat); and

e) any requirement for engaging in negotiations before commencement of arbitration, or provision for a structured alternative to arbitration, such as an Arb-Med-Arb clause.

The parties may also wish to state the number of arbitrators and the language in which the arbitration is to be conducted. In addition, they may specify the venue of the arbitration hearing if this is different from the seat.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The Singapore courts take a pro-enforcement approach to arbitration agreements. On the legal front, Singapore has adopted an open regime for international arbitration by allowing counsel from all jurisdictions to freely participate in arbitral proceedings. Courts in Singapore have constantly and strongly supported international arbitration, party autonomy and the finality of arbitral awards. Singapore's judiciary is viewed as one that understands and encourages commercial enterprise and is independent from influence. The government has been equal to the task by ensuring that Singapore's UNCITRAL Model Law (MAL)-based arbitration legislation is up to date with international jurisprudence.

Neutrality is a key factor for an international arbitration, and more so in an investor-state arbitration. The removal of potential domestic court bias and the non-existence of any geopolitical influences which may plague other jurisdictions in the region set apart Singapore as a unique neutral option.

Singapore is also a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which guarantees the enforceability of awards rendered in over 145 countries. Moreover, parties' perception of the quality and fairness of the arbitral process in Singapore makes it more likely that they will comply with an award voluntarily, as has been the case with awards rendered within Singapore-seated commercial arbitrations.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The principal statute governing the enforcement of arbitration proceedings in Singapore is IAA Cap 143A, which incorporates the MAL and the New York Convention.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Domestic arbitrations in Singapore are governed by the Arbitration Act Cap 10 (AA). The first distinction to be made is between international and domestic arbitrations. Generally, an arbitration is "international" if the parties to the arbitration are of different nationalities or the subject-matter of the dispute involves a state other than the state in which the parties are nationals. An international arbitration usually has no connection with the state in which the arbitration is being held, other than the fact that it is taking place on its territory. The parties to an international dispute are usually corporations or state entities, rather than private individuals, while domestic arbitrations involve small claims by individuals. Many states, recognising that different considerations apply to international commercial arbitrations, have provided for a separate legal regime to govern arbitrations that are international in nature, such that there is less judicial intervention in the arbitration by the courts of the state in which the arbitration takes place.

Stay Of Proceedings. The AA provides that the court may stay proceedings "*if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement*". The court has a discretion under the AA but the position is different under the IAA, where it is mandatory for a court to make an order staying the proceedings.

Powers Of The Arbitrator. The AA provides a limited set of powers for the arbitrator, including to make an interim award and administer oaths or affirmations of parties and witnesses. The arbitrator also has the power to determine costs and correct any clerical mistake in an award. The IAA gives the arbitrator a much wider range of powers and control over the proceedings and over the parties themselves. Arbitrators under the IAA have all of the powers of domestic arbitrators as well as a number of additional powers under Section 12 of the IAA. These include the power to make an order for security for costs or for security of the amount in dispute and to order discovery of documents. The arbitrator has also been given the power to ensure that an award is not rendered ineffectual by the dissipation of assets by a party. He can order the preservation, interim custody or sale of any property which is the subject-matter of the dispute or grant an interim injunction or any other interim measure. In addition, the arbitrator may award any remedy or relief which could have been ordered by the High Court of Singapore. This makes it clear that the emphasis in the IAA is on party autonomy by giving extensive powers to the arbitrator, whereas the tendency in the AA is for these powers to be given to the court.

Under IAA, the arbitrator has the power to decide whether to adopt the inquisitorial system or the adversarial system unless the parties agree otherwise in writing. The power is given to the arbitrator to decide whether the proceedings are to be by presentation of oral evidence or on the basis of documents only. The IAA also gives the arbitral tribunal the power to meet at any place it considers appropriate and to determine the language or languages to be used in the proceedings.

Appeals Against Awards And Grounds For Setting Aside Awards. The AA provides for parties' rights of appeal on questions of law and gives the court the power to set aside an award in situations where the arbitral tribunal misconducted itself in the proceedings. The IAA does not provide for any right of appeal against an arbitration award on points of law and only allows a party to apply to have an award set aside if the situation falls within several narrow grounds in addition to those set out in Article 34(2) of the MAL, such as the existence of fraud or corruption, a breach of the rules of natural justice and consideration of public policy. The court's approach to the IAA regime was explained by the Singapore High Court in the case of *Stanley Tan Poh Leng v Jeffrey Tang Boon Jeck (2000)* as "*entirely against the court making the substantive decision or investigating the correctness of the decision*" and "*the powers to recall, reconsider and reverse does not fit in well with the fit of things of the Model Law*".

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The IAA incorporates and gives effect to the MAL.

Apart from that mentioned in the answer to question 1.1, the following were introduced by the International Arbitration (Amendment) Bill passed in 2012 by Singapore's parliament.

Review of negative jurisdictional rulings by arbitral tribunals

Section 10 of the IAA has been repealed and replaced with a new Section 10. In a rare departure from the position under the MAL (the IAA adopts almost all of the MAL without modification), the newly worded Section 10 allows a party to apply to the High Court to review any ruling by an arbitral tribunal (and at any stage of the proceedings) that it does not have jurisdiction to hear a dispute.

Previously, a Singapore court could only review positive jurisdictional rulings made by arbitral tribunals, i.e. rulings by tribunals that they have jurisdiction to hear the dispute. With these latest amendments, Singapore now joins other notable arbitration hubs such as England, Switzerland and France where courts are empowered to review both positive and negative jurisdictional rulings by arbitral tribunals.

Tribunal's power to award interest

Sections 12(5) and 20 of the IAA now make it clear that an arbitral tribunal may award simple or compound interest from such date, at such rate and with such rest on the whole or any part of any sum claimed or costs awarded in the arbitration.

Legislative support for emergency arbitrators and interim orders

Section 2(a) of the IAA has been amended to include an emergency arbitrator in the definition of "arbitral tribunal". The amendments give emergency arbitrators the same legal status and powers as that of any other arbitral tribunal. They also ensure that orders made by emergency arbitrators are enforceable under the IAA regime.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The IAA contains the following mandatory rules for the conduct of arbitration in Singapore:

- The application of the Limitation Act Cap 163 and the Foreign Limitation Periods Act 2012.
- The requirement for the arbitration agreement to be in writing.
- The court's power to order a stay of court proceedings in favour of arbitration proceedings.
- Unless the number of arbitrators is determined by the parties, an arbitral tribunal shall consist of a sole arbitrator.
- The competence of the arbitral tribunal to rule on its own jurisdiction.
- Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so.

- The power of the arbitral tribunal to make orders or give directions for security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, preservation or sale of any property which is or forms part of the subject-matter of the dispute, samples to be taken from or observations or experiments conducted on any property which is or forms part of the subject-matter of the dispute, preservation or interim custody of evidence, security for the amounts in dispute, ensuring that any award is not rendered ineffectual by the dissipation of assets by a party, interim injunctions or any other interim measure, to award any remedy or relief that could have been ordered by the High Court if the dispute had been subject to civil proceedings in that Court, to award simple or compound interest.
- A provision of rules of arbitration agreed to or adopted by the parties shall apply and be given effect.
- An arbitral award may, by leave of the High Court, be enforced in the same manner as a judgment or an order and judgment may be entered in terms of the award.
- An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
- The court's power to set aside an award.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The following may not be referred to arbitration:

- The IAA provides that any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so.

The Singapore courts respect the jurisdiction of the arbitral tribunal to determine illegality and fraud, and views such issues as arbitral. This, again, is indicative of the philosophy of the IAA which is to enable and empower the tribunal to determine all issues as per the consent and agreement of the parties and not to have arbitral proceedings ambushed by vexatious allegations of fraud and illegality which would result in delaying application to the High Court.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. An arbitral tribunal has the power to rule on its own jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The court will order a stay of the court proceedings if they are commenced in breach of an arbitration agreement. The court may only refuse to grant a stay if the arbitration agreement is null and void, inoperative or incapable of being performed.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Where a tribunal has ruled on a plea as a preliminary issue that it has jurisdiction, or on a plea at any stage of the arbitral proceedings that it has no jurisdiction, a party may within 30 days appeal that decision to the High Court.

The Standard of Review:

In *AQZ v ARA [2015] 2 SLR 972* the tribunal had issued an award finding in favour of its own jurisdiction. The seller applied to set aside the award. Prakesh J rejected the seller's application. The issue concerned whether the award was in writing. However, an interesting point was raised by the seller in that case, which was whether it was entitled to the relief under Section 10(3) of the IAA and Article 16(3) of the MAL notwithstanding that the tribunal had made its decision, not as a preliminary issue, but together with the merits. That argument was rejected. The judge rejected the seller's argument that the words "*at any stage of the arbitral proceedings*" in Section 10(3) of the IAA gave the seller the right to challenge the ruling on jurisdiction if such ruling was made with an award on the merits. In her view, Section 10(3) of the IAA modifies Article 16(3) of the MAL only to the extent of allowing parties to seek a review of the negative jurisdictional rulings by arbitral tribunals.

In a case before the Singapore High Court in 2016 between *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd* before Steven Chong J (as he then was) the judge laid down the standard of review to be exercised by the Court when considering application to set aside arbitration awards based on Section 24 of the IAA read together with Article 32(2) of the MAL. In this case, Jiangsu submitted that they were not a party to the contracts, but the tribunal held that they had been and therefore the arbitration agreement was binding. The judge held that it must always be open for a party seeking to set aside an arbitration award to argue that no arbitration agreement was formed between them. Secondly, on such applications, the Court undertakes a *de novo* hearing of the arbitral tribunal's decision on its decision on jurisdiction. The existence of the arbitration agreement and the existence of the contract "*stand or fall*" together and the Court can determine both issues on the basis of a full hearing.

Whether there is any bar to adducing new evidence before a court tasked with reviewing an arbitral tribunal's findings on jurisdiction is a question which has led to differing views in recent cases as the judge noted. In *Government of Lao v Sanum Investments* [2015] 2 SLR 322 the court rejected the notion that a party has full latitude to adduce new evidence. On the other hand, in *AQZ*, Prakesh J noted that there was nothing in O 68A r 2(4A)(c) to restrict parties from adducing new evidence which had not been placed before the arbitrators. The judge took notice of the persuasive authority of the English court and in particular the judgment of Males J in *Central Trading and Exports Ltd v Fioralba Shipping Company* [2014] EWHC 2397. That decision was that a court would not normally exclude relevant and admissible evidence, even if it might cause prejudice to the other side in an application in the context of a challenge to the arbitrator's jurisdiction having regard to the overriding objective and the interest of justice. However, it should be noted that *Sanum* said that evidence would only be admitted if:

a. sufficiently strong reasons are shown as to why the evidence was not submitted at the arbitration hearing;
b. the evidence, if admitted, would have an important influence on the result of the case; and
c. the evidence is credible.

The court applies an objective test in deciding whether the parties reached an agreement. That is how it would be reasonably understood by others. This objective intention can be gleaned from the documents and the background, which includes the industry the parties are in and the dealings between the parties (see *RI International Pte Ltd v Longstroff AG* 1 SLR 521).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Arbitration is a consensual process and, generally speaking, an arbitration tribunal may not assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Limitation Act Cap 163 and the Foreign Limitation Periods Act 2012 apply to the commencement of arbitration in the same way that they apply to actions commenced in court. Claims in both contract and tort are subject to a six-year limitation period from the date on which the cause of action accrued. If the law of another jurisdiction falls to be applied, then the laws governing limitation of actions from that jurisdiction shall be applied.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Under Section 262(3) of the Singapore Companies Act, ongoing arbitration proceedings would be stayed upon a company being wound up in Singapore. Singapore has also just passed various amendments to its Companies Act, which provide for proceedings, including arbitration proceedings, to be stayed in the event of a cross-border insolvency in line with the MAL on Cross-Border Insolvency.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Parties have liberty to decide on the law applicable to the substance of their dispute. Failing an express or implied agreement, the applicable substantive law will be the law with the closest connection to the contract.

This does not mean that a tribunal does not and cannot grapple with issues of foreign law. It maybe, for example, that in order to make certain findings of fact, the tribunal will have to determine whether or not a company is insolvent as a matter of a foreign law of incorporation. They will then hear foreign lawyers as witnesses of fact giving evidence on the foreign law and make a determination and then apply that to the relevant issues in the arbitration.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In arbitration in Singapore the procedural law of the arbitration will be that of Singapore. The substantive law will be that chosen by the parties, failing which, under Article 34(2)(a)(i) of the MAL, "*the law of the State*" that is the law of Singapore (see Section 3(2) of the IAA). This default applies only in cases where the parties have neither expressed nor impliedly chosen the law governing the arbitration clause.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

For arbitration in Singapore, and as this is a procedural law matter, the law of Singapore.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties have a wide autonomy in their selection of arbitrators, including as to the number of arbitrators, whether there is to be a chairman or an umpire, the arbitrators' qualifications and the method of appointment.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. If the parties fail to agree on the number of arbitrators, the tribunal will consist of a sole arbitrator. If a tribunal consists of three arbitrators and the parties fail to agree on the appointment of the third arbitrator within 30 days, the appointment shall be made on application by a party by the appointing authority, which is the President of the Court of Arbitration of the SIAC.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A party may request that the court take the necessary action to appoint an arbitrator if either party fails to do so. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

An arbitrator is required to treat the parties with equality and to be independent and impartial.

Arbitrators are required to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Parties are free to agree on the procedural rules for their arbitration, or to agree on the application of institutional rules which will be given effect, provided they are inconsistent with the MAL or with Part II of the IAA.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Other than as set out above, the procedure will be that of the rules of the arbitral body chosen, and for *ad hoc* arbitration as per the provisions of the IAA and the large amount of discretion given to the tribunal to conduct the reference case as they see fit.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Counsel must behave in a manner consistent with the rules of professional conduct in Singapore and of the jurisdiction in which they are admitted (where applicable) and, in general, with best international practice (as exemplified by, for example, the 2013 IBA Guidelines on Party Representation).

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The power of the arbitral tribunal to make orders or give directions for security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, preservation or sale of any property which is or forms part of the subject-matter of the dispute, samples to be taken from or observations or experiments conducted on any property which forms part of the subject-matter of the dispute, preservation or interim custody of evidence, security for the amounts in dispute, ensuring that any award is not rendered ineffectual by the dissipation of assets by a party, interim injunctions or any other interim measure, to award any remedy or relief that could have been ordered by the High Court if the dispute had been subject to civil proceedings in that Court, to award simple or compound interest.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are no rules restraining the appearance of lawyers from other jurisdictions from acting in arbitration proceedings in Singapore.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators are immune from liability for negligence in respect of anything done or omitted to be done in the capacity of arbitrator, and for any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes. The Singapore courts have jurisdiction to make interim orders including injunctions, preservation of evidence or assets if the arbitral tribunal either does not have the power to make such an order, or if at the time being is unable to act effectively. The Singapore courts also have jurisdiction to subpoena witnesses to testify or produce documents in an arbitration.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitral tribunal has jurisdiction to award preliminary and interim relief by making orders or giving directions for security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, preservation or sale of any property which is or forms part of the subject-matter of the dispute, samples to be taken from or observations or experiments conducted on any property which is or forms part of the subject-matter of the dispute, preservation or interim custody of evidence, security for the amounts in dispute, ensuring that any award is not rendered ineffectual by the dissipation of assets by a party, interim injunctions or any other interim measure, to award any remedy or relief that could have been ordered by the High Court if the dispute had been subject to civil proceedings in that Court, to award simple or compound interest.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes. The Singapore courts have jurisdiction to make interim orders including injunctions, preservation of evidence or assets if the arbitral tribunal either does not have the power to make such an order, or if at the time being is unable to act effectively. The Singapore courts also have jurisdiction to subpoena witnesses to testify or produce documents in an arbitration. Interim relief granted by the Singapore courts should not impact on the jurisdiction of the arbitral tribunal. An arbitral tribunal may make an order expressly relating to the same subject-matter as the court's order, in which case the court's order shall cease to have any effect to the extent that it is dealt with by the order of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The Singapore courts are supportive of arbitration and, in practice,

would be mindful of supporting but not interfering with arbitration within the context of applications for interim relief.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The Singapore courts' support of arbitration extends to the granting of anti-suit injunctions to restrain the pursuit of foreign proceedings in breach of a Singapore arbitration agreement.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Yes, both arbitral tribunals and the Singapore courts have jurisdiction to order security for costs. However, this jurisdiction shall not be exercised if the claimant is:

(a) an individual ordinarily resident outside Singapore; or

(b) a corporation or an association incorporated or formed under the law of a country outside Singapore, or whose central management and control is exercised outside Singapore.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

An order for preliminary relief or an interim measure, whether ordered by a tribunal in Singapore or in another jurisdiction, is generally enforceable with leave from the Singapore courts, in the same manner as an order or direction of the court that has the same.

The Singapore courts consistently complies with its obligation to support, rather than interfere with, the arbitral process and a party seeking the enforcement of an order for preliminary relief or an interim measure can expect the court to approach their application with this policy in mind.

While an emergency arbitrator order is legally enforceable in certain jurisdictions, it does not enjoy the status and near global enforceability of an arbitral award under the New York Convention. Given that both the New York Convention and the MAL are silent on the definition of an arbitral award, it falls to each jurisdiction's domestic legislation to set out what it would recognise as an award which it is required to enforce under the New York Convention.

Many jurisdictions require an award to be "final and binding" on the substance of the dispute between the parties before it may be recognised and enforced. An emergency arbitrator's order, however, is intended to deal only with the application for interim relief and, under the SIAC Rules, will cease to be binding unless the tribunal is constituted within 90 days of the date of the order. This leads to some doubt as to whether an emergency arbitrator order is enforceable in most jurisdictions.

Singapore has passed amendments to the IAA to provide for express recognition of an emergency arbitrator's orders.

The Singapore IAA has achieved this by expanding the definition of "arbitral tribunal" in the Act to include an emergency arbitrator.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The arbitral tribunal is not bound by the strict rules of evidence that apply in proceedings before the courts (except for the rules relating to privilege). Subject to the agreement of the parties and any institutional rules, the tribunal can decide what evidence to admit and then how that evidence should be weighed in reaching its findings of fact. It is not uncommon for parties to adopt the IBA Rules on the Taking of Evidence in International Arbitration.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

An arbitration tribunal has the powers conferred by the **arbitration** agreement and the applicable **arbitration** rules as agreed by the parties.

The arbitral tribunal is also granted general powers to order discovery of documents and interrogatories, the giving of evidence by affidavit, preservation or sale of any property which is or forms part of the subject-matter of the dispute, samples to be taken from or observations or experiments conducted on any property which is or forms part of the subject-matter of the dispute, preservation or interim custody of evidence, interim injunctions or any other interim measure, to award any remedy or relief that could have been ordered by the High Court if the dispute had been subject to civil proceedings in that Court, to award simple or compound interest.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

The Singapore courts may order that a subpoena to testify or a subpoena to produce documents shall be issued to compel the attendance before an arbitral tribunal of a witness wherever he may be within Singapore.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Parties are free to agree whether there should be oral or written evidence in arbitral proceedings. Otherwise, the tribunal may decide whether or not a witness or party will be required to provide oral evidence and, if so, the manner in which that should be done and the questions that should be put to, and answered by, the respective parties.

Unless otherwise agreed, the tribunal also has the power to direct that a particular witness or party may be examined on oath or affirmation, and may administer the necessary oath or affirmation. There is no strict requirement that oral evidence be provided on oath or affirmation; it is a matter for the tribunal's discretion.

Cross-examination of witnesses in arbitration is permitted.

The tribunal does not have the power to compel the attendance of a witness. However, a party can apply to the court to order the attendance of a witness in order to give oral testimony (or to produce documents).

In addition, unless the parties agree otherwise, the tribunal is empowered to appoint experts to report to it, and the parties are entitled to submit written comments on any such report.

The conduct of lawyers with regard to the preparation of witness testimony is often regulated by the rules of professional conduct in Singapore and of the jurisdiction in which that lawyer is admitted to practise.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

A document is privileged if: (1) it is a confidential communication between lawyer and client for the purposes of seeking or giving legal advice; or (2) it is a confidential communication made between either the client or her/his legal adviser and a third party (such as a factual or expert witness), where such communication comes into existence for the dominant purpose of being used in connection with actual, pending or contemplated litigation, which includes arbitration. Privilege may be waived if all or part of a document is disclosed in the proceedings.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An arbitral award in Singapore must be made in accordance with Article 31 of the MAL. An arbitral award must therefore be made in writing and signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. Under the SIAC's Expedited Procedure, for example, it is expressly provided that the tribunal may give a summary of the reasons for the award, unless the parties agree that no reasons are to be given.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Under Section 19B 2 of the IAA, except as provided in Articles 33 and 34(4) of the MAL, upon an award being made, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award. The SIAC Rules contain an express rule providing that within 30 days of receipt of an award, a party may request the tribunal to correct in the award any error in computation, any clerical or typographical error or any error of a similar nature. If the tribunal considers the request to be justified, it shall make the correction within 30 days of receipt of the request. The tribunal may correct any error of the type referred to in Rule 33.1 on its own initiative within 30 days of the date of the award. Within 30 days of receipt of an award, a party may also request that the tribunal give an interpretation of the award. If the tribunal considers the request to be justified, it shall provide the interpretation in writing within 45 days after receipt of the request.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

International arbitration awards made in Singapore are final and binding on the parties, and not subject to a right of appeal, pursuant to Section 19B of Singapore's IAA.

Under the IAA, parties may apply to the courts to set aside arbitral awards in certain situations.

Applications for arbitration awards to be set aside can be granted if one of the limited grounds in Article 34(2) of the MAL (which is annexed to, and forms part of, the IAA) are met, the most relevant of which are that:

i. *"the party making the application was … unable to present his case"*;

ii. *"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"; and*

iii. *"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"*.

Despite this, the case of *AKN v ALC* [2015] 4 SLR 488 has helpfully reiterated Singapore's pro-arbitration stance, where the Singapore courts will only set aside arbitral awards in exceptional cases.

The arbitral tribunal (Tribunal) decided in favour of the Defendants, awarding them damages for the loss of opportunity to earn profits and granted them relief in respect of their payment obligations. The Plaintiffs then applied to the High Court to set aside the arbitral award on the grounds of a breach of natural justice and excess of jurisdiction. The High Court held that the Tribunal had committed a breach of natural justice by failing to consider the Plaintiffs' submissions on several issues. An instance was when the Tribunal re-characterised the Plaintiffs' claim for damages as one for "*loss of opportunity*" and failed to give them an opportunity to address that question. The High Court also held that the Tribunal had exceeded its jurisdiction by deciding on issues that fell beyond the agreed scope of reference to the arbitration. The Court of Appeal allowed the appeals in part, having found that the High Court erred in various aspects. The Court of Appeal held that when examining a challenge for breach of natural justice, courts must first assess the real nature of the challenge. Only an arbitral tribunal's failure to even consider an argument would amount to a breach of natural justice. A decision to reject an argument is merely an error of law, and does not, by itself, constitute grounds for setting aside an award.

The Court of Appeal observed that generally the courts should not engage with the merits of the dispute when dealing with an application to set aside an arbitral award.

As noted by the Court of Appeal, the courts will not interfere in the merits of an arbitral award, and in the process, bail out parties who had made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. Instead, the courts will only step in to intervene in the enforcement of an award where a fundamental procedural error occurred, affecting the fairness of the arbitral process, or where a decision exceeds the jurisdiction granted to the Tribunal through the arbitration agreement.

Remit a Matter to the Tribunal

The Court of Appeal recently (in the *Sanum* case) had to consider whether it had the power to remit any matter, which is the subject of an award that has been set aside (in whole or in part), to the same tribunal that made the award. The Court of Appeal observed that, in the ordinary course of events, a tribunal's mandate is exhausted once it issues a final and binding award. This position is reflected in Section 19B of the IAA and Article 32 of the MAL.

The Court of Appeal concluded that the only avenue by which a court may direct a tribunal to review its award is Article 34(4) of the MAL, which expressly provides that a court may, where appropriate, "*suspend setting aside proceedings … to give the arbitral tribunal*

an opportunity 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". The Court of Appeal found support for this view in Article 5 of the MAL, which provides that, in matters governed by the MAL, no court shall intervene except as provided in that law. Accordingly, there was no form of residual power vested in the court to remit an award except in the circumstances set out in Article 34(4).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The default position is that the parties do not have the right to appeal an award on a question of law, or to challenge an award on the grounds of serious irregularity. In order to confer this right, the parties must opt in to these rights. The parties may not exclude the right to challenge an award on the procedural grounds set out above.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they cannot.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

By application to the court for the exercise of its limited power to set aside the award in accordance with the timelines prescribed by Article 34(3) of the MAL.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, it has.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Singapore is a signatory to and has ratified the New York Convention.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The courts are generally pro-recognition and enforcement of awards.

To enforce an award, one must produce to the High Court:

- either the original award or a certified copy;
- the original arbitration agreement or a certified copy; and
- if applicable, a certified translation of the award and/or arbitration agreement.

The High Court may refuse to enforce the award where the party resisting enforcement proves that:

- a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him, under some incapacity at the time when the agreement was made;
- the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;
- he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;
- the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made;
- the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or
- enforcement of the award would be contrary to the public policy of Singapore.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

A party is prohibited by the doctrine of *res judicata* from seeking to re-litigate an issue which is already the subject of a final binding arbitration award. An attempt to re-open the same issue in further court proceedings would be an abuse of the court process. Issue estoppel arises even if the first proceeding is an arbitration.

In the *Sanum* case, the Court of Appeal also considered the relevance of the doctrines of *res judicata* and abuse of process where a party seeks to commence a new arbitration after an award is set aside and their application in the case before it.

As a matter of Singapore law, the Court of Appeal noted that there are three "*res judicata* principles" – cause of action estoppel, issue estoppel and what it called the "extended" doctrine of *res judicata*. The "extended" doctrine of *res judicata*, which in Singapore is a form of the abuse of process doctrine, refers to the situation where a party seeks to argue points that were not previously determined by a court or tribunal because they were not brought to the court or tribunal's attention even though they could or should have been. The Court of Appeal identified the policy underpinning these doctrines as that "*litigants should not be twice vexed in the same matter, and that the public interest requires finality in litigation*", citing its own recent decision on this point in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (Tan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] SGCA 50.

The Court of Appeal considered that there was no reason these doctrines should not apply in arbitration since finality is also important in an arbitration context. A court typically will not only refuse to rehear matters that have already been determined in arbitration, but may disallow a party from raising points in court that

could and should have been raised in the arbitration. The Court of Appeal considered there was "*strong support*" for the view that the "*extended*" doctrine of *res judicata* operates to preclude a party from reopening matters that are: (*i*) covered by an arbitration agreement; (*ii*) arbitrable; and (*iii*) could and should have been raised by one of the parties in an earlier set of proceedings that had already been concluded.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The court applies the public policy ground sparingly. The most obvious ground on which the court will refuse enforcement on the public policy ground is where the award has been procured by fraud, criminal, oppressive or otherwise unconscionable behaviour. Before making any such finding, the court will require cogent evidence of the impugned conduct.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Yes. Unless otherwise agreed, no party may publish, disclose or communicate any information relating to the arbitral proceedings under an arbitration agreement or an award made in those arbitral proceedings.

However, a party may publish, disclose or communicate information relating to arbitral proceedings under an arbitration agreement or an award made in those arbitral proceedings if the publication, disclosure or communication is made to:

- Protect or pursue a legal right or interest of the party or to enforce or challenge any award.
- Any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication.
- A professional or other adviser of the parties.

It should be noted that the duty of confidentiality extends only to the parties, and not to the arbitrators or any other participants in the arbitration. In practice, many institutional rules contain provisions dealing with confidentiality which require participants, including arbitrators, to treat information relating to the arbitration as confidential.

In the case of court proceedings relating to arbitrations, the presumption is that these are not to be heard in open court, in which case they will retain a high degree of confidentiality. However, the court may order the proceedings to be heard in open court on the application of any party or if in any particular case the court is satisfied that those proceedings ought to be heard in open court. In addition, where a judgment is of major legal interest, the court must direct that reports of the judgment may be published (with concealment of matters reasonably requested by the party).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Not generally, but see the answer to question 12.1.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

No. Tribunals can make all the interim relief and orders and remedies of a court and in addition, pursuant to Section 12 of the IAA, order security for the claim (although this is rarely if ever done).

13.2 What, if any, interest is available, and how is the rate of interest determined?

Subject to the agreement of the parties or any applicable institutional rules, the tribunal may award simple or compound interest from the dates, at the rates, and with the rests the tribunal considers appropriate, on any money awarded by the tribunal, on money outstanding at the commencement of the reference but paid during the course of the reference, and on costs awarded or ordered by the tribunal.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Subject to the agreement of the parties or any applicable institutional rules, the tribunal may award costs. In so doing, the tribunal is not obliged to follow the scales and practices adopted by the court on taxation; however, the tribunal must only allow costs that are reasonable having regard to the circumstances of the case. Costs for these purposes, include the costs of the parties' professional advisers and experts, the tribunal's fees and expenses and other costs of the hearing, and may include those of any arbitral institution concerned.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Payment of tax is a personal matter for the party to whom damages are paid and will depend on, amongst other things, the jurisdiction of incorporation of the recipient of funds.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Currently, contingency fees are not allowed insofar as lawyers are concerned under Singapore law. Singapore has, however, recently amended its Civil Law Act (Sections 5A and 5B) as well as its Legal Profession Act (Section 107(3A)), which allows for third parties (but not lawyers), to fund claims and it is envisaged that the market for "professional funders" for litigation/arbitration will increase significantly moving forward.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, Singapore has ratified and signed the Convention. The

commitment to protecting investments within Asia is further illustrated by the ASEAN Agreement, 1987, and the ASEAN Comprehensive Investment Agreement (ACIA), 2009, binding the 10 ASEAN member states to comprehensive investment protections. Article 33 of the latter agreement provides that investor-state disputes may be submitted for arbitration under the UNCITRAL Arbitration Rules, 1976, or to the ICSID centre if the necessary consent exists, or to any other regional centre for arbitration within the ASEAN, such as the Kuala Lumpur Regional Centre for Arbitration (KLRCA), or the SIAC.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Singapore has 35 BITs currently in force with various countries. It has, in addition, signed a further seven, but they are not yet in force.

Asian states have entered into a number of BITs, with China (128 BITs), India (82 BITs) and South Korea (90 BITs) being amongst the highest number of such agreements concluded by a state in the world. In 2011, a World Trade Organization Report characterised the Asia-Pacific region as the most active in concluding Free Trade Agreements (FTAs) as well, which normally contain investment chapters.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Please see the answer to question 14.2 above.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Enforcement of arbitration agreements and awards against sovereign states poses the particular challenge of sovereign immunity. Singapore follows a restrictive immunity policy that allows arbitral agreements to be enforced against sovereign states where they relate to commercial and contractual matters and not purely sovereign ones. Similarly, awards may be enforced against assets of a state used for commercial purposes and not sovereign or diplomatic purposes. Section 11 of the State Immunity Act, 1985, provides that the state is not immune in respect of proceedings in Singaporean courts which relate to arbitration. The Singapore Court of Appeal has also recently shown, in a dispute between an Indian company and the Government of Maldives, that the judiciary will readily recognise waivers of immunity by states and refer the parties to arbitration.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

In 2012, the IAA was amended to include, among other things, a provision that interim orders and awards made by emergency arbitrators shall have the same status as awards made by a constituted tribunal. The SIAC published new rules in 2016. Key features of the amended rules include a more streamlined procedure for consolidating multi-contract disputes, provisions for joinder of additional parties, and rules providing for the early dismissal of claims and defences.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The SIAC published new rules in 2016, the most notable new features of which are as follows:

In recognition of the increasingly complex nature of the commercial disputes, the 2016 Rules incorporate a new streamlined procedure for disputes arising under multiple contracts.

The 2016 Rules now enable both parties and non-parties to apply (either prior to or after the constitution of the tribunal) for joinder of a party to an arbitration.

Rule 29 of the 2016 Rules provides that a party may apply for the early dismissal of a claim or defence.

In recognition of the fact that the majority of disputes which the SIAC administers are international in nature, Singapore is no longer the default seat of arbitration under the 2016 Rules. Instead, the tribunal will determine the seat once constituted unless the parties have agreed otherwise.

The application of the Expedited Procedure has been expanded under the 2016 Rules, with the monetary threshold raised from SGD$5 million to SGD$6 million, which means that where the amount in dispute is less than the equivalent of SGD$6 million, the parties can apply to have the matter heard in accordance with the Expedited Procedure.

In addition, the tribunal now has the discretion to determine a claim under the Expedited Procedure by documentary evidence only. This is a welcome change given that the tribunal could previously only dispense with an oral hearing where the parties so agreed. In practice, this could mean, for example, that where an arbitration was uncontested, the claimant still needed to incur the costs of an oral hearing as the other party had not agreed to dispense with an oral hearing.

In December 2017, the SIAC initiated a proposal for various arbitral institutions to adopt a protocol permitting the cross-institution consolidation of arbitral proceedings subject to different institutional arbitration rules. The existing institutional rules by leading arbitral institutions do not permit consolidation in this manner, even if other criteria for consolidation are satisfied. Presently, only arbitral proceedings subject to the same institutional rules can be consolidated. The proposed protocol provides for a standalone mechanism which addresses the timing, appropriate decision-maker, applicable criteria of cross-institution consolidation applications, and suggests the imposition of objective criteria to determine the institution which should administer the consolidated dispute.

Acknowledgment

The authors would like to acknowledge the third and fourth authors of this chapter, Timothy Tan, Director of Asia Legal LLC, and Louise Tan, Trainee at HFW's Singapore office.

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Paul acts for clients in the maritime, offshore and commodity sectors (mainly Oil and Gas). He specialises in all aspects of shipping, transport and insurance, down and midstream oil and gas transactions, shipbuilding and repair disputes, advising shipyards and buyers on contracts for the construction of various offshore structures (rigs/FPSO), as well as their utilisation offshore. He has particular expertise in relation to long- and short-term contracts for the supply, transportation, sale and purchase, and storage of petroleum products and LNG. He advises on commercial transactions and shipping projects.

Paul has worked in our London, Shanghai, Hong Kong and Singapore (which he founded) offices, and is presently located in the Singapore office with particular responsibility for Offshore and Energy. Paul has substantial experience of acting for parties in international arbitration and mediation in many jurisdictions.

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Suzanne's practice covers dispute resolution across the maritime sector, including shipbuilding/repair and conversions (acting for both shipyards and owners), commodities trading disputes (physicals, largely bulk such as coal, grain, and iron ore), sale contracts, BL, LC and charterparty disputes, disputes under payment and security instruments, offshore contract disputes (upstream and downstream) including under PRE-FEED, FEED, drilling, supply, EPC, operations, logistics, maintenance and decommissioning contracts, as well as all aspects of international trade.

Suzanne has experience representing parties in various dispute resolution forums, including the English and European Courts, the World Trade Organisation Disputes Panel, and various arbitral institutions, including the LCIA, ICC, SIAC, SCMA and LMAA, as well as trade body panels such as GAFTA and FOSFA.

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HFW is a sector-focused law firm with offices in 18 cities across Asia, Australia, the Middle East, Europe and the Americas.

Our International Arbitration team focus on disputes in a number of core sectors including energy, trade and commodities, shipping, aviation, insurance/reinsurance, banking and financial services and construction. With its legacy as an international trade firm, HFW crucially offers specialist arbitration teams in almost all of the world's major international arbitration centres.

Arbitration as a form of dispute resolution has grown exponentially in Singapore over recent years. Singapore has emerged as the most preferred seat for international commercial arbitration in Asia.

Singapore has adopted an open regime for international arbitration by allowing counsel from all jurisdictions to freely participate in arbitral proceedings. Arbitrators enjoy tax incentives. Courts in Singapore have supported international arbitration, party autonomy and the finality of arbitral awards. Singapore's judiciary understands and encourages commercial enterprise and is independent from influence. Singapore has ensured that its MAL-based arbitration legislation is up to date with international jurisprudence.

HFW has a formal law alliance with a local Singaporean partner firm, Asia Legal LLC.

Vietnam

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Under the Law on Commercial Arbitration No. 54/2010/QH12 dated 17 June 2010 (the "**LCA**"), a valid arbitration agreement must:

(i) be in writing, or other forms having similar effect (please refer to Article 16.2 of the LCA for the similar forms);

(ii) involves disputes which are arbitrable in accordance with Article 2 of the LCA;

(iii) be duly executed by a person having authority and civil capacity according to the law;

(iv) not be obtained through fraud, duress or coercion; and

(v) not violate Vietnamese law.

1.2 What other elements ought to be incorporated in an arbitration agreement?

In practice, it is common to include the following elements in an arbitration agreement:

(i) the parties' choice of arbitral institution (if none is specified and there is no subsequent agreement, the claimant has the right to choose the arbitral institution);

(ii) the arbitration rules;

(iii) regarding the number of arbitrators, per Article 39.2 of the LCA:

  (a) if there is no agreement between parties, the default number of arbitrators is three; and

  (b) if there is an agreement, parties have the options to choose between a sole-member or a three-member tribunal;

(iv) the place of arbitration, per Article 11 of the LCA;

(v) the language of arbitration, per Article 10 of the LCA:

  (a) if the dispute is without any foreign element and none of the party involved is a foreign invested company, the applicable language must be Vietnamese regardless of the parties' agreement;

  (b) if the dispute is with any foreign element, or at least one party is an enterprise with foreign invested capital, the applicable language can be agreed upon by the parties; and

  (c) please refer to Article 663.2 of Civil Code No. 91/2015/QH13 dated 24 November 2015 (the "**Civil Code**") for the definition of "foreign element"; and

(vi) the governing law of contract (please see question 4.1 below for more details).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Under Article 6 of the LCA, the court will give deference to the arbitration agreement if the agreement is valid and able to be performed. However, if the agreement is invalid or unable to be performed, the court will have jurisdiction and the matter falls outside the exclusive jurisdiction of the Vietnamese courts.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Arbitration proceedings are governed by following legislation:

(i) Law on Commercial Arbitration No. 54/2010/QH12 dated 17 June 2010;

(ii) Decree No. 63/2011/ND-CP dated 28 July 2011;

(iii) Resolution No. 01/2014/NQ-HDTP dated 20 March 2014 ("**Resolution No. 01/2014/NQ-HDTP**");

(iv) Civil Code No. 91/2015/QH13 dated 24 November 2015;

(v) Civil Procedure Code No. 92/2015/QH13 dated 25 November 2015 (the "**Civil Procedure Code**"); and

(vi) Law on Enforcement of Civil Judgment No. 26/2008/QH12 dated 11 November 2008 (the "**Law on Enforcement of Civil Judgment**").

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes, the LCA governs both domestic and international arbitration proceedings in Vietnam. However, it is not clear whether the LCA applies to international arbitration proceedings with no other connection to Vietnam aside from being the location of their seat.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the LCA is based on the UNCITRAL Model Law, with supplementary and divergent provisions on:

(i) principles of settling disputes;

(ii) state administration of arbitration;

(iii) the enforcement of arbitration awards (please see question 11.3 for more details);

(iv) minimum qualifications of an arbitrator;

(v) the right of the parties to request conciliation conducted by the arbitral tribunal; and

(vi) setting aside an arbitral award for violation of fundamental principles of Vietnamese law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Article 4 of the LCA provides the following principles that govern both domestic and international arbitrations in Vietnam:

(i) arbitrators must honour parties' agreements, except when it violates the law or is contrary to social morals;

(ii) arbitrators must be independent, objective, impartial, and must comply with the law;

(iii) parties shall have equal rights and obligations;

(iv) the tribunal shall enable the parties to exercise their rights and obligations;

(v) arbitration proceedings shall be conducted *in camera*, unless otherwise agreed by the parties (please see section 12 for the analysis of confidentiality under the LCA); and

(vi) arbitral awards shall be final.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The general approach is to perform a step-by-step analysis as follows:

(i) First, Article 2 of the LCA limits the categories of dispute that may be resolved through arbitration to the following:

(a) arising from "commercial activities" (please refer to Article 3.1 of Commercial Law No. 36/2005/QH11 dated 14 June 2005 (the "**Commercial Law**");

(b) at least one party is engaged in commercial activities; and

(c) where the law stipulates that arbitration is permissible.

(ii) Second, the matter is not arbitrable if it belongs to the following matters which fall within the exclusive jurisdictions of Vietnamese courts per Article 470.1 of the Civil Procedure Code:

(a) civil cases over immovable property within Vietnamese territory;

(b) divorce proceedings between a Vietnamese citizen and a foreigner; or a Vietnamese citizen and a stateless person; and in both cases, the spouses have to be long-term residents of Vietnam; and

(c) civil cases where the parties have the right, under Vietnamese law or an international treaty signed by Vietnam, to select the jurisdiction of Vietnamese courts, and have decided to make such selection.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, per Article 43 of the LCA.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Assuming the arbitration agreement is valid and able to be performed, the court may not hear the case, unless the dispute falls under the exclusive jurisdiction of Vietnamese courts.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

There are two circumstances under which a national court can address the issue of jurisdiction and competence of an arbitral tribunal:

(i) if, during an arbitration proceeding, a party disagrees with the tribunal's decision of its own jurisdiction, that party may submit the challenge against such decision to the competent court within five business days from the date of receipt of such decision in accordance with Article 44 of the LCA. The petitioner must simultaneously notify the arbitral tribunal of the challenge. The competent court will decide within 15 business days and issue a final and binding decision. The arbitral tribunal may continue the arbitration proceeding in the meantime; or

(ii) if a party disagrees with the jurisdiction decision in the award of the arbitration tribunal, under Article 69 of the LCA, the party shall have 30 days from the receipt of the award to challenge the jurisdictional decision. However, if the petitioning party did not raise its challenge against the tribunal's jurisdiction within the provided time limit by law, the party is considered to have waived the right to object to the tribunal's jurisdiction in the set-aside petition under Article 13 of the LCA.

There is no standard of review defined under Vietnamese law with respect to a court's review of the tribunal's decision as to its own jurisdiction. However, in practice, the standard of review is similar to the *de novo* standard.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There are two scenarios per Article 5 of the LCA:

(i) in case of death or incapability, the heirs or the legal guardian will be bound by the arbitration agreement unless the parties agreed otherwise; and

(ii) if a party ceases to legally exist, then the legal successor will be bound by the arbitration agreement unless the parties agreed otherwise.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Article 33 of the LCA provides that arbitration proceedings must be initiated within two years from the date of infringement of a party's legal rights and interests, unless otherwise stipulated by law.

In practice, Vietnamese courts tend to consider rules prescribing limitation periods as substantive law.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Per Article 41.2 of the Law on Bankruptcy No. 51/2014/QH13 dated 19 June 2014 (the "**Law on Bankruptcy**"), if the court accepts the application for bankruptcy, the arbitration proceedings shall be temporarily suspended. Article 41.2 of Law on Bankruptcy further stipulates that the procedure for temporary suspension shall be carried out in accordance with the LCA. We note, however, that the current LCA does not provide any procedure for temporary suspension of an arbitration proceeding.

Per Article 71 of the Law on Bankruptcy, if the court then opens the bankruptcy proceeding, the arbitration proceedings which were temporarily suspended before shall be dismissed.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

It depends on whether the dispute involves any foreign element or not. Per Article 14 of the LCA, if the dispute does not involve any foreign element, the substantive law shall be Vietnamese law.

If the dispute involves any foreign element, the arbitral tribunal shall apply the law chosen by the parties. However, if the applicable substantive law is not already agreed upon by the parties, the applicable substantive law shall be the law the arbitral tribunal considers most appropriate.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Under Article 14.1 of the LCA, regarding disputes without any foreign element, Vietnamese law will be the governing law by default. That means Vietnamese law shall prevail over the law chosen by the parties, if any.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The applicable "choice of law" rule is Article 14 of the LCA. Under this Article 14, the following principles will apply:

(i) If the disputes are without any foreign element, then the applicable law for all issues, including issues surrounding the arbitration agreement, shall be Vietnamese law.

(ii) If the disputes contain any foreign element, then the parties can agree on the applicable law, including the applicable law for issues surrounding the arbitration agreement. In the absence of such agreement, the arbitration tribunal shall decide on the applicable law it considers most appropriate.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Yes, Article 20 of the LCA imposes minimum qualifications for an arbitrator, which are:

(i) sufficient civil capacity as prescribed in the Civil Code;

(ii) a university qualification and at least five years of working experience in the discipline in which he or she studied; and

(iii) in special circumstances, an expert with highly specialised qualifications and considerable practical experience may still be selected as an arbitrator, despite the fact that he or she fails to satisfy requirement (ii) above.

However, being any of these persons results in automatic disqualification as an arbitrator:

(i) a judge, prosecutor, investigator, enforcement officer or officer of a people's court, of a people's procuracy, of an investigative agency or of a civil judgment enforcement agency; or

(ii) a person who is currently prosecuted, or a person who is serving a criminal sentence or who has fully served his or her sentence but his or her criminal record has not been cleared yet.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, Article 40 of the LCA provides for a default procedure for an institutional arbitration:

(i) in case of a three-member arbitration tribunal, if the respondent fails to select an arbitrator or fails to request the director of the arbitration centre to appoint an arbitrator, the director shall appoint an arbitrator for the respondent; or

(ii) in case of a sole-member arbitration tribunal, if no arbitrator was selected within 30 days from the receipt of the claimant's statement of claim, at the request of one or all parties, the director of the arbitration centre shall appoint the sole arbitrator.

Article 41 of the LCA provides for a default procedure for *ad hoc* arbitration, which is listed below in question 5.3.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes, but only in *ad hoc* arbitrations. Per Article 41 of the LCA:

(i) regarding a three-member arbitration tribunal, if there is no appointment of arbitrator within 30 days from the date of receipt of the claimant's statement of claim, the claimant shall have the right to request the competent court to appoint an arbitrator for the respondent unless the parties agreed otherwise. In addition, if the co-arbitrators fail to appoint the presiding arbitrator of the tribunal within 15 days from the date of their appointment, the parties shall have the right to request the competent court to appoint such presiding arbitrator; and

(ii) regarding a sole-member arbitration tribunal, if there is no appointment of the sole arbitrator within 30 days from the receipt of the statement of claim, and there is no agreement to request the arbitration centre to appoint the sole arbitrator, the competent court shall appoint the sole arbitrator if requested to do so by any party.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Among the rights and obligations of arbitrators provided under Article 21 of the LCA, arbitrators are compelled to remain independent, impartial and must comply with the rules on professional ethics.

Article 42.2 of the LCA further imposes the duty on an arbitrator to notify the arbitration centre or the arbitral tribunal and the parties, in writing, of any circumstance which may affect his or her objectiveness and impartiality from the time of his or her appointment.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Yes, there are (please see question 2.2 for more details).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The LCA sets out the following procedural steps which are typical procedures in international arbitration proceedings:

(i) Article 30 stipulates the submission of statement of claim;

(ii) Article 32 stipulates the delivery of statement of claim to the respondent;

(iii) Article 35 stipulates the submission of statement of defence; and

(iv) Article 36 stipulates the submission of statement of counter-claim.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Yes, Vietnamese lawyers are subjected to the Law on Lawyers No. 65/2006/QH11 dated 29 June 2006 (the "**Law on Lawyers**") when providing legal services, including an arbitration forum. Article 5 of the Law on Lawyers further provides that Vietnamese lawyers are subjected to the Ethical Rules and Professional Conducts of Vietnamese lawyers issued by the Vietnam Bar Federation. The same rule governs Vietnamese lawyers when they are involved in an arbitration seated outside of Vietnam.

Article 1 of the Law on Lawyers governs the professional conducts of both Vietnamese lawyers and foreign lawyers practicing in Vietnam, including when the foreign lawyers are involved in an arbitration seated in Vietnam.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Article 21 of the LCA provides that the arbitrators have the following rights and obligations:

(i) to accept or refuse to arbitrate a dispute;

(ii) to remain independent during the arbitration;

(iii) to refuse to provide information concerning a dispute;

(iv) to receive compensation;

(v) to maintain confidentiality of the dispute, unless information must be provided to a competent State authority as required by law;

(vi) to ensure the resolution of a dispute is fair, efficient and prompt; and

(vii) to comply with the rules on professional ethics.

Article 42.1 of the LCA further provides four specific circumstances under which an arbitrator must excuse himself or herself from participating in the arbitration proceeding, and in these cases, the parties have the right to request the replacement of such arbitrator:

(i) the arbitrator is a relative or a representative of a party;

(ii) the arbitrator has an interest in the dispute;

(iii) there are clear grounds showing that the arbitrator is not impartial or objective; or

(iv) the arbitrator was a mediator, representative or lawyer for any of the party prior to the dispute being brought to arbitration for resolution, and no written consent with regard to the participation of said arbitrator in the arbitration proceeding was provided.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Yes, Article 76 of the Law on Lawyers requires that foreign lawyers:

(i) only provide advice on foreign law and international law and other legal services related to foreign law;

(ii) only provide advice on Vietnamese law if they hold a Vietnamese Bachelor's diploma in law and meet all requirements of Vietnamese lawyers; and

(iii) cannot participate in legal proceedings as representatives or counsels before Vietnamese courts.

However, it is not clear if the limitations above apply to alternative dispute resolution. In practice, in arbitrations in Vietnam, foreign lawyers often participate as authorised representatives of their clients.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Under Vietnamese law, there is no ground for a party to sue an arbitrator, except as provided under Article 49.5 of the LCA. Article 49.5 states that "if an arbitral tribunal grant a different form of interim relief or an interim relief which exceeds the scope of the application by the applicant, thereby causing loss to the applicant or to the party against whom the interim relief was applied or to a third party, then the party incurring loss shall have the right to institute court proceedings [against the tribunal] for compensation in accordance with the law on civil procedure".

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes, but the courts will refrain from interfering with the arbitration, except in these circumstances:

(i) appointing arbitrators in certain circumstances (please see question 5.3 for more details);

(ii) considering challenges to appointment of arbitrators, per Article 42 of the LCA;

(iii) assisting with the collection of evidence from individuals or organisations if the arbitral tribunal or the parties cannot obtain such evidence, per Article 46 of the LCA;

(iv) issuing summons to witnesses to give oral evidence, per Article 47 of the LCA;

(v) granting interim reliefs, per Article 53 of the LCA; and

(vi) hearing petitions against decisions of arbitral tribunals on the arbitration agreement's formation, validity and legality and the arbitral tribunal's jurisdiction, per Article 44 of the LCA.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes, an arbitral tribunal is permitted to award interim reliefs pursuant to Article 48.1 of the LCA. Article 49.2 of the LCA lists the types of interim relief that an arbitral tribunal may grant:

(i) enjoining any change of the assets in dispute;

(ii) constraining the behaviour of any party in dispute to prevent adverse consequences to the arbitration proceedings;

(iii) attachment of the assets in dispute;

(iv) ordering the preservation of, deposit, sale or evaluation of any of the assets of any party in dispute;

(v) ordering temporary payment between the parties; or

(vi) enjoining any transfer of property rights of the property in dispute.

No, an arbitral tribunal needs not seek the assistance of a court when granting the above interim reliefs.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes, a court is entitled to grant interim reliefs in arbitration proceedings, except when the parties have already applied to the arbitral tribunal for any one of the interim reliefs listed in question 7.1.

We note that the courts may grant the following additional reliefs:

(i) freezing bank accounts at banks, other credit institutions, the state's treasury, freezing assets under other parties' detention;

(ii) freezing assets of the obligated parties;

(iii) enjoining the obligated party from leaving the country;

(iv) detaining vessels, aircrafts to ensure the resolution of a dispute; or

(v) constraining the behaviour of any party, or ordering specific acts to be taken by a party in dispute.

Article 48.2 of the LCA provides that a party's request to a court for an interim relief has no effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In practice, if an interim relief is on the list of relief in question 7.1, and it has never been requested to the arbitral tribunal before, the court will consider such request for that interim relief.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions are not available under Vietnamese law.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Vietnamese law does not provide that a party can request an arbitral tribunal to order security for costs. A party, however, can request interim reliefs per Article 49.2 (d), (dd) and (e) of the LCA, which, in some circumstances, may serve the same purpose as security for cost.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Vietnamese courts can grant interim reliefs but cannot enforce those reliefs. The enforcement should be made by the competent civil judgment enforcement agency, per Article 50.5 of the LCA referencing Article 28.3 of the Law on Enforcement of Civil Judgment.

Because interim reliefs ordered by arbitral tribunals from other jurisdictions are not considered final awards, there is no procedure to recognise and enforce them in Vietnam.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Vietnam has no rule of evidence similar to the IBA Rules on the Taking of Evidence in International Commercial Arbitration. The IBA Rules on the Taking of Evidence is also not recognised under Vietnamese law.

A general rule of evidence in arbitration or ligation proceedings in Vietnam is that the parties have the rights and obligations to provide evidence to support their claims and arguments. The tribunal may, on its own initiative or at the request of a party, request evidence from the witnesses, consult opinions of professional experts and seek an assessment or valuation of the assets in dispute.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Article 46 of the LCA allows the tribunal to request documentary

evidence from witnesses, to consult opinions from professional experts, appraisers or valuers and to request the attendance of witnesses pursuant to Article 47 of the LCA.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Article 46 of the LCA allows the tribunal to seek assistance from the court to obtain evidence from any individuals, organisations in possession of evidence; and to summon witnesses to give oral evidence pursuant to Article 47 of the LCA.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

In general, Vietnamese law on evidence is limited. Article 46.2 of the LCA allows the arbitral tribunal to request a witness to provide information and documents that are relevant to the resolution of the dispute, but it is silent on the production of witness' written and oral testimony.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

It appears that there is no clear concept of privilege under Vietnamese law. Article 25 of the Law on Lawyers provides that lawyers should not disclose information of their cases and their clients unless (i) there are written consents from the clients, or (ii) otherwise provided by law. In addition, Article 78.3 of the Civil Procedure Code provides that a witness has the right to refuse to give testimony pertaining to professional secrets, business secrets and personal secrets (among others), which can be applied to lawyers testifying against their clients.

However, it is not clear whether lawyers may use such provision as a privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 61 of the LCA provides the requirements for the content, form and validity of an arbitral award. Particularly, an arbitral award must be in writing and include the following compulsory elements:

(i) date and location of issuance of the award;
(ii) names and addresses of the claimant and the respondent;
(iii) full names and addresses of the arbitrator(s);
(iv) summary of the statement of claim and matters in dispute;
(v) reasons for the issuance of the award, unless the parties agreed it is unnecessary to specify the reasons for the award;
(vi) result of the dispute resolution;
(vii) time limit for the enforcement of the award;
(viii) allocation of arbitration fees and other relevant fees; and
(ix) signature(s) of the arbitrator(s).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Per Article 63 of the LCA, within 30 days upon the receipt of an award, either party may request the arbitral tribunal to correct any typo in the award or to clarify any points of the award, as long as that party informs the opposing party. If the arbitral tribunal considers the request reasonable, it has 30 days upon the receipt of the request to correct or clarify its award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Under Article 69 of the LCA, a party may request the competent court to set aside an arbitral award within 30 days from the date of receipt of such award. The request must be accompanied by evidence proving that such application has sufficient grounds and is lawful.

Article 68 of the LCA provides the following grounds:

(i) there is no arbitration agreement, or the arbitration agreement is invalid;
(ii) the composition of the arbitral tribunal or the arbitration proceeding is not in compliance with the agreement of the parties or the LCA;
(iii) the dispute does not fall within the jurisdiction of the arbitral tribunal; any part of the arbitral award that is outside the jurisdiction of the arbitral tribunal shall be set aside;
(iv) the evidence, which was relied upon by the arbitration tribunal, and supplied by the parties, was forged; or an arbitrator received money, assets or some other material benefit from one of the parties in dispute which affected the objectivity and impartiality of the arbitral award; or
(v) the arbitral award is contrary to the fundamental principles of Vietnamese law. There is, however, no explicit provision on the "fundamental principles of Vietnamese law".

Article 68 of the LCA further requires that, with respect to grounds (i) to (iv), the parties bear the burden of bringing the evidence supporting these grounds, and with respect to ground (v), the court is responsible for the verification and collection of such evidence, in order to make the decision whether to set aside the award.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

No, the parties may not agree on excluding any basis of challenge against an arbitral award that would otherwise apply as a matter of law.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties are not allowed to extend the scope of appeal. The parties' consent is limited per Article 15.2 of Resolution No. 01/2014/NQ-HDTP, which states that during hearing petition to set aside an arbitral award, the courts can only consider whether the award falls under one of the grounds in Article 68.2 of the LCA. If it does not, the court shall not set aside the arbitral award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Pursuant to Article 4.5 of the LCA, arbitral awards are final and binding, and may not be appealed in Vietnam.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Vietnam has been a party to the New York Convention since 12 September 1995 and the Convention came into force on 11 December 1995 in Vietnam.

In its accession to the Convention, Vietnam made three declarations pursuant to Article I(3) and Article X(1) of the Convention:

(i) the Convention is applicable to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State. With respect to arbitral awards made in the territories of non-contracting States, the rule of reciprocity applies;

(ii) the Convention will be applied only to differences arising out of legal relationships which are considered "commercial activities" under the law of Vietnam (please see Article 3.1 of the Commercial Law for definition of "commercial activities"); and

(iii) interpretation of the Convention before the Vietnamese courts or competent authorities should be made in accordance with the Constitution and the law of Vietnam.

Please see question 2.1 above for the relevant national legislation.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

There is no published comprehensive list of the bilateral or multilateral treaties to which Vietnam is a party with regard to the recognition and enforcement of arbitral awards. Other than the New York Convention, Vietnam is not party to any other multilateral treaties, for example, the ICSID Convention.

However, according to the WTO Center of Vietnam Chamber of Commerce and Industry ("**WTO Center**"), Vietnam is currently a party to 70 BITs, which all include provisions dealing with dispute settlement and the recognition and binding effect of arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

There are distinct and separate mechanisms for recognition and enforcement of arbitral awards in Vietnam. In addition, the procedures for recognition and enforcement vary depending on whether the award is foreign or non-foreign, *ad hoc* or institutional:

(i) regarding non-foreign arbitral awards:

(a) if such an award is an institutional award, then it is automatically recognised and is effective from the date of issuance; and

(b) if such an award is an *ad hoc* award, then it is automatically recognised and is effective from the date of issuance. However, to be enforced, an *ad hoc* award needs to be registered to the competent Vietnamese court in Vietnam within one year from the issuance, per Article 62 of the LCA;

(ii) regarding foreign arbitral awards, both *ad hoc* and institutional must be formally recognised and held enforceable by the competent provincial People's Court as follows:

(a) within three years from the date the award takes legal effect, application for recognition shall be submitted to the Vietnam's Ministry of Justice, or the competent Vietnamese court as the case may be (please see Article 451 of the Civil Procedure Code for more details); and

(b) once the award is recognised and held enforceable by the competent provincial People's Court, it shall be considered as legally effective as any decision or judgment of a Vietnamese court; and

(iii) the enforcement procedure is the same for non-foreign or foreign, institutional or *ad hoc* awards. The award creditor shall request the competent civil judgment enforcement agency, not the court, to enforce the award (per Article 66 of the LCA).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Please see question 10.4.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Under the Civil Procedure Code, the standard is "fundamental principles of Vietnamese law". These principles are broad and undefined and are generally considered to be synonymous with "public policy" in Vietnam.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The LCA does not clearly define the concept of confidentiality. However, there are different obligations regarding disclosure of the arbitration for all participants as follows:

(i) in general, Article 4.4 of the LCA provides that arbitration proceedings are conducted *in camera*, unless the parties agreed otherwise;

(ii) regarding the arbitrator, Article 21 of the LCA imposes an obligation of strict confidentiality on the arbitrator; and

(iii) regarding the parties in dispute, they are obligated to keep the information about the arbitration proceedings out of the public domain (per Article 4.4 of the LCA). We note, however, there is no express obligation of strict confidentiality imposed on the parties under the LCA. Different arbitration centres may have different rules regarding strict confidentiality obligation for the parties.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Generally, no.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are three types of monetary remedies under Vietnamese law: direct and actual damages, direct loss of profits and penalty (as agreed by the parties subject to statutory limits).

13.2 What, if any, interest is available, and how is the rate of interest determined?

The LCA is silent on whether interest would be awarded on the principal claim or cost. In litigation proceedings, there is guidance from the Ministry of Finance, the Ministry of Justice, the Supreme People's Prosecutor and the Supreme People's Court from 1997, which states that the court must provide in its judgment that interest must be included on the principal claim and cost to prevent any delay in the enforcement of the judgment by the loser. We believe that in arbitration, the tribunal can take the same view as the court.

Pursuant to Article 357 and Article 468 of the Civil Code, the applicable rate for interest due to delay in performing payment obligations is 10% *per annum*.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The "loser pays" rule is the default per Article 34.3 of the LCA, unless:

(i) agreed by the parties;

(ii) provided under the arbitration rule of an arbitration centre; or

(iii) allocated by the tribunal.

Please refer to Article 34.1 of the LCA for a breakdown of fees and costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

In Vietnam, an arbitral award is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Vietnamese law is silent on third-party funding in arbitration, as well as restriction for contingency fees arrangements.

Funding claim is not officially recognised in Vietnam. Therefore, there has been no "professional" funder officially recognised in the market.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

No, it has not.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

According to the World Trade Organization ("**WTO**") Center, Vietnam is currently a party to 70 BITs. Vietnam is also officially a party to nine multilateral treaties, including the WTO, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**"), the Association of Southeast Asian Nations ("**ASEAN**"), ASEAN with China, ASEAN with Hong Kong, ASEAN with Japan, ASEAN with Korea, ASEAN with India, and ASEAN with Australia and New Zealand.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The language of "most favoured nation" or exhaustion of local remedies provisions are used in several investment treaties in accordance with international standards. No significance of that language is intended.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Please see question 11.5.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The Supreme People's Court and the Ministry of Justice have publicly recognised that enforcement of arbitral awards under the New York Convention has been uneven and inconsistent largely because Vietnamese courts lack the specialisation and experience. Specialist courts are being considered as a potential solution.

With respect to types of disputes commonly being referred to arbitration, the Vietnam International Arbitration Centre revealed the main areas of dispute in 2017 were: purchase and sale (44%); construction (24%); services (8%); leasing (7%); and insurance (5%).

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

On 1 March 2017, Vietnam International Arbitration Centre issued the new Rules of Arbitration. Under the new rules, a claimant can

now file a single request for arbitration regarding claims arising out of, or in connection with, multiple contracts and have them resolved through a single arbitration (Article 6 – Multiple Contracts). By request, the arbitral tribunal may consolidate claims made in separate, but pending, arbitrations into a single arbitration with the earliest commencement date (Article 15 – Consolidation of Arbitrations). Finally, the parties may agree to have their dispute resolved via an expedited procedure (Article 37 – Expedited Procedure).

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International Arbitration in Central and Eastern Europe

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I. Introduction

1. Numerous countries in the Central and Eastern European ("**CEE**") region and in the Commonwealth of Independent States ("**CIS**") have made continuous efforts to modernise their arbitration laws, making them compliant with prevailing international arbitration practices and responding to the needs of arbitration users.[1] By considering a variety of jurisdictions, this chapter presents key trends and developments that took place over the past year, including legislative changes and amendments to institutional rules, enforcement of arbitration agreements, as well as enforcement and annulment of arbitral awards. Notable investor-state and state-to-state disputes are discussed in the final section of the chapter.

II. Reforms of National Arbitration Laws

2. The past year has generated numerous developments in the states of the CEE region. Some countries have amended their legislations (like Bulgaria, Lithuania and Poland), some have seen amendments to institutional arbitration rules (like Austria and Russia), and some have done both (like Hungary and Ukraine).

3. The major changes to the Law on International Commercial Arbitration ("**LICA**")[2] and the Civil Procedure Code ("**CPC**")[3] of **Bulgaria** concern the arbitrability of consumer disputes (discussed in more detail further below in section III), "tacit" consent to arbitration (discussed in section IV), minimum professional requirements for arbitrators, and grounds for setting aside domestic awards (discussed in section V).[4] A body supervising and controlling the work of arbitral institutions has also been introduced.[5] The amendments took effect on January 28, 2017.[6]

4. One of the amendments to the LICA affects the way arbitrators and arbitral institutions operate in Bulgaria by presenting some new specific requirements that were absent in the old law. This change was triggered by the fact that certain arbitrators and institutions had questionable qualifications and reputations. Therefore, the amended Article 11(3) of the LICA requires that anyone wishing to serve as arbitrator must: (i) be a legally capable citizen, who has not been sentenced for a premeditated publicly indictable offence; (ii) have higher education; (iii) have at least eight years of professional experience; and (iv) possess high moral qualities.[7]

5. In addition, the law also provides for control and supervision over arbitrators and arbitral institutions exercised by the Ministry of Justice through a special Inspectorate.[8] The mandate of the Inspectorate entails the examination of arbitrators' and arbitral institutions' compliance with the LICA. The inspectors may scrutinise the work of arbitral institutions and provide compulsory instructions to achieve compliance with the law, as well as fine arbitrator(s) who fail to comply with such instructions.[9]

6. Finally, in order to increase transparency in arbitration proceedings, the amended law provides that parties have the right to access their case files and verify the necessary information on the website of the arbitral institution.[10] In turn, each arbitral tribunal must archive all the documentation for completed cases for a period of 10 years. After this period, only the awards and the settlements must be kept.[11]

7. The changes that took place in **Poland** in 2017 resemble those that occurred in Bulgaria. A new set of rules for consumer arbitration was introduced, the goal of which is to reinforce and further protect consumers' rights in arbitration. The rules cover issues such as the form of an arbitration agreement, grounds for challenging an arbitral award and recognition and enforcement of an arbitral award.[12] These are further discussed in sections IV and V.

8. As of July 1, 2017, amendments to the **Lithuanian** Law on Commercial Arbitration apply.[13] Some notable amendments concern provisions on the enforcement of awards.[14] Additionally, modifications address confidentiality when arbitration-related matters are heard before the courts: certain cases are now deemed confidential by default (e.g. assistance with the taking of evidence, injunctive relief, and challenge of arbitral awards).[15]

9. The second group of countries is comprised of those in which arbitral institutions have reformed their arbitration rules. **Austria** is one of the leading hubs of international arbitration in Europe, with a particular focus on the CEE and CIS regions.

10. Following a legislative change,[16] as of January 1, 2018, the Vienna International Arbitral Centre ("**VIAC**") is now permitted to administer domestic disputes in addition to its significant international case-load. To encourage parties to resolve disputes of lower value in a VIAC arbitration, registration and administrative fees have been reduced for disputes valued under EUR 25,000 and under EUR 75,000.[17]

11. The new Rules also aim to improve time- and cost-efficiency in various ways. First, they introduce an electronic case management system for administering proceedings. Second, the Rules explicitly state that arbitrators, parties and counsel shall conduct the proceedings in a cost-effective manner; their compliance with this principle may influence the arbitrator's fees and costs.[18] The VIAC Secretary General may also modify the arbitrators' fees by 40%, depending on, among other things, the case's complexity and the tribunal's efficiency.[19] This last amendment is likely to encourage arbitrators to conduct proceedings efficiently.[20] Furthermore, arbitrators are now expressly authorised to order a claimant to provide security for costs as well as to terminate the proceedings if the claimant fails to comply with the order.[21]

12. Lastly, as a signatory to the Equal Representation in Arbitration Pledge, VIAC aims to improve gender diversity. The new Rules, thus, provide that terms referring to natural persons such as "claimant" or "arbitrator" shall apply to all genders and shall be used in a "gender-specific manner" in practice.[22] In 2017, 50% of institutional appointments by VIAC were of women arbitrators.

13. Last year, the legal framework in **Russia** went through significant changes aimed at increasing transparency and stability in arbitration. One of the notable novelties was the introduction of a requirement for arbitral institutions to obtain a licence from the Ministry of Justice. Among the institutions that have fulfilled this prerequisite is the Russian Arbitration Center ("**RAC**"; formerly the "**Arbitration Center at the Institute of Modern Arbitration**").[23] RAC has recently opened divisions in Kaliningrad,[24] a Russian province in the Baltic, and Vladivostok,[25] in the country's Far East. It has also signed cooperation agreements with SIAC and HKIAC, thereby laying the foundations for expansion and collaboration on conferences, training and research opportunities.[26] The current Rules of RAC were adopted in 2017 and encompass rules on domestic, international and corporate disputes.[27] Some of the noteworthy provisions address issues of joinder and consolidation, emergency relief and fast-track arbitration.[28] The new Rules have also decreased arbitration fees.[29] While not explicitly stated in the Rules, RAC requires sole arbitrators and tribunal presidents to be qualified lawyers.[30]

14. Other arbitral institutions in Russia have likewise revamped their rules in accordance with the new legislation.[31] On January 27, 2017, a new set of rules of the Maritime Arbitration Commission at the Chamber of Commerce and Industry ("**MAC**") entered into force.[32] While the requirements regarding content and structure of the parties' pleadings have been toughened,[33] certain conditions regarding form have been relaxed. Parties may now agree on a language(s) of the arbitral proceedings, and written documents may be submitted in their original language.[34] Similar to a number of other institutions, MAC has introduced provisions on expedited arbitration if the total amount in dispute is less than USD 15,000 and the parties do not agree otherwise.[35]

15. The final group of countries consists of those that have changed their domestic arbitration regime and have amended the rules of their domestic arbitration institutions. In **Hungary**, Act No. LX of 2017 ("**Hungarian Arbitration Act**") replaced the previous Arbitration Act LXXI of 1994. The new law, which entered into force on January 1, 2018, mirrors the 2006 version of the UNCITRAL Model Law and purports to increase the jurisdiction's appeal to foreign investors.[36] Changes have been made to the structure of the Hungarian permanent arbitration courts, and rules on intervention and participation of non-contractual parties, interim measures and preliminary orders, and review of arbitral awards have been introduced.[37]

16. Under the new law, third parties who have a legal interest in the outcome of an arbitration may intervene on behalf of the party whose interest they share, subject to the arbitrators' approval. Moreover, unless otherwise agreed by the parties, even non-contractual parties may join the proceedings if the claim submitted by or against them can only be decided along with the claim that is before the arbitral tribunal. Another significant novelty is the possibility of retrial within one year of the award date. A party may request a retrial if, for reasons not attributable to that party, it was prevented or otherwise unable to present a fact or evidence during the arbitration proceedings, and if the consideration of that fact or evidence would have resulted in an award in that party's favour.[38] Lastly, legal successors of the parties are bound by an arbitration clause, unless the parties agree otherwise.[39]

17. With respect to permanent arbitration courts, the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry ("**HCCI**", alternatively known as the Commercial Arbitration Court) remains the most notable arbitration institution in Hungary.[40] Apart from empowering arbitrators to grant interim relief,[41] the new HCCI Rules,[42] effective as of February 1, 2018, introduce a number of mechanisms for improving the efficiency of proceedings.[43] The first one concerns a preliminary case management conference, which is held within 30 days of the tribunal's constitution. During this meeting the tribunal will come to terms with the parties as to the procedural rules, the means of evidence expected to be applied, and the desirability of an oral hearing.[44] Second, following the practice of other arbitral institutions, HCCI Rules provide for consolidation in cases where parties to all proceedings that are sought to be consolidated unanimously request so.[45] Another trend that HCCI embraced concerns rules on fast-track arbitration. Provided that the parties have expressly so agreed, their dispute will be governed by the Sub-Rules of Expedited Proceedings. A sole arbitrator will decide on the basis of the parties' written submissions within 15 days of the close of proceedings, unless either party requests an oral hearing, or the sole arbitrator considers this reasonable.[46]

18. The past year has also seen changes in the legal framework in **Ukraine**. The legislative reform that started in 2016 resulted in the Law on Amendments to Codes of Commercial, Civil and Administrative Procedures of Ukraine.[47] The reform covered issues including arbitrability, enforcement of arbitration agreements and awards (discussed below). The reform also inspired a change of institutional arbitration rules. The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry ("**ICAC at the UCCI**") and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry ("**MAC at UCCI**")[48] have updated their Rules, which are in force since January 1, 2018. Innovations concern provisions on the Rules' applicability, expedited proceedings, interim measures, determination of the amount of the claim, and procedural succession.[49] Given that amendments to the Rules of MAC at UCCI[50] largely resemble those of the Rules of ICAC at the UCCI, only the latter will be discussed in greater detail.

19. The amendments increase the likelihood that the Rules of ICAC at the UCCI will be applied, because they will govern the proceedings whenever the parties have agreed to submit the dispute to the ICAC.[51] This holds true even if parties have not specified an arbitral institution or have inaccurately or incompletely specified the name of the ICAC.[52] Another arguably pro-arbitration, but also controversial, amendment to the Rules is a provision regarding procedural legal succession. In case of death, termination of legal entity or a similar event, the ICAC President or the arbitral tribunal (if such has been constituted) may engage a legal successor of the respective party in arbitral proceedings. This successor will be bound by all acts committed in the course of the proceedings prior to joining.[53]

20. In line with the trend of including provisions on fast-track arbitration, the new Rules also envisage expedited arbitral proceedings.[54] Similar to other institutions, a sole arbitrator will conduct expedited proceedings under ICAC at the UCCI, unless otherwise agreed by the parties. However, unlike many other institutions, which tie the application of special rules to the amount in dispute, the UCCI at the ICAC opts for a solely consensual basis. Thus, parties may either provide for expedited arbitral proceedings in their arbitration agreement or agree on them until the filing of the response to the Statement of Claim.[55]

21. For such expedited proceedings, the Rules limit the number of parties' submissions to Statement of Claim and Statement of Defence, as well as counterclaim and objections to a counterclaim, when applicable.[56] Deadlines are shortened. For instance, the respondent has 10 days upon receipt of the Statement of Claim to

submit a Statement of Defence and/or to file a counterclaim.[57] The case will be decided solely on the basis of documents, unless either party requests an oral hearing or the tribunal considers it appropriate in light of the circumstances.[58] The tribunal has 20 (rather than 30)[59] days from the date of case completion to render an award.[60]

III. Arbitrability

22. While approaches to the issue of arbitrability are far from uniform in the CEE region, certain patterns in recent legislative changes appear to emerge, such as exclusion of consumer disputes from the realm of arbitrable matters.

23. **Bulgaria** has recently amended its arbitration legislation by narrowing the scope of arbitrable disputes further than most legislative systems. Claims involving rights *in rem*, possession of real estate, alimony, rights arising out of employment relationships and consumer disputes are non-arbitrable as per Article 19 of the amended Civil Procedure Code.[61] As of January 24, 2017, all pending arbitration proceedings involving consumers have been, therefore, terminated.[62] Furthermore, all arbitration agreements providing for arbitration between consumers and commercial parties are deemed null and void, unless the dispute is referred to an alternative dispute resolution procedure under the Consumer Protection Act.[63] If an arbitral tribunal renders an award in a non-arbitrable dispute, the award is *ex lege* deemed void, and the arbitrators are sanctioned with a fine by the Inspectorate.[64]

24. The reason behind this fairly drastic change is an abuse of arbitration proceedings by debt collection corporations, monopolistic companies and public service providers. For a number of years, these entities have been including non-negotiable arbitration clauses in their standard contracts and general terms.[65] While this itself is not abuse, some companies created their own arbitral institutions, or so-called "pocket arbitrations", which rendered awards predominantly in the companies' favour, sometimes without even informing the consumer.[66] The growing number of newly established arbitral institutions dealing mainly with consumer disputes gave rise to further debatable practices, such as "dubious service of documents" to respondents and questionable qualifications of unknown arbitrators appointed by those institutions.[67] For all these reasons, the Bulgarian legislator opted to declare consumer disputes non-arbitrable.

25. The new **Hungarian** Arbitration Act seemingly expands the notion of arbitrability. Under the new Act, disputes arising out of "commercial relationships" are arbitrable. The broad meaning given to the term "commercial", which encompasses all commercial or business matters, whether contractual or not, demonstrates this expansion of the scope of arbitrability.[68] Disputes that may not be submitted to arbitration are those that arise out of family, employment and consumer relations.[69]

26. **Ukraine** has also amended its arbitration legislation with respect to the scope of non-arbitrable disputes. Specifically, the Law on Amendments to Codes of Commercial, Civil and Administrative Procedures of Ukraine[70] identifies the list of non-arbitrable disputes and purports to resolve, to a certain degree, the problem with the non-arbitrability of corporate and public procurement disputes.[71] Article 22 excludes as non-arbitrable disputes arising from privatisation of property,[72] protection of competition and bankruptcy.[73] Disputes regarding corporate relations, including disputes between business entity participants (founders, shareholders, members) or between a business entity and its participant (founder, shareholder, member), including a former participant, regarding the business entity's establishment, activity, management and liquidation[74] are likewise non-arbitrable. However, if corporate disputes arise out of a contract, they may be arbitrated if there is an arbitration agreement between the business entity and all of its participants.[75] Similarly, civil law aspects of the disputes arising from the execution, modification, termination and performance of public procurement agreements are arbitrable.[76]

IV. Arbitration Agreements

27. The recent amendments introduced by the countries of the CEE region clarify the requirements for consent to arbitration. Some countries went further, by making those requirements more stringent than they used to be.

28. In **Bulgaria**, under the old Article 7(3) of the LICA, a respondent was deemed to have consented to an arbitration agreement if he had not explicitly rejected it.[77] However, this possibility of "tacit consent to arbitration" was seen as a gateway to abuse. Thus, under the new regime, consent can only be evidenced through express statements or unambiguous actions. In particular, if a party participates in the procedure by undertaking specific actions (such as responding to the Statement of Claim, submitting evidence, filing a counterclaim, or appearing in an open hearing related to the case) without objecting to the jurisdiction of the arbitral tribunal, consent to arbitration will be assumed.[78]

29. In March 2017, the **Polish** Supreme Court ruled on an agent's authority to enter into arbitration agreements. The Court refused to recognise and enforce an arbitration award because it found that the agent lacked the requisite authority. The contract was concluded through an exchange of electronic documents, none of which showed that the agent had been authorised.[79] The Court held that, if by no other means, the agent should have at least been authorised in the same manner. While the Court's ruling was specific to arbitration agreements, it has wider implications as it reaffirms that Polish law does not recognise general presumed authority.

30. The Polish Parliament has also made certain changes regarding arbitration agreements, albeit only in the realm of consumer arbitration. On January 10, 2017, in line with the EU Directive 2013/11/EU of May 21, 2013 on alternative dispute resolution for consumer disputes,[80] the Act on the Out of Court Resolution of Consumer Disputes of September 23, 2016 was amended.[81] According to the new Article 1164 of the Code of Civil Procedure, an arbitration agreement relating to disputes involving consumer agreements can only be concluded in writing *after* the dispute has emerged.[82] Any other means of conclusion, such as by reference or through an exchange of communications, are not acceptable. Unlike the Bulgarian legislation, the newly introduced rules in Polish law do not apply to pending arbitral proceedings, but only to disputes that have arisen after the law entered into force.[83]

31. **Ukraine** has also amended its arbitration legislation, making it more arbitration-friendly. The recent changes bring Ukrainian law in compliance with the 2006 UNCITRAL Model Law on Commercial Arbitration, since the "writing requirement" is met by an "electronic communication if the information contained therein is accessible so as to be usable for subsequent reference".[84]

V. Annulment and Enforcement of Arbitral Awards

32. Legislators across the CEE region have taken different approaches to the issues of annulment and enforcement of arbitral awards.

33. While it is not unusual for institutional rules to link the tribunal's performance of their duties to their remuneration (the most recent

example being the new VIAC Rules, discussed above), the new **Hungarian** Arbitration Act goes one step further by expressly linking arbitrators' fees to the outcome of setting-aside proceedings. The new law requires arbitrators to reimburse their fees to the parties if the award they had rendered fails to survive scrutiny by the courts.[85] Hungary seems to be the only state in the CEE region to adopt this approach.

34. A more common occurrence among different states are changes made to the grounds for annulment, on the one hand, and recognition and enforcement, on the other. **Poland**, for example, expanded these grounds. Under Article 1194(3) of the Polish Code of Civil Procedure,[86] consumers cannot be deprived of the protection granted to them by the binding provisions relevant to a certain legal relationship. If a tribunal renders an award, disregarding these provisions, the award may be set aside as being contrary to public policy.[87] Recognition and enforcement may be refused on the same ground.[88]

35. Conversely, **Bulgaria** has narrowed the grounds for annulment. Unlike the old legislation, which allowed parties to set aside awards due to a violation of public policy, the new legislation removes this ground.[89] A domestic award, thus, may be set aside only for reasons that are exhaustively listed in Article 47 of the LICA,[90] whereas a foreign award can still be refused enforcement on public policy grounds (by virtue of Bulgaria's ratification of the New York Convention, 1958).[91]

36. In terms of the enforcement of awards, the Bulgarian Parliament introduced two key changes regarding writs of execution of arbitral awards by domestic courts. The first change relates to the designated body that is empowered to issue such writs. First, the Sofia City Court no longer has exclusive competence to issue a writ of execution for arbitral awards. The amended legislation grants this authority to any competent district court (i.e. a district court at the award debtor's domicile).[92] Second, state courts may now examine whether the case was properly subject to arbitration and whether the dispute in question was indeed arbitrable before issuing the writ of execution. It is suggested that this is a form of state control over arbitration,[93] which adds a second prong to the test that arbitral awards ought to pass in order to be recognised and enforced.

37. In **Ukraine**, the Law on Amendments to Codes of Commercial, Civil and Administrative Procedures of Ukraine[94] transferred competence on setting-aside and enforcement proceedings from the first instance courts to the Kyiv Appellate Court.[95] Meritless appeals are sanctioned: the reform allows the Appellate Court to dismiss manifestly unfounded appeals or otherwise erroneous motions.[96] The maximum duration of recognition and enforcement proceedings is capped at two months starting from the date of registration of the application with the Court.[97] When recognition is requested by the debtor, an accelerated procedure of 10 days applies. Non-appearance in Court no longer prevents recognition. The list of interim measures, which can be ordered by the Court during the recognition procedure, is expanded.[98]

38. Other states of the CEE region have not made notable changes to their legislation in terms of the annulment and enforcement of awards. An overview of recent case law, however, still proves instructive. The Supreme Court of **Lithuania** recently ruled on the applicability of a statutory limitation period to the recognition and enforcement of foreign arbitral awards. Distinguishing between foreign and local awards, the Court held that the five years' statutory limitation period applied only in the latter case. In case of foreign arbitral awards this period runs from the day the award is recognised in Lithuania.[99]

39. The Supreme Court of **Russia** ruled in favour of an investor, who sought to enforce a USD 112 million award[100] against Ukraine, one of the biggest investment treaty arbitrations in Ukrainian history.[101] Tatneft had initiated arbitral proceedings under the Russia-Ukraine 1998 BIT, alleging that Ukraine had caused Tatneft to lose its corporate rights in Ukrtatnafta, which controlled the biggest Ukrainian oil refinery. After being awarded damages for breaches of fair and equitable treatment ("**FET**"), Tatneft brought an application for enforcement in state courts. In early summer of 2017, the Arbitrazh Court of Moscow (Moscow Commercial Court) dismissed with prejudice Tatneft's attempt to enforce the award using the premises of Ukraine's embassy to Russia and a Ukrainian cultural centre in the city.[102]

40. In August of the same year, the Moscow District Commercial Court overruled that decision, holding that Ukraine had waived its right to jurisdictional immunity.[103] The Court stated that arbitration awards were to be recognised and enforced if recognition and enforcement is warranted by an international treaty of Russia and federal law.[104] According to the Court, by signing the BIT, Ukraine had agreed to be bound by arbitral awards and to be subject to the competence of Russian courts as part of the recognition and enforcement process. In support of its conclusion, the Court noted the grounds for refusing recognition and enforcement envisaged in the New York Convention, to which Ukraine is party.[105]

41. Finally, the Court addressed the question of immunity. According to the Federal Law on Jurisdictional Immunities of Foreign Governments and Property of Foreign Government in the Russian Federation, a state may not invoke immunity if it has publicly consented to the competence of the Russian courts with respect to a dispute concerning an international treaty, an agreement in writing that is not an international treaty, and statements given through diplomatic channels regarding the particular dispute.[106] For all of the above reasons, the Court dismissed Ukraine's immunity argument and remanded the case for reconsideration to the court of first instance.[107]

42. Ultimately, Ukraine sought the opinion of the Russian Supreme Court, which was unsuccessful as well.[108] The Supreme Court examined whether any grounds that warranted a thorough reconsideration existed. Since it could find neither an incorrect application of the norms of substantive law, nor illegality, the Court dismissed Ukraine's appeal.[109]

VI. Investor-State Arbitration

43. The number of investment disputes involving states from the CEE region has significantly risen in the past year. In fact, 36% of cases registered in ICSID in 2017 concerned states from the "Eastern Europe & Central Asia" region, making this the region at ICSID with the highest number of claims.[110] While there have been recurring respondents,[111] some states, like Belarus, have faced claims for the very first time.[112]

44. A large portion of disputes arose in the energy sector, and states from Central and Eastern Europe have also contributed to the increased Energy Charter Treaty ("**ECT**") case-load.[113] Similar to the claims brought against Spain and Italy[114] for reforms to their solar energy subsidy regimes, investors advanced claims against Bulgaria[115] and the Czech Republic.[116] Although most cases are pending, tribunals in *Wirtgen v. Czech Republic* and *Antaris Solar v. Czech Republic* have rendered awards.

45. On March 6, 2018, in the case of *Slovak Republic v. Achmea BV* (the "**Achmea case**"),[117] the Court of Justice of the European Union ("**CJEU**") held that arbitration agreements concluded between Member States of the European Union in so-called intra-EU BITs had an adverse effect on the autonomy of EU law. The CJEU held that while commercial arbitration proceedings "originate in the freely expressed wishes of the parties",[118] intra-EU BIT arbitration "derives from a treaty by which member states agreed to remove"

disputes over the interpretation of EU law from the jurisdiction of their own courts.[119] As such, the CJEU concluded that the dispute resolution mechanisms provided for in the BITs establish a mechanism that prevents "the full effectiveness of EU law" when it comes to dispute resolution.[120]

46. The CJEU's reasoning, while going against the opinion of the Advocate General, mirrors the European Commission's views as previously expressed on numerous occasions in its *amicus curiae* briefs in various investor-state arbitrations.[121] As such, it is doubtful whether tribunals, in particular under instruments like ICSID and the ECT, will be persuaded to change the long-standing precedent that such tribunals operate independently from EU law and so do not create, with their decisions, any incompatibility with EU law either. Enforcement of awards based on intra-EU BITs will likely become more difficult after *Achmea*, because the CJEU's position may have to be taken into account by EU Member State courts as a matter of public policy exception under the New York Convention, although ICSID offers an independent and directly-applicable enforcement regime that does not allow for a reconsideration of public policy at the enforcement stage.

47. These issues are likely to be at the forefront of investment arbitration in the region for the foreseeable future. Several states in the CEE region have, under pressure from the EU Commission, already proceeded to terminate their BITs with other EU Member States. Almost two years after announcing that it would terminate its 22 intra-EU BITs, Romania finally acted on its promise.[122] While not yet seeking to terminate its intra-EU BITs, **Hungary** appears to have relied on *Achmea* when it requested an ICSID award, ordering it to compensate a Portuguese investor for denial of justice, be annulled.[123] The *Achmea* decision has also prompted at least one investor to withdraw its treaty claims.[124]

48. The CJEU's ruling in *Achmea* also raises questions regarding multilateral treaties, such as the ECT, which appear to fall outside the immediate scope of *Achmea*, not least because the EU itself is a signatory party to the ECT.[125] The ICSID tribunal in *Masdar v. Spain* thus ruled that the CJEU decision in *Achmea* had no bearing on ECT cases.[126]

VII. Overview of State-to-State Arbitrations

49. The territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia[127] originated after the break-up of Yugoslavia in 1991, when the former republics omitted to delineate their borders. On June 29, 2017, five years after the start of this highly publicised dispute, the five-member PCA tribunal rendered a final award.

50. Apart from fixing the boundary in more than 20 areas, the tribunal also determined the boundary with respect to the Bay of Piran / Bay of Savudrija. Croatia had argued that the delineation of the border ought to be made along a median line, whereas Slovenia claimed the whole of the Bay. Although the tribunal fixed the boundary along a line situated between the lines advanced by the parties, the larger part of the Bay was passed to Slovenia.[128] Using equidistance principles, the tribunal also created a "Junction Area" of 2.5 nm in Croatia's territorial sea.[129] In an attempt to "guarantee both the integrity of Croatia's territorial sea and Slovenia's freedoms of communication between its territory and the high seas",[130] the tribunal established a special, never before seen under the UNCLOS, usage regime.[131]

51. Specifically, the tribunal prescribed a regime designed to safeguard freedom of communication, which included "freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea",[132] except for "the freedom to explore, conserve or manage the natural resources, whether living or non-living, of the waters or the seabed or the subsoil in the Junction Area".[133] Croatia retained the rights "to adopt laws and regulations applicable to non-Croatian ships and aircraft in the Junction Area"[134] and to "respond to a request made by the master of a ship or by a diplomatic agent or consular officer of the flag State for the assistance of the Croatian authorities and also, exceptionally, […] the right to exercise in the Junction Area powers under UNCLOS Article 221 in respect of maritime casualties".[135] While Croatia also retained its rights "to enforce its laws and regulations in all other areas of its territorial sea and other maritime zones",[136] it received no such prerogatives in the Junction Area.

52. Nearly a year has passed since the final award was issued, but it has seemingly not put an end to the dispute. Slovenia has recently threatened to take Croatia to the European Court of Justice for its continuing refusal to comply with the award.[137]

53. Another territorial and maritime dispute, administered by the PCA, arose out of Russia's 2014 annexation of Crimea.[138] Reports state that Ukrainian vessels are unable to access the Ukrainian regions adjoining the occupied areas in the country's eastern region through the Kerch Strait due to safety and other reasons (for example, the construction of a 19 km bridge). Unofficial sources report that the area in dispute covers 2,000 km^2 of sea.[139]

54. Historically, the Sea of Azov and the Strait of Kerch have been inland waters of both Ukraine and Russia. Under the agreement signed in 2003 between Ukraine and Russia, "all matters … [were to be] solved only by peaceful means together or by agreement of Ukraine and Russia".[140] Given the current state of affairs, however, that is no longer a viable option. Thus, on September 16, 2016, Ukraine served on the Russian Federation a Notification and Statement of Claim under Annex VII to the 1982 UNCLOS. Ukraine asked the PCA, among other things, to confirm its rights in the Black Sea, Sea of Azov, and Kerch Strait, and order Russia to respect Ukraine's sovereign rights in those waters, cease misappropriating Ukraine's natural resources, and compensate it for damages caused.[141] Unlike in the investor-state arbitrations concerning Crimea, where Russia has objected on jurisdictional grounds, it is actively participating in this case.[142]

Acknowledgment

The author would like to acknowledge the invaluable contributions of Dina Prokic and Simona Valkova in the preparation of this chapter.

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Austria

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Pursuant to §581(1) Austrian Code of Civil Procedure ("ACCP"), an arbitration agreement requires at least the exact designation of the parties to the arbitration agreement, the specific legal relationship to which the arbitration agreement pertains and the parties' unambiguous consent to have all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, resolved by arbitration. The arbitration agreement may be concluded as a separate agreement or a clause within a contract. The subject matter has to be arbitrable.

The formal requirements are addressed in §583(1) ACCP, according to which an arbitration agreement must be in writing and contained either in a written document signed by the parties or in letters, telefax, e-mails or other forms of communication exchanged between the parties which preserve evidence of the agreement. An arbitration agreement may also be part of general terms and conditions, provided that the contract referring to these terms is validly executed. It is not necessary to attach the general terms and conditions to the main contract.

Special provisions apply to arbitration agreements with consumers. Pursuant to §617(1) and (2) ACCP, arbitration agreements between an entrepreneur and a consumer may only be validly concluded for disputes that have already arisen. Further, the arbitration agreement must be contained in a document which is personally signed by the consumer and does not contain any agreements other than those relating to the arbitral proceedings. The latter also applies to arbitral proceedings in labour law matters.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Elements that are advisable to be incorporated in an arbitration agreement are the determination of the place of arbitration, the language of the proceedings, the number of arbitrators, the manner of their appointment, the applicable arbitration rules and the substantive law applicable to the dispute and the arbitration agreement.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

In general, Austrian courts have a positive approach towards arbitration agreements. Austrian courts apply interpretations that uphold the validity of arbitration agreements, provided that the formal and minimum content requirements have been met.

The pendency of arbitral proceedings bars the commencement of parallel court proceedings. The pendency of an action before an arbitral tribunal results in the inadmissibility of subsequent proceedings concerning the same dispute ("*lis pendens*"). If court proceedings are commenced in a dispute that is subject to an arbitration agreement, the courts must dismiss the claim if it relates to a matter which is subject to an arbitration agreement, unless the respondent enters into the merits of the dispute without raising objections to this effect or the court establishes that the arbitration agreement is invalid or unenforceable.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

In Austria, arbitration proceedings are governed by §§577 to 618 ACCP. The legislation is based on the UNCITRAL Model Law and was amended in 2013.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The same provisions apply to domestic and international arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Austrian arbitration law conforms with the UNCITRAL Model Law to a large extent. The most significant difference is that, pursuant to §611(2) 5 ACCP, an award may only be set aside if the arbitral procedure was not in accordance with Austrian public policy

(procedural *ordre public*). The accordance of the arbitral procedure with the agreement of the parties, as required by Article 34(2)(a)(iv), second case of the UNCITRAL Model Law, is not required under Austrian law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The ACCP contains only a few mandatory provisions, e.g. the principle of equal treatment, the parties' rights to representation and to be heard, the rules on objective arbitrability, the option of applying to state courts for interim measures, the possibility of challenging an arbitrator before national courts and the provisions on actions for setting aside an award.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Any claim involving an economic interest may be arbitrable. A dispute relating to a non-proprietary claim is arbitrable if the parties could enter into a settlement on the subject-matter in dispute. Claims in family law, tenancy law and matters concerning social security are not arbitrable.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Pursuant to §592(1) ACCP, the arbitral tribunal is permitted to rule on its own jurisdiction in the final award or in a separate award (doctrine of competence-competence).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The court has to dismiss a claim if it relates to a matter which is subject to an arbitration agreement, unless the respondent makes submissions on the merits of the dispute or orally pleads before the court without raising objections to this effect or the court establishes that the arbitration agreement is invalid or unenforceable.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

An arbitral tribunal's decision on jurisdiction may be challenged and, thus, can be subject to national court review. The challenge of an award on jurisdiction does not prevent an arbitral tribunal from continuing arbitral proceedings or from rendering a final award.

Further, a national court may notify the parties before the start of hearings of its view that the case is subject to arbitration and dismiss the action *in limine litis*.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The extension of an arbitration agreement's scope to third parties is viewed conservatively by the Austrian courts, as well as legal writers. There are no express provisions on the extension of an arbitration agreement's scope to non-signatories. In general, only the parties to the arbitration agreement are bound by that agreement. As a consequence, concepts such as "groups of company doctrine", "piercing of the corporate veil" or representation and agency generally do not apply. However, the Austrian Supreme Court consistently rules that legal successors, as well as third-party beneficiaries are also bound by an arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Austrian laws or rules do not prescribe any limitation periods for the commencement of arbitration. Pursuant to §584(4) ACCP, when an arbitral tribunal or a court denies its jurisdiction over a dispute, or where an arbitral award is set aside due to the arbitral tribunal's lack of jurisdiction, the proceedings are considered to be properly continued ("*gehörig fortgesetzt*") if the claimant immediately files its claims with the competent court or arbitral tribunal. This ensures continuous suspension of the limitation period under Austrian law.

Limitation periods are governed by the applicable substantive law in Austria. The typical length of such limitation periods is either three or 30 years, depending on the nature of the claim.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pursuant to the Austrian Insolvency Act, all pending proceedings in which the debtor is either a claimant or respondent are interrupted by virtue of the commencement of insolvency proceedings. This rule also applies to arbitration proceedings which have their seat in Austria.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The law applicable to the substance of a dispute shall be determined by the parties. Pursuant to §603 ACCP the arbitral tribunal has to decide the dispute in accordance with the provisions of law as chosen by the parties. Unless the parties have explicitly agreed otherwise, an agreement on the law of a given state shall be construed as directly referring to the substantive law of that state and not to its conflict rules. Only in the absence of any designation by the parties does the arbitral tribunal have full discretion to determine the law which it considers to be appropriate, without having to resort to specific conflict-of-laws rules.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The parties' autonomy to determine the applicable law is limited by mandatory laws, for example, if so required by the principle of the protection of the weaker party, e.g. in consumer law or employment law. The Austrian public policy (*ordre public*) also prevails over the law chosen by the parties.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

In view of recognition and enforcement, Article V(1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") applies, providing for the application of the law chosen by the parties or, lacking such agreement, the law of the country where the award was made. Austrian arbitration law does not explicitly regulate this matter. Lacking agreement between the parties, the laws of the place of arbitration shall be applied.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties' autonomy to select arbitrators is limited to the extent that an arbitrator may be challenged if there are circumstances that give rise to justified doubts as to his impartiality or independence or if he or she lacks qualifications agreed upon by the parties. An arbitral tribunal which has its seat in Austria must be composed of an uneven number of arbitrators (§586 ACCP).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

§587 ACCP provides for a default procedure if the parties' chosen method for selecting arbitrators fails or does not exist at all. If the parties agreed upon arbitration proceedings with a sole arbitrator and if the parties fail to agree on the arbitrator within four weeks of receipt of a request to do so from the other party, the arbitrator shall be appointed by the court upon application by a party. If no nomination procedure was agreed upon for a three-arbitrator tribunal, each party shall appoint one arbitrator, and thereafter the two appointed arbitrators shall appoint a third arbitrator as chairman. If more than three arbitrators have been provided for, each party shall appoint the same number of arbitrators and the arbitrators thus appointed shall appoint a further arbitrator as chairman.

Any party may apply to a court for substituting an appointment of an arbitrator if the party-agreed appointment procedure has failed, i.e. one party does not act in accordance with the agreed procedure, or the parties are unable to reach an agreement as to the joint appointment of an arbitrator, or a third party does not fulfil its role in the appointment of an arbitrator.

Austrian arbitration law provides for a mandatory subsidiary catch-all provision in §587(6) ACCP, which covers all cases not expressly mentioned in the law, in which a party does not appoint an arbitrator within four weeks after receipt of a written request to do so, and in which any agreed substitute procedure does not lead to the appointment of an arbitrator within a reasonable period of time.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court may only intervene in the selection of arbitrators upon application by a party to the arbitration agreement. §587(3) ACCP provides for a party's right to request a court to appoint the missing arbitrator(s) if the party-agreed appointment procedure has failed.

Pursuant to §589(3) ACCP, the courts may also be requested by a party to decide on the challenge of arbitrators if a challenge under a party-agreed procedure or under the procedure set forth in §589(2) ACCP is not successful. This competence is mandatory and applies as an additional instance of review even in cases where an arbitral institution decides on challenges raised by the parties.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Pursuant to §588 ACCP, an arbitrator must disclose any circumstances which could raise doubts as to his or her impartiality and/or independence, or which are in conflict with the agreement of the parties at any stage of the arbitral proceedings. Independence is defined by the absence of close financial or other ties between the arbitrator and the parties. Impartiality is closely related to independence, but refers to the arbitrators' attitude. However, an arbitrator may be successfully challenged if there is objectively justified doubt as to his or her impartiality or independence.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The procedure of arbitration in Austria is governed by §§577 *et seq*. ACCP. These provisions apply to all arbitral proceedings that have their seat in Austria. Subject to mandatory requirements, the parties are free to derogate from most of the procedural rules.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no particular procedural steps required by the ACCP. Arbitration proceedings must meet fundamental procedural rights such as fair and equal treatment, proper representation and the right to be heard. The respondent's right to submit a memorandum in reply is considered as such a mandatory procedural step.

Unless otherwise agreed by the parties, the arbitral tribunal shall decide on whether to hold oral hearings or to conduct the proceedings in writing. Upon a party's request, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, unless the parties have agreed that no oral hearings shall be held. In any case, pursuant to §599(2) ACCP, the arbitral tribunal has to notify the parties in a timely manner of any hearings or any meetings for taking evidence. The latter is mandatory.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no specific rules that govern the conduct of counsels from Austria in arbitral proceedings that have their seat in Austria. However, Austrian counsels admitted to the Austrian Bar are bound by the Austrian Attorney's Act (*Rechtsanwaltsordnung*) that sets forth the core principles for the exercise of the profession as a lawyer, such as the obligation to confidentiality and integrity towards the client, the prohibition of dual representation, etc. Further, Austrian counsels shall refrain from creating the appearance to influence witnesses and are not entitled to agree on fee arrangements containing a *quota litis*, i.e. contingency fees.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The main obligation of the arbitrators is to conduct the arbitral procedure in accordance with the parties' agreement and the principles of a fair trial, including the duty of neutrality. Upon a plea, the arbitrators may decide on their own jurisdiction. During the proceedings, the arbitrators have the power to decide on the admissibility of evidence, to take such evidence and to determine its relevance, materiality and weight unrestrictedly. The arbitrators thus have wide discretion on the conduct of the proceedings. Finally, arbitrators have the right to render interim or protective measures upon either party's request.

The most significant duties of the arbitrators are to conduct the arbitral procedure efficiently and to be cost-effective in accordance with the parties' agreement and ultimately render an award with final and binding effect. Arbitrators must promptly disclose any circumstances likely to raise doubts as to his or her impartiality or independence at any stage of the arbitration proceedings.

The main powers bestowed upon the arbitrators are the rendering of arbitral awards with final and binding effect, including a decision on the tribunal's own jurisdiction, as well as the discretion to conduct the proceedings in all questions not regulated by the law or by virtue of the parties' agreement. Arbitrators have the power to render interim measures although they lack coercive powers. As such, arbitrators cannot compel witnesses or parties to produce particular documents, to give testimony or even to appear at an oral hearing. Further, arbitrators cannot administer oaths, requiring them to request state court assistance in case an examination under oath is required.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

In Austria the appearance of lawyers, including lawyers from other jurisdictions, in legal matters is strictly regulated. The rules of representation applicable to national court proceedings do not apply to arbitration proceedings sited in Austria and representation in arbitration proceedings is, unlike national court proceedings, not reserved to lawyers.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Austrian law does not provide for arbitrator immunity. Pursuant to §594 ACCP, arbitrators are liable for any damage caused by their culpable refusal or delay in fulfilling the duty assumed by acceptance of the appointment, e.g. if they do not render the arbitral award in a timely manner or unjustifiably resign from their function. For any liability going beyond the ambit of §594 ACCP, the Austrian Supreme Court has repeatedly held that any such liability requires a successful challenge of the arbitral award in order to even be considered.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

National courts may only deal with procedural issues arising during arbitration proceedings if so provided for in §§577 *et seq*. ACCP, e.g. the appointment or challenge of arbitrators. Arbitrators or any party with the approval of the arbitrators may request national courts to perform judicial acts for which the arbitrators do not have authority, including the request to a foreign court or other authority to carry out such acts, e.g. assisting in the taking of evidence. In addition to the arbitrators' power to issue interim measures, national courts remain competent to grant interim measures of protection even though the parties have entered into an arbitration agreement.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless otherwise agreed by the parties, an arbitral tribunal may, upon request of a party and after hearing the other party, order interim or protective measures. Such measures may only be ordered if the enforcement of a claim would otherwise be frustrated or materially hampered, or there would be a danger of irreparable damage. Interim or protective measures are only of a preliminary nature and no awards. The issuance of *ex parte* measures is explicitly forbidden. Austrian law does not provide for a *numerous clausus* of such interim or protective measures. Thus, arbitral tribunals are also free to issue measures which are unknown to Austrian law. Arbitral tribunals do not have to seek the assistance of a court for issuance of preliminary measures.

Interim or protective measures are enforceable by Austrian courts upon request of a party.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Pursuant to §585 ACCP, an arbitration agreement does not deprive a party of its right to request interim relief from the courts. Upon request by a party before or during arbitration proceedings, courts are entitled to grant interim measures of protection even though the parties have entered into an arbitration agreement. This provision brings the side-by-side power of granting interim measures of

national courts and arbitrators. However, the principle that no legal action can be instituted twice for the same cause of action has to be considered.

Preliminary measures, either granted by arbitrators or courts, shall not prejudice the final outcome of the arbitration proceedings.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Austrian courts have repeatedly granted interim measures related to arbitration.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Austrian law does not provide for anti-suit injunctions either by an arbitral tribunal or by a domestic court.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Austrian law allows for the national court to order security for costs, whereby in certain cases national courts are obliged to order security for costs. Austrian arbitration law does not explicitly provide for the right or duty of arbitral tribunals to order security for costs. In practice, it is common that the arbitral tribunal may require any party to provide appropriate security in connection with an interim or protective measure, as well as with an award.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Pursuant to §593 ACCP, Austrian courts (i.e. the District Court), upon application of a party, shall enforce interim measures ordered by arbitral tribunals. This applies to interim or protective measures of arbitral tribunals having their seat in Austria, as well as to measures of tribunals not having their seat in Austria or having the seat not yet determined.

Austrian law leaves no discretion to Austrian courts whether to enforce interim or protective measures ordered by an arbitral tribunal. However, Austrian courts shall refuse to enforce a measure ordered by arbitral tribunals having their seat in Austria if the measure suffers from a defect that would constitute grounds for setting aside an arbitral award. They shall also refuse to enforce measures ordered by an arbitral tribunal not having its seat in Austria if the measure suffers from a defect that would constitute grounds for refusal of recognition and enforcement. If the measure provides for means of protection unknown in Austrian law, the court may, upon application of a party and after hearing the opponent, execute the means of protection under Austrian law which comes closest to the means ordered by the arbitral tribunal. The court may also formulate the measure ordered by the arbitral tribunal differently in order to safeguard the realisation of its purpose.

Austrian courts shall revoke interim or protective measures if the term of the measure set by the arbitral tribunal has expired or the arbitral tribunal has limited the scope or set aside the interim or protective measure.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Unless otherwise agreed by the parties, the arbitral tribunal is free to determine the rules of evidence. Pursuant to §599 ACCP, the arbitral tribunal has the power to decide on the admissibility of evidence, to take such evidence and to determine its relevance, materiality and weight unrestrictedly.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The disclosure of documents and other disclosures are not regulated with regard to arbitration. In general, the parties are free to agree on a certain disclosure policy. Even without such an agreement, arbitral tribunals seated in Austria have repeatedly ordered the production of documents, often relying on what they consider to be best practice in international arbitration.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

A court may only intervene in matters of disclosure/discovery if the arbitral tribunal or any party with the approval of the arbitral tribunal requests from the court assistance in the gathering of evidence. However, the Austrian courts' authority to order the production of documents is very limited and cannot be enforced. Rather, the consequences of a party's failure to produce the documents ordered are limited to negative inferences during the evaluation of evidence. To the contrary, the attendance of witnesses may be ordered by national courts and can also be enforced.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Austrian arbitration law does not provide for certain rules determining the production of written and/or oral witness testimony. The parties are free to decide upon the procedure. Written and oral witness testimony, as well as cross-examination of witnesses or experts at a hearing is allowed as evidence. Witnesses or experts cannot be sworn by the arbitral tribunal, but only with the assistance of a national court. The professional rules for lawyers admitted to the Austrian Bar require them to refrain from influencing a witness.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Lacking any specific rules, an arbitral tribunal seated in Austria may consider any documents submitted to it by the parties, irrespective of whether such submission was made in violation of a confidentiality obligation or legal privilege. However, in line with international practice, wherever an arbitral tribunal orders the production of

documents, legal privileges acknowledged by the law, such as the attorney-client privilege or the doctor-patient privilege, must be observed. No privilege protection is granted to communications between company representatives and their in-house counsel.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Pursuant to §606 ACCP, an award must be made in writing and signed by the arbitrators. Unless otherwise agreed by the parties, the award must be signed by at least the majority of members of the arbitral tribunal, provided that the obstacle which prevented the missing signature on the award is noted. The award also has to state the date on which it has been rendered and the seat of the arbitral tribunal.

The award has to be reasoned, unless the parties have agreed otherwise. The reference to the parties' respective agreement will suffice only in the case of an award on agreed terms.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Pursuant to §610 ACCP, the arbitral tribunal may, upon request by either party, (i) correct in the award any errors in computation, any clerical, typographical or errors of similar nature, (ii) explain certain parts of the award, or (iii) render an amended award as to claims asserted in the arbitral proceedings but not disposed of in the award. Arithmetic and spelling mistakes in terms of (i) above may also be corrected by the arbitral tribunal on its own initiative.

The arbitral tribunal shall decide upon the correction within four weeks and upon an amendment within eight weeks. The other party shall be served with the request to clarify, correct or amend the arbitral award and shall be heard before the arbitral tribunal decides upon such request. The correction (or clarification or amendment) of the arbitral award constitutes a part of the (original) arbitral award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Pursuant to §611 ACCP, the arbitral award may be challenged only based on the following grounds:

1. invalid arbitration agreement;
2. violation of the right to be heard;
3. award is beyond the matter in dispute;
4. violation of Austrian arbitration law by the constitution or composition of the arbitral tribunal;
5. violation of the fundamental values of the Austrian legal system by the arbitral procedure (procedural *ordre public*);
6. fulfilment of requirements for an action for revision;
7. lack of arbitrability of the matter in dispute; and
8. violation of public policy (substantive *ordre public*).

The grounds stipulated in numbers 7 and 8 above also have to be observed *ex officio* at all stages of court proceedings.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties may not waive the right to challenge the arbitral award or any challenge grounds in advance. The grounds stipulated in numbers 7 and 8 in question 10.1 above cannot be excluded by an agreement between the parties at all as they concern the public interest.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The challenge to set aside an arbitral award is the only recourse against an arbitral award. The list of grounds for the challenge is exhaustive. The parties may not expand the scope of appeal by Austrian national courts.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The action for setting aside an arbitral award must be filed with the Austrian Supreme Court as first and also last instance. The Supreme Court, however, has to apply the same procedural rules as a court of first instance when deciding upon an action for setting aside an award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Austria ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) on 2 May 1961 and the convention entered into force on 31 July 1961. No reservations are currently in place since the initial reservation under Article I(3) of the NYC was withdrawn on 25 February 1988. §614 (2) ACCP explicitly refers to the NYC.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Apart from the NYC, Austria has ratified the following multilateral conventions concerning arbitration: (i) the Geneva Protocol on Arbitration Clauses of 1923; (ii) the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927; and (iii) the European Convention on International Commercial Arbitration of 1961. In addition, Austria has entered into several bilateral agreements concerning the recognition and enforcement of arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In general, Austrian national courts have a positive approach towards the recognition and enforcement of domestic or foreign arbitral awards. In particular, they do not review the merits of the arbitral tribunal decision.

The recognition and enforcement of arbitral awards is governed by the Austrian Enforcement Act ("*Exekutionsordnung*"). However, where applicable, the NYC overrides most of the domestic provisions. Austrian courts consistently apply the NYC with due consideration of its international character, recognising the need for a unified instrument of recognition and enforcement.

The first step to be taken by a party intending to enforce an award is to apply for declaration of enforcement ("*exequatur*"). The applicant must provide the court with the original or a duly certified copy of the award and the arbitration agreement. After the declaration of the enforcement has been granted, the party may apply for enforcement authorisation which will lead to the execution of enforcement.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award has the effect of a legally binding judgment between the parties. The arbitral award's finality and enforceability do not differ from those of binding judgments of national courts. As a result, any issues finally determined by an arbitral tribunal are to be considered *res judicata*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Refusing enforcement of foreign arbitral awards violating public policy (*ordre public*) is primarily governed by the NYC. The standard for refusing enforcement of a foreign arbitral award refers to fundamental principles of the Austrian jurisdiction, e.g. the mandatory fundamental principles of the constitution or criminal law. Pursuant to several court decisions, this public policy standard is defined very narrowly.

In practice, objections to enforcement based on this ground are fairly common, but very rarely successful.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Austrian law does not provide for the confidentiality of arbitral proceedings sited in Austria. In practice, arbitration proceedings are mostly kept confidential. It is generally accepted that arbitrators have to keep the arbitration proceedings confidential. The arbitration rules agreed upon by the parties may contain provisions relating to confidentiality.

It is advisable to expressly agree on confidentiality as a part of the document when concluding an arbitration agreement.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Unless the parties have agreed otherwise, information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings. In the context of challenge proceedings to set aside an arbitral award, the public may be excluded from the oral hearings upon request of a party.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Austrian arbitration law does not determine limits on the types of remedies available. However, *ordre public* has to be considered. Austrian law does not know punitive damages. While there is no applicable case law, in literature it is argued that the concept of punitive damages could violate Austrian public policy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Under Austrian law, interest is a matter of substantive law. Pursuant to the Austrian Civil Code, the interest rate is determined with a basic percentage of 4% *per annum* and, pursuant to the Austrian Commercial Code, in case of disputes between non-consumers with 9.2% *per annum* above the base interest rate as published by the Austrian National Bank.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Pursuant to §609(1) ACCP the arbitral tribunal is legally requested to decide on the duty to reimburse the costs of the proceedings upon termination of the arbitration proceedings, unless otherwise agreed by the parties. The arbitral tribunal has wide discretion in taking into account all the circumstances of the case, in particular the outcome of the proceedings. The arbitral tribunal shall decide on reimbursement only upon request by either party if the proceedings are terminated by entering into a settlement.

There is no general practice. The reimbursement of fees and/or costs is decided in each case depending on the individual circumstances.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An arbitral award is not subject to tax. The Austrian Stamp Duty Act provides for stamp duties on out-of-court settlements recorded in writing. If arbitration proceedings are terminated by entering into a settlement, stamp duty may be imposed pursuant to the Austrian Stamp Duty Act. The stamp duty amounts to 1% of the settlement amount.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Pursuant to Austrian substantive law, contingency fees violate the so-called forbidden *pactum de quota litis* and are considered invalid/void. The rules of professional conduct for lawyers expressly forbid contingency fees.

Professional funders are active in the Austrian market. However, for the time being they are mainly active in court litigation.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Austria signed the Washington Convention on 17 May 1966 and the convention entered into force on 24 June 1971.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Austria is party to 65 BITs, to several multi-lateral investment treaties and the Energy Charter Treaty. Many of Austria's BITs provide for dispute settlement under the auspices of ICSID.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Austria has a model BIT which aims at providing a high degree of protection to investors, not only incorporating all typical substantive standards, but also providing for a choice of dispute resolution under the auspices of either ICSID or the ICC, or under the UNCITRAL Arbitration Rules. The model BIT addresses, in particular, the issue of transparency in investor–state dispute settlement.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

A state that has entered into an arbitration agreement and, thus, has agreed to arbitration proceedings is recognised under Austrian law to have waived the immunity defence. The state is then also deemed to have agreed to potential court proceedings relating to such arbitration. The state's commercial assets are subject to enforcement of arbitral awards.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

On 1 January 2018, the new Arbitration and Mediation Rules of the Vienna International Arbitral Centre ("VIAC", Vienna Rules 2018) entered into force. VIAC has also revised and amended its Model Arbitration Clause and the Model Mediation Clauses. The most noteworthy new features are that VIAC now also administers purely domestic cases in addition to the international cases that have been handled so far. All new proceedings will be administered electronically via an electronic case management system. Further, under certain circumstances respondents now have the possibility to request security for costs. Finally, in terms of gender diversity it has been defined that the terms in the Vienna Rules 2018 shall be used in a gender-specific manner.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

In order to address the current time and costs issue, the new Vienna Rules 2018 explicitly specify that arbitrators and parties as well as their representatives shall conduct the proceedings in an efficient and cost-effective manner. Non-compliance with these rules may be taken into consideration when determining the arbitrators' fees. Further, when determining the arbitrators' fees, the VIAC Secretary General now is more flexible to increase the fees by a maximum total of 40% depending on the circumstances of the case or, conversely, to decrease the fees where appropriate. Finally, the fee schedules have been revised.

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Arbitration agreement requires the consent of the parties to submit all or separate disputes, which have occurred or may arise out of the legal relations, binding upon the parties, for settlement by the international arbitration court (Article 11 of the Law on International Arbitration Court). The arbitration agreement may be entered into either in the form of an arbitration clause (separate provision of the contract) or as a separate contract.

The arbitration agreement shall be in writing. An agreement is in writing if it is stipulated 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. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that clause part of the contract.

1.2 What other elements ought to be incorporated in an arbitration agreement?

In general, there are no other mandatory requirements that have to be stipulated in an arbitration agreement.

However, in order to avoid invalidity or unenforceability of an arbitration agreement, it is preferable for the parties to determine unambiguously the following information:

- type of arbitration (institutional or *ad hoc*);
- competent arbitration institution; and
- applicable arbitration rules.

An arbitration agreement might also include additional conditions like the place and language of the arbitral proceeding, the number of arbitrators, their qualification and election procedure, etc.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

According to the provisions of the Civil Procedural Code of the Republic of Belarus (hereinafter – CPC), the court of general jurisdiction shall refuse receipt of the claim or terminate the proceedings if it finds that parties have concluded an arbitration agreement.

Under article 151 of the Economic Procedural Code of the Republic of Belarus (hereinafter – EPC), an economic court starts the commencement of proceedings independently of the existence of an arbitration agreement, but leaves the statement of claim without consideration if the respondent files a motion to refer the dispute to arbitration. The respondent must submit this motion no later than its first statement on the merits.

According to legislation and court practice, the court shall refuse to apply the legal consequences of an arbitration agreement in the following cases:

- the form of an arbitration agreement does not correspond to the requirement of the legislation;
- the arbitration agreement does not determine the kind of arbitration, particular arbitration institute or arbitration rules;
- the arbitration agreement is void, inoperative, incapable of being performed; and
- subject matter of the dispute is not arbitrable under Belarusian legislation.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The enforcement of arbitration proceedings in Belarus is governed by the Law "On arbitration courts" dated 18 July 2011, the IAC Act, the CPC, which applies to enforcement of arbitration proceedings with the participation of individuals, and the EPC, which applies to arbitration proceedings with the participation of private entrepreneurs and legal entities.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The IAC Act governs international arbitration proceedings and the Law "On arbitration courts" governs domestic arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The IAC Act is based on the UNCITRAL Model Law on international commercial arbitration 1985 in its primary form, without the changes and amendments adopted in 2006.

The main differences are the following:

- The UNCITRAL Model Law applies to international commercial arbitration. Whereas according to article 4, the IAC Act applies also to relations between Belarusian entities (entrepreneurs).
- The IAC Act (chapter 2) determines the procedure for the establishment of the permanent international arbitration court. Due to the specifics of the Belarusian law, this court is a legal entity and therefore the IAC Act regulates, along with the court's status, the issues of the creation of the court, the structure of the court and the bodies of its management, including their competence.
- The IAC Act provides that if the parties have stipulated in the arbitration agreement that the dispute should be referred to the permanent court of international arbitration; in the absence of an agreement to the contrary, they agree for the dispute to be considered in accordance with the arbitration rules.
- The IAC Act (article 15), unlike the UNCITRAL Model Law, regulates issues associated with arbitration costs.
- The UNCITRAL Model Law specifies that if two arbitrators within 30 days from the date of their appointment do not agree on the choice of the third arbitrator, then such arbitrator should be appointed by the state court; in the IAC Act (article 17), the specified period is 10 days.
- The UNCITRAL Model Law provides that the party seeking to challenge an arbitrator may request the court, or other authority, to decide on the challenge within 30 days of receiving notice of the decision from the arbitral tribunal rejecting the challenge. However, while such a request is pending resolution from the arbitration court, arbitral proceedings – including the arbitrator being challenged – may continue and the tribunal may make an arbitral award. In the IAC Act (article 19), proceedings of the international arbitration court are postponed pending resolution of the challenge of an arbitrator.
- The UNCITRAL Model Law provides that while a request to the court or other authority on the question of an arbitrator's competence is pending resolution, the arbitration proceedings may continue and an award can be made. The IAC Act (article 22), however, provides that the international court of arbitration proceedings shall be suspended at the time of the consideration of the issue on competence.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Mandatory rules are determined by the IAC Act.

In particular, article 3 of the IAC Act establishes that the arbitral tribunal relies on the principles of the economic legislation of the Republic of Belarus, which does not contradict the principles of international commercial arbitration proceedings. Thereby, the general approach of the EPC shall be taken into account during the course of the arbitration proceedings.

The IAC Act establishes: the requirements of an arbitration agreement (article 11), which shall be concluded in written form; and the requirements as to the form and content of the award (article 40), which shall be made in writing and shall be signed by the sole arbitrator or by the majority of the arbitral tribunal.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Based on existing court practice, disputes referred to in articles 47 and 236 of the EPC are not considered as arbitrable.

According to article 47 of the EPC, the following categories of cases are under the special competence of the economic court:

- economic insolvency (bankruptcy) disputes;
- disputes concerning the registration, reorganisation and liquidation of legal entities and organisations which do not have the status of a legal entity, and termination of activities of individual entrepreneurs;
- disputes on the refusal of state registration, on evasion of state registration of legal entities, organisations, which do not have the status of a legal entity, and individual entrepreneurs;
- disputes between a shareholder and a joint-stock company, participants of other companies and disputes arising out of the realisation of activities by the companies, excluding labour disputes;
- disputes regarding the protection of a business's reputation in the sphere of entrepreneurial and other economic activity; and
- other disputes related to the realisation of entrepreneurial and other economic activity in cases stipulated by legislative acts.

In accordance with article 236 of the EPC, the exclusive jurisdiction of economic courts includes the following kinds of cases which involve the participation of foreign persons:

- disputes related to property owned by the state of the Republic of Belarus, including disputes related to privatisation of state-owned property and compulsory acquisition of property for state needs;
- real estate disputes with regard to property located in the territory of the Republic of Belarus, including gaining possession or the right to gain possession;
- disputes regarding the recognition of records in State Registers (Cadasters), made by the state body of the Republic of Belarus competent to run the Register (Cadaster);
- disputes related to the establishment, registration or liquidation of legal entities and individual entrepreneurs in the territory of the Republic of Belarus, appealing against decisions of the bodies of the above-mentioned legal entities;
- disputes on economic insolvency (bankruptcy) of legal entities and individual entrepreneurs, located or domiciled in the Republic of Belarus;
- disputes on the exclusion of property from the inventory or arrest, if the arrest of the property has been made by the state body of the Republic of Belarus; and
- disputes related to the recognition of non-normative legal acts of state bodies, bodies of local government and self-government agencies of the Republic of Belarus.

The exclusive competence of the economic courts of the Republic of Belarus shall also cover economic disputes and other cases arising out of administrative legal relations determined by article 42 of the EPC which involve the participation of foreign persons.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

According to the article 22 of the IAC Act, the arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

According to article 151 of the EPC, the economic court shall leave the statement of claim without consideration if:

- there are existing proceedings at the international arbitration court on the dispute between the same persons, on the same subject matter, and on the same grounds; and
- there is an agreement between the parties to submit the dispute to the arbitration court or international arbitration court, and a possibility of appealing to the arbitration court or international arbitration court was not lost. The statement of claim will also be left if the respondent, who is objecting against the consideration of the case at the economic court, not later than his first statement on the merits, files a motion to refer the dispute to consideration of the arbitration court or international arbitration court.

Thus, the Belarusian state court shall stay its proceedings initiated by another party in an apparent breach of an arbitration agreement and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Under article II (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was adopted by the Republic of Belarus, the state court, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of article II, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

When the award is rendered, a party may apply to the state court to set aside the award, or to resist enforcement on the grounds that the arbitrators did not have jurisdiction to consider the case and make an award.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There is no possibility in Belarus to assume jurisdiction over individuals or entities which are not party to an arbitration agreement. As a general rule, the arbitration clause binds only the parties that originally agreed to it.

Moreover, according to the Resolution of the Supreme Economic Court of the Republic of Belarus N 34 "On jurisdiction of disputes after assignment or debt transfer" (article 3), dated 23 December 2005, in case of assignment or debt transfer in full, the new creditor or debtor is not bound by the arbitration agreement which was concluded by the original creditor or debtor.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The limitation periods are set forth by the Civil Code of the Republic of Belarus. The state courts of Belarus consider them as substantive law rules. The general period of limitation is three years from the day when a person becomes aware of, or ought to have become aware of, the violation of his rights (article 197 of the Civil Code). This rule applies to the majority of contractual and tort claims.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Insolvency proceedings fall under the exceptional competence of the economic courts and are not arbitrable in Belarus.

Any claims against a debtor which arise after bankruptcy has commenced should be filed with the state court considering the bankruptcy case against the debtor. At the same time, there is no restriction in terms of participating in an arbitration procedure as a creditor of an entity in respect of which an insolvency proceeding has already started.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

According to article 36 of the IAC Act, the arbitral tribunal settles disputes in accordance with the law chosen by the parties as applicable to a dispute. Any indication to the law or the system of law of any state should be interpreted as a direct reference to the material law of this state, but not to the norms of the conflict of laws.

Unless the parties have agreed otherwise, the arbitral tribunal applies the law determined in accordance with the rules of the conflict of laws it considers applicable.

During the arbitral procedure, the arbitral tribunal takes into consideration the content of the contract binding on the parties, as well as the customary business practice and court practice.

The legislation of Belarus does not regulate the possibility of international arbitration to settle the dispute *ex aequo et bono*. At the same time, article 38 of the Rules of the International Arbitration Court at the Belarusian Chamber of Commerce and Industry (hereinafter – IAC at BCCI Rules) allows disputes to be settled on the basis of justice (generally, recognised moral rules) only if both parties to the dispute agree to it and it does not contradict the imperative norms of Belarusian legislation.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

According to article 1100 of the Civil Code of the Republic of Belarus, the mandatory norms of the law of the Republic of Belarus are applied independently of applicable law, including the law

agreed between the parties in the contract. The term "mandatory norms" relates not only to public relations but also to private law (currency regulations, licensing and foreign trade legislation).

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

There are two basic factors influencing the validity of an arbitration agreement:

1) whether or not the arbitration agreement relates to the arbitrable dispute (objective arbitrability); and
2) whether the parties of the arbitration agreement can be subject to the arbitration (subjective arbitrability).

According to article 43 of the IAC Act, declaration that an arbitration agreement is null and void is made on the basis of the law applicable to the arbitration agreement or the law of the Republic of Belarus if the applicable law is not specially determined.

The Law "On arbitration courts" (articles 9–11) determines that an arbitration agreement is null and void in the following cases:

- in the absence of a real agreement to submit the dispute to the international arbitration court (agreement with defective will – under coercion, fault, duress, fraud or misrepresentation);
- the type of dispute is not determined in the arbitration agreement, or the dispute is not arbitrable;
- the arbitration court, which considers the case, is not indicated;
- the arbitration court, determined in the agreement, does not exist, is uncertain, is named incorrectly or the formation and activities of an *ad hoc* arbitration court are not specified;
- the written form of the arbitration agreement is not observed; or
- the requirement of the Law "On arbitration courts" has been violated in relation to the arbitration agreement.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are no restrictions with regard to the parties' autonomy to select arbitrators. Any person can be selected as an arbitrator. The general rule is that an arbitrator has to be impartial and independent. According to the IAC Act, an arbitrator must be a capable person, chosen by the parties to the dispute with their agreement or appointed in by means of an established process to resolve the dispute. No one may be deprived of the right to become an arbitrator because of his nationality or citizenship, unless the parties agreed otherwise (article 17 of the IAC Act).

Article 13 of the Law "On arbitration courts" establishes the following provisions in regard to the arbitrators in domestic arbitration:

The sole arbitrator must have a law degree and at least three years' experience in the legal profession. When there is a panel of arbitrators, however, the Chairman of the arbitral tribunal must have a law degree and at least three years' experience in the legal profession, while the other arbitrators must have completed higher education and at least three years' work experience.

The following persons cannot be arbitrators:

- public servants, including those who exercise powers of a judge in court;
- persons who are incapable or partially capable;
- persons with a criminal record; and
- former judges of the court, prosecutors, members of the Internal Affairs bodies, members of the Investigative Committee of the Republic of Belarus, members of State Security agencies, members of State Security bodies, employees of the State Control Committee of Belarus, tax and customs authorities, other public servants, private notaries or lawyers who were withdrawn from their positions on the grounds that they were incompatible with their professional activities – within three years from the date of the relevant decision – unless otherwise stipulated by legislative acts of the Republic of Belarus.

Additional requirements for the arbitrators may be determined by the regulations of the permanent court of arbitration and the arbitration agreement.

Such additional requirements to the arbitrators are established in the IAC at BCCI Rules: only capable persons (with consent) who have sufficient training and the necessary personal qualities can be selected (appointed) as arbitrators (article 5).

For domestic arbitration in the IAC at BCCI, the parties may appoint those arbitrators listed in the Recommendatory Lists of Arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties' chosen method for selecting arbitrators fails, such appointment of arbitrators has to be made by the Chairman of the permanent court of arbitration.

According to article 17 of the IAC Act, the following procedure is established:

In case of a panel consisting of three arbitrators of the international arbitration court, the claimant names one arbitrator in the statement of claim, the respondent notifies of the second arbitrator in reply to the claim, and the two arbitrators appointed in this way elect the third arbitrator (the Chairman). If the parties do not appoint the arbitrators before expiration of 30 days from the date of receipt by the respondent of a copy of the statement of claim, or if two arbitrators within 10 days fail to elect the third one, appointment of the panel of arbitrators of the permanently acting international arbitration court shall be made by the Chairman of this court, and appointment of the panel of arbitrators of the *ad hoc* international arbitration court shall be made by the President of the Belarusian Chamber of Commerce and Industry, unless otherwise agreed by the parties or determined by the international treaty.

In case of a sole arbitrator of the international arbitration court, if the parties failed to agree upon the arbitrator within 30 days from the date when the respondent has received or is considered to have received the statement of claim, appointment of an arbitrator of the permanently acting international arbitration court shall be made by the Chairman of this court, and appointment of an arbitrator of the *ad hoc* international arbitration court shall be made by the President of the Belarusian Chamber of Commerce and Industry, unless otherwise agreed by the parties or determined by the international treaty.

If one of the parties does not observe this procedure, or the parties or two arbitrators cannot reach an agreement in accordance with the procedure stipulated, or the third person does not fulfil any function placed on him within the procedure agreed, necessary measures in relation to the formation of the permanently acting international arbitration court are taken by the Chairman of this court, and in relation to the formation of the *ad hoc* international arbitration court shall be decided by the President of the Belarusian Chamber of Commerce and Industry, unless otherwise is set by an agreement between the parties or determined by the international treaty.

Upon appointment of an arbitrator, the Chairman of the permanent acting international arbitration court or the President of the Belarusian Chamber of Commerce and Industry takes into account all the requirements for appointing an arbitrator, including that the arbitrator be qualified, independent and impartial. Such decision is not subject to appeal.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

No, national courts are not allowed to intervene in the selection of arbitrators under Belarusian legislation.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

An arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to his/her impartiality or independence.

A challenge to an arbitrator may be declared only if there are circumstances causing grounded doubts in respect of his/her impartiality or independence, or when he/she does not possess a qualification stipulated by the agreement between the parties. The party may declare a challenge to an arbitrator, appointed by such party or with participation of such party in his/her appointment, only in connection with the circumstances which have become known to it after his/her appointment.

A person who has received information on the possible appointment (election) of an arbitrator is obliged to notify the parties of circumstances which may cause grounded doubts in respect of his/her impartiality, independence or competence. In case the arbitrator has not notified the parties before his/her appointment (election), he/she is obliged to notify the parties of any such circumstances as soon as possible during proceedings of the case.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The rules established in the Law "On arbitration courts" apply to any arbitral proceeding sited in Belarus.

The IAC Act provides for the mechanism for commencing arbitral proceedings in the international arbitration courts.

The parties are free to agree on the procedure of arbitration. In the absence of such agreement between the parties, the arbitral tribunal may conduct the arbitral proceedings in a manner it deems appropriate, provided that provisions of the ICA Act and the Law "On arbitration courts" are duly followed.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Arbitration is carried out in either Belarusian or Russian, unless the parties have agreed to use an alternative language.

The claimant must state the facts supporting its claim, the points at issue and the relief or remedy sought; the respondent is supposed to submit a statement of defence.

The parties may submit with their statements all documents they consider relevant, or may refer to documents or other evidence they will submit.

The parties must receive notification of the time and place of arbitration no later than 10 days before the hearings.

Where there is a panel of arbitrators, a ruling of the majority of arbitrators will determine the outcome of the case.

The award of the arbitral tribunal must be in writing.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no special requirements regarding the conduct of counsel from Belarus or on the conduct of counsels from other countries.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The main obligation of the arbitrators is to conduct the arbitral procedure in accordance with the parties' agreement and the principles of due process, including the duty of neutrality.

Arbitrators are obliged to provide equal treatment to all parties and to give full opportunity to each party to present its case. As mentioned above, arbitrators must remain impartial and independent throughout arbitration proceedings, and are obliged to disclose all circumstances giving rise to reasonable doubts as to their impartiality and independence (see question 5.4).

An arbitral tribunal of the international arbitration court, *inter alia*, may:

- refer to the state court or a court of a foreign state with the request for interim measures with regard to a claim or evidence on its own behalf or on behalf of another party (article 23 of the IAC Act); or
- order that all documentary evidences are accompanied by a translation into the language(s) upon which the parties have agreed or which has been determined by the arbitral tribunal.

Arbitrators should give proper notice in advance of any hearing or meeting in arbitration proceedings, as well as ensure that the final arbitral award is rendered in compliance with all the requirements established by the IAC Act and the Law "On arbitration courts".

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Only advocates with licences from the Ministry of Justice of the Republic of Belarus have the right to represent interests of their clients in state courts. Such restriction does not apply to arbitration proceedings sited in Belarus.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no such regulations in Belarus.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Under article 23 of the IAC Act, article 30 of the Law "On arbitration courts", as well as under article 113 of the EPC, national courts can deal with the issue of imposing interim measures.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The possibility to award preliminary relief is not provided for an arbitral tribunal by Belarusian legislation. Under article 23 of IAC Act, unless the parties' agreement provides otherwise, the arbitral tribunal may, at the request of any party, take interim measures in respect of the subject matter of dispute, as it deems necessary. The arbitral tribunal, or a party with its consent, may apply to the state court or a foreign court with a request for interim measures. The state court, within its competence and in accordance with the procedure established by the procedural legislation of the Republic of Belarus, performs the request.

In practice, such interim measures could be provided by the state court under a party's request with consent of the arbitral tribunal.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Under article 113 of the EPC, a court is entitled to grant interim relief upon the motion of the arbitral tribunal. According to article 14 of the IAC Act, an application requesting interim measures of protection to the state court before or during an arbitration procedure at the international arbitration court, or the granting interim measures by the state court, does not cancel the arbitration agreement. Thus, a party's request to a court for interim relief has no effect on the jurisdiction of the arbitration tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In general, Belarusian state courts could grant interim measures; however, they rarely do in practice. The grounds for provision of interim relief in arbitral proceedings are the same as in court proceedings. The requesting party must present evidence of the necessity of such relief. This includes the evidence that future enforcement of the arbitral award could be impossible or substantially complicated or refusal to impose interim measures could cause the applicant substantial damage. Chapter 9 of the EPC deals with provision of interim relief.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The anti-suit injunction provisions are not stipulated in Belarusian legislation.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Belarusian legislation does not contain special rules on security for costs. It should be noted that the arbitration fees in arbitration proceedings at the IAC at BCCI are paid by the parties in advance, except arbitrators' travelling expenses, accommodation, translation, hearings outside the arbitration institution, etc.

As a general rule, the arbitration proceeding may only be commenced upon the receipt of the arbitration fee by the IAC at BCCI, but the claimant may apply to the Chairman of the IAC at BCCI for permission to pay 50% of the arbitration fee first and, if such permission is granted, to pay the rest of the sum before the first hearing.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Belarusian national procedural legislation does not provide a procedure of enforcement of preliminary reliefs or interim measures as such. Only final arbitral awards can be enforced under Belarusian legislation.

However, the arbitral tribunal, or a party with its consent, may apply to the state court with a request for interim measures. The state court, within its competence and in accordance with the procedure established by the procedural legislation of the Republic of Belarus, performs the request. See also question 7.1.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

As a basic rule, each party shall prove the facts in support of their claims and objections (article 31 of the Law "On arbitration courts"). Evidence must be relevant and admissible. The list of evidence, procedure of submission and research are established only with regard to proceedings in state courts. The tribunal defines the subject of proof based on the claims and objections of the parties, as well as on the law applicable to the case (scope of facts which have to be determined during the process).

The arbitral tribunal shall directly investigate all available evidence. The arbitral tribunal may, if it considers the evidence insufficient, invite the parties to submit additional evidence. Evidence is the information obtained in the manner prescribed by the civil or economic procedural legislation of the Republic of Belarus, on the basis of which the arbitral tribunal determines the presence or absence of circumstances justifying the claims and defences of the parties and other circumstances relevant to the proper resolution of the dispute.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Belarusian legislation does not establish disclosure procedures and there are no special rules of disclosure. Each party must present evidence confirming their claims and objections. The arbitral tribunal may order that a party disclose particular documents if they are relevant and admissible. There are no special provisions on the authority of the tribunal to obtain the evidence from the other party or a person who is not involved in the process.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

According to article 35 of the IAC Act, the arbitral tribunal – on its initiative or a party with the consent of the arbitral tribunal – may apply to the state court or a foreign court for assistance in obtaining evidence on the matters of the case. The state court will fulfil such request within its competence and in accordance with the procedure set by the procedural law of the Republic of Belarus. The IAC Act contains the abovementioned general reference; however, there is no established procedure on that.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Belarusian legislation does not establish any special rules on witness testimony or with regard to cross-examination. Oral witness testimony is more common than the production of written witness testimony. As a general rule, witnesses must attend the hearings and testify on the facts they know in person. There is not any sworn-in procedure.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

There is no special regulation on privilege rules under the law of Belarus. Attorneys cannot be examined as witnesses regarding circumstances that constitute attorney-client privilege and information that has become known while executing professional duties.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Such legal requirements are set forth in article 37 of the Law "On arbitration courts" and article 40 of the IAC Act.

Pursuant to article 37 of the Law "On arbitration courts", arbitral awards shall be in writing.

The arbitral award shall indicate the following:

- the date of award;
- the place of arbitration;
- the composition of the arbitral tribunal and the order of its formation;
- the name and location of entities which are parties to the arbitration, surnames, first names, place of residence (stay) of individuals who are parties to the arbitration, and bank details of the parties (for legal entities and individual entrepreneurs);
- the plaintiff's claims and objections of the defendant, petitions of the parties;
- circumstances of the case established by the arbitral tribunal, the evidence on which the arbitral tribunal made the conclusions about such circumstances and acts of legislation of the Republic of Belarus; and
- conclusions of the arbitral tribunal to grant or refuse each of the claims, as well as expenses associated with the arbitration proceedings, the order of distribution of these costs between the parties, if necessary, and the procedure and time frame for the execution of the arbitral tribunal.

Under article 40 of IAC Act, the award of the international arbitration court should specify the grounds on which it is based. The award should specify the date of its adoption and place of arbitration, determined in accordance with Article 26 of the IAC Act.

The award of the arbitral tribunal shall be signed by an arbitrator (in case of a sole arbitrator), and by all arbitrators, or by the majority of arbitrators, provided there is a valid reason for the absence of signatures of the other arbitrators.

There are no requirements for the signing of each page of an award and, in practice, only the last page of an award is signed.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Under article 42 of the IAC Act, the arbitral tribunal on its own initiative within 30 days from the date of rendering the arbitral award can correct any counting error, slip, typo or similar mistake, made in the arbitral award, and should also notify both parties about this.

Upon request of the parties, the arbitral tribunal can provide clarifications of any provision or part of an arbitral award, or render an additional award in regard to the claims which were submitted during proceedings, but have not been reflected in the arbitral award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

An arbitral award cannot be revised on the merits by the court. It may be set aside by the court only on certain grounds, an exhaustive list of which is given in article 43 of the IAC Act and article 47 of the Law "On arbitration courts".

The arbitral award may be set aside by the court if the party making the application furnishes proof that:

- a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the applicable law;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his case;
- the award deals with a 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; or

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

Furthermore, an arbitral award may be set aside if the court finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration under the law of Belarus; or
- the award is in conflict with the public policy of Belarus.

An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award.

If an arbitral award is made on a commercial dispute, the economic court of the region (of the city of Minsk) at the place of location of the international arbitration court has competence in setting aside. If an arbitral award is made on a non-commercial dispute, a district court in which territory the arbitral award is issued has competence in setting aside.

The court's decision on setting aside may be appealed in cassation.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

No, the parties cannot agree to exclude any basis of challenge against an arbitral award.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Provisions of the Belarusian legislation on challenging arbitral awards are mandatory and the parties cannot agree to make any changes.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Arbitral awards cannot be appealed. In respect of an arbitration award, an application to set aside the award may be submitted. This is an exclusive remedy (recourse) against arbitral awards. This application is considered by the court.

In accordance with article 251 of the EPC, the court considering the applications for setting aside the awards of international arbitration courts is the economic court of the region (city of Minsk) at the location of the international arbitration court.

In accordance with article 252 of the EPC, the application to set aside the award of the international arbitration court may be submitted within three months from the date of receipt of the award by the party.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Belarus ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 13 September 1960, and it came into force on 13 February 1961.

Belarus has entered the following reservation:

- with regard to awards made on the territory of non-contracting States, the State will apply the Convention only to the extent to which those States grant reciprocal treatment.

According to article 45 of the IAC Act, international arbitration awards (regardless of the country in which they were made) shall be recognised and enforced in accordance with the economic procedural legislation of the Republic of Belarus and its international treaties.

The procedure of recognition and enforcement of Foreign Arbitral Awards is set forth in chapter 28 of the EPC and Annex 4 of the CPC.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

On 24 November1992, Belarus ratified the Kyiv (CIS) Convention on the Settlement of Commercial Disputes.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

According to article 245 of the EPC, foreign arbitral awards are recognised and enforced by the national courts if such recognition and enforcement is stipulated by legislation or by an international treaty, or on the basis of the reciprocity principle.

A party seeking recognition and enforcement of an international arbitral award shall file, within three years from the issue date of the award, a respective written motion with the local court at the place of residence or location of the debtor, or at the place of the debtor's property, if the location or place of residence is unknown.

Article 246 of the EPC indicates elements which have to be provided in the motion. Such elements include: the name of the court to which the motion is submitted; and the name, location and composition of the foreign international arbitration court, etc.

The documents which have to be provided together with the motion are the same as those stipulated in article IV (1) of the New York Convention. Of particular importance is the document confirming the payment of the state fee. Mistakes on such documents are the most common grounds for rejection in the recognition and enforcement of foreign arbitral awards.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Arbitral awards are binding and enforceable, have *res judicata* and are executed on the basis of a writ issued by a state court.

National courts are not entitled to re-hear cases already decided by the arbitral tribunals.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

According to article 248 of the EPC, the economic court can refuse the recognition and enforcement of a foreign arbitral award if execution would contradict the public policy of the Republic of Belarus.

Article 1 of the IAC Act provides that the public policy is the basis of the law and order of the Republic of Belarus. This definition allows Belarusian courts to interpret "public policy" widely. At the same time, in practice, Belarusian courts apply public policy very rarely.

Generally, public policy in Belarus can be described as the fundamental principles of civil law and a person's constitutional rights.

The Belarusian legislation establishes special regulations on public policy. According to the Resolution of the Supreme Economic Court of the Republic of Belarus N 34 "On jurisdiction of disputes after assignment or debt transfer" (clause 6) dated 23 December 2005, the recognition and enforcement of the awards of foreign courts and foreign arbitration institutions shall be denied if all parties of the dispute are persons located (live) on the territory of the Republic of Belarus. Thus, Belarusian legislation establishes the general rule that the Belarusian entities (entrepreneurs) cannot conclude an arbitration agreement and transfer their disputes to foreign arbitration institutions.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Article 5 of the Law "On arbitration courts" determines the principles of the arbitration court, among which is the principle of confidentiality. Participants of the arbitration cannot disclose any information regarding an arbitration without the consent of the parties.

According to article 16 of the ICA at BCCI Rules, hearings are conducted confidentially. With the consent of the parties, the court may allow other persons, in addition to the parties and their representatives, to attend the hearing. Hearings are not public. Participants of hearings are required to keep confidential all information obtained during the case. The sole arbitrator or the Chairman of the arbitral tribunal shall notify participants of such circumstances.

There is no special regulation on confidentiality in arbitration proceedings in Belarus.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

No – such information cannot be used as evidence in other proceedings. At the same time, any information provided in one arbitral proceeding can be used in subsequent proceedings, taking into consideration the confidentiality of the previous arbitral proceeding.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The party can apply for any type of remedies, taking into consideration the arbitrability of the dispute. There are no restrictions for such remedies. With regard to damages, the concept of civil law provides that damages have to be compensated in full (actual costs incurred and lost profits). At the same time, punitive damages are not known in Belarus.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Belarusian legislation establishes a possibility to demand interest. According to article 366 of the Civil Code of the Republic of Belarus, compensatory interest on a sum shall be paid for wrongful use of funds (in Belarusian rubles only) due to their improper retention, evasion of their repayment, any other delay in their payment or unjustified receipt, or saving of funds at the expense of another person. The interest rate is determined by the rate of refinancing of the National Bank of the Republic of Belarus on the day of execution of the obligation or its corresponding part, excluding debt collection in court, when the court satisfies the claim of the creditor on the basis of the refinancing rate of the National Bank on the date of the decision.

A different interest rate may be established by law or by a contract.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The costs of arbitration proceedings include:

- the remuneration to the arbitrators;
- the arbitrator's costs of participation in the arbitration, including the arbitrator's travelling costs to the place of arbitration, examination of material evidences in their location;
- sums payable to the experts and translators;
- witnesses' expenses;
- costs of representatives' services;
- costs of organisational, material and other support related to an arbitration proceeding; and
- other expenses determined by the arbitral tribunal.

If the claim is granted or rejected partially, expenses shall be allocated between the parties proportionately with the granted sums, unless another order of allocation is determined in the arbitration agreement.

Costs of the winning party's representative's services and other expenses related to an arbitration proceeding might be imposed on the other party if the claim to compensate costs is raised within the arbitration proceeding and the arbitral tribunal upholds this claim.

If the claimant abandoned his claim, the respondent does not compensate incurred costs.

The order of the allocation of costs related to an arbitration proceeding is determined by the arbitral award.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The arbitral award itself is not subject to tax in Belarus.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Belarusian legislation does not provide any regulation on the possibility to fund claims in Belarus. In practice, such services are

rendered by the law firms (advocates) and clients pay in the same way as for regular legal services. Thus, there are no professional funders in the Belarusian market at the moment.

Under article 58 of the Rules of Advocates, a professional ethics advocate should not undertake obligations on legal assistance provisions, under the condition that fees would depend on the future results.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Belarus signed and ratified the ICSID Convention. The ICSID Convention entered into force for Belarus on 9 August 1992.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Belarus participates in more than 60 bilateral investment agreements. Belarus has signed agreements with the United States of America, the Federal Republic of Germany, Bosnia and Herzegovina, the Turkish Republic, the Kingdom of Sweden, and the Netherlands. Inter-governmental agreements have been concluded with Finland, Oman, Denmark, the economic union of Belgium and Luxembourg, Austria, Israel, Moldova, Kyrgyzstan, Latvia, the Czech Republic, Romania, France, Ukraine, the United Kingdom of Great Britain and Northern Ireland, Vietnam, China and others.

Belarus is a party to the Agreement on the Eurasian Economic Union, where Annex No. 16 regulates investment among Belarus, Russia, Armenia, Kazakhstan and Kyrgyz Republic.

The Republic of Belarus acceded to the Convention Establishing the Multilateral Investment Guarantee Agency (concluded on 11 October 1985; entered into legal force on 3 December 1992) being a member of the agency.

International agreements, such as the Agreement on Cooperation in the Sphere of Investment Activities dated 24 December 1993 in which all CIS states participate (except for Russia) and the Convention on the Protection of Investor's Rights 1997 (which remains in force for Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, and Tajikistan), have great importance.

Belarus has not concluded bilateral agreements on the matters of international commercial arbitration. However, most bilateral investment treaties usually include provisions about dispute settlements between investors from one state and the host state by means of arbitration.

Under a bilateral investment agreement, the dispute between an investor and a receiving state can be settled in the International Centre for Settlement of Investment Disputes, acting on the basis of the Washington Convention 1965 (the majority of bilateral investment agreements), and in an *ad hoc* arbitration under the UNCITRAL Arbitration Rules 1976 (agreements with Austria, South Korea, Yugoslavia) or the ICC Arbitration Court in Paris (agreement with Turkey).

With regards to the Energy Charter Treaty, Belarus accepted provisional application of the Treaty, which means that – pending ratification – it agreed to apply the Treaty to the extent that it is consistent with the constitutions, laws and regulations of Belarus.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Investment treaties in most cases use the "most favoured nation" regime.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Belarus or its state entities may enter into arbitration agreements. They may also become a party to an international arbitration. Belarusian state courts can be asked to enforce awards against a state or state entity.

According to article 239 of the EPC, a foreign country acting in the capacity of a sovereign has judicial immunity against a claim submitted to the economic court, its participation as a third person, the imposing of an arrest on the property belonging to the foreign country and located in the territory of the Republic of Belarus, and the taking of measures to secure the claim and property interests. Application of recovery on such property by way of enforcement of the court resolution shall be allowed only with the consent of the competent bodies of the corresponding country, unless otherwise stipulated by legislative acts or international treaties of the Republic of Belarus.

The judicial immunity of international organisations is defined by international treaties of the Republic of Belarus.

A waiver of judicial immunity shall be executed under the procedure established by legislation of the corresponding country, or rules of the relevant international organisation. If immunity is disputed, the economic court shall consider the case under the procedure established by EPC.

According to article 553 of the CPC, it is only possible to sue a foreign state, take measures to secure the claim and recover property of a foreign state located in the Republic of Belarus, with the consent of the competent authorities of that state (waived).

Thus, under both codes, execution of foreign judgments and arbitral awards against a state is allowed only with the consent of the competent authorities of that state.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

No significant trend is expected in the near future.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

There have been no recent steps taken by arbitral institutions in this regard. However, with regard to international arbitration, the IAC at BCCI Rules require the arbitral tribunal to consider the dispute and render the award within six months of its formation. In practice, the IAC at BCCI endeavours to ensure observation of this time limit.

At the present moment, there are two different regulations for regular arbitration and simplified arbitration (expedited arbitration), which are available in domestic arbitration proceedings.

With regard to the resolving of disputes involving Belarusian entities (entrepreneurs), in cases where the sum of the dispute is not more than 10,000 basic units (approx. USD 115,000), an established simplified procedure (expedited arbitration) is applied. In such procedure the sole arbitrator has to conduct the case and make an award within three months from the time of the formation of the arbitral tribunal. As a general rule, in such procedure there is no hearing and arbitration is conducting on the basis of documents.

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Bulgaria

Georgiev, Todorov & Co.

Tsvetelina Dimitrova

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The arbitration agreement may be incorporated in a contract as an arbitration clause or it could be a separate agreement. In any case, the arbitration agreement as any other agreement has to comply with the requirements of the law for its validity, namely requirements for legal capacity of the parties (according to *lex personalis*), form of the agreement and capability of the dispute to be settled by arbitration. The specific rules regarding the arbitration agreement in Bulgaria are incorporated in the International Commercial Arbitration Act (ICCA). Art.7, para.2 of ICAA sets the requirement that the arbitration agreement has to be in written form. It is deemed that the agreement is in writing when it is evidenced in a document, signed by the parties, or in the exchange of letters, telex, telegrams or other communication means shall also be considered that the arbitration agreement is evidenced in writing when the defendant accepts in writing or by declaration, recorded in the minutes of the arbitration hearing that the dispute shall be settled by the arbitration or in case the defendant participates in the arbitration proceedings without challenging the arbitration jurisdiction.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The arbitration agreement may contain provisions regarding the choice of material and substantive law (if any), the scope of the arbitration, whether the arbitration is *ad hoc* or institutional, the seat of arbitration, the number of arbitrators, rules for the composition and constitution of the arbitral tribunal, procedural rules and such for the collecting of evidence, as well as the term for initiation of arbitration proceedings or the term for validity of the arbitration clause.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The arbitration agreement itself does not affect the competence of the court to hear the dispute in relation to which the agreement is entered into. Nevertheless, pursuant to Art.8 of ICAA, if the respondent raises an objection that the dispute should be subject to arbitration proceedings within the term for the submission of the statement of defence, the court is obliged to terminate the case, the court resolution being subject to further appeal.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Domestic Sources:

International Commercial Arbitration Act 1988 (ICAA)

The International Commercial Arbitration Act (ICAA), enacted in 1988, as amended from time to time (lastly with SG. 8/24 Jan 2017), provides an elaborate and modern regulation on the commercial arbitration. ICAA is the main domestic source of law in the area of arbitration, both domestic and international.

Civil Procedure Code 2008 (CPC)

Art.19 deals with the arbitration agreement and its form and determines the eligibility of the disputes to be subject to arbitration. Arts.404–409 determine the grounds and procedures for issuance of a writ of execution, including on the basis of an arbitral award and settlements where the seat of arbitration is in Bulgaria. As far as the courts of law have jurisdiction over some issues related to the arbitration proceedings, they apply CPC when they intervene.

International Private Law Code 2005 (IPLC)

Apart from the conflict of law rules relevant to the determination of the law applicable to the substance of the dispute that is subject to an arbitration (derogated by Rome I for contracts entered into after December 17th, 2009), the Code also contains the procedural rules for the recognition and enforcement of a foreign court decision, to which ICAA expressly refers to regarding the recognition and enforcement of foreign arbitral awards. IPLC rules regarding the law applicable to contractual obligations very closely follow the Rome Convention substituted by Rome I and in force for Bulgaria since the EU accession as of January 1st, 2007.

International Sources:

Convention for Recognition and Enforcement of Foreign Arbitration Awards (New York Convention).

For more details see question 11.1 below.

European Convention for International Commercial Arbitration (European Convention) to which Bulgaria made no reservations or declarations.

Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (Washington Convention).

Bilateral Mutual Legal Assistance Treaties.

Bulgaria is a party to bilateral mutual legal assistance treaties with several countries, some of them containing rules on the mutual recognition and enforcement of arbitral awards and even the settlements reached before the arbitration. These rules provide for conditions for refusal for recognition and enforcement that usually slightly differ from those set out in Art.5 of the New York Convention.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

ICAA governs both domestic and international arbitration. According to Art.1, para.1 of ICAA, the provisions of ICAA apply to international commercial arbitration, based on an arbitration agreement when the place of arbitration is within the territory of the Republic of Bulgaria, as well as to cases of arbitration between parties with residence or a seat in the Republic of Bulgaria (domestic arbitration), apart from the requirement that a foreign national be an arbitrator (except in the cases when a party to the dispute is an enterprise with predominantly foreign shareholders) and the possibility that the language of arbitration be one other than Bulgarian.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

ICAA is based on the UNCITRAL Model Arbitration Law 1985 (the Model Law) and implements its principles and most of its recommendations, but ICAA has not been updated according to the amendments to the UNCITRAL Model Arbitration Law as of 2006. Following the model of arbitration provided by the Model Law, ICAA covers all stages of the arbitral procedure, from the arbitration agreement to the setting aside of the award and recognition and enforcement of a foreign award.

There are certain differences with the Model Law, among which the following are noteworthy: the Bulgarian law does not apply the concept of nullity *vis-à-vis* arbitration awards; ICAA does not provide an opportunity for the suspension of the setting aside proceedings in order for a chance to be given for additional actions that may eliminate the grounds for setting aside; and although not explicitly provided in ICAA, the case law held that when the award is challenged on a ground that affects only a part of it and this part is separable and relatively independent from the rest of the award, only this part of the award may be set aside.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The rules regarding the arbitrability of the disputes are mandatory, as well as the form of the validity of the arbitration agreement and the legal capacity of the parties to enter into an arbitration agreement, along with the principle of equal treatment of the parties. In addition, the conflict of laws rules which are part of the Bulgarian International Private Law contain mandatory provisions, as specified in question 4.2 below.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Pursuant to Art.19, para.1 of CPC, any civil or commercial property dispute is capable of settlement by arbitration except for disputes in respect of any rights *in rem* or possession of real estate, maintenance obligations (e.g. alimony) or rights under an employment relationship or dispute, where one of the parties is a consumer under §13, item 1 of the Additional Provisions of the Consumer Protection Act. *Per argumentum a contrario* from the provision of Art.19 of CPC, any dispute other than a civil or commercial property dispute is also not allowed to be settled by arbitration. These are either disputes that are not civil or commercial, e.g. administrative disputes or non-pecuniary disputes such as disputes concerning personal rights (e.g. parental rights) or the legal status of a natural person (e.g. divorce, establishment of origin) or legal entities.

The provisions concerning the capability of a dispute to be settled by arbitration are imperative. An arbitral agreement related to a dispute that is not capable of being settled by arbitration will be null and void under Bulgarian law and the award based on such an agreement shall be void as per Art.47, para.2 of ICAA when the seat of arbitration is in Bulgaria. Otherwise, when the seat of arbitration is in another country, the Bulgarian court may reject, as per Art.5, para.2 of the New York Convention, any claim for the recognition and enforcement of foreign arbitral awards related to a dispute that falls within the exclusive jurisdiction of the courts of law according to the Bulgarian law.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The arbitral tribunal is permitted to rule on its own jurisdiction as a preliminary question with a separate ruling or to decide on it with its final award on the merits. Unlike the Model Law (which provides the arbitration ruling upon the request of a party to be reconsidered by a court of law), ICAA provides that in any case the decision of the arbitral tribunal on its jurisdiction is final and subject to no appeal.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

As described in question 1.3 above, Art.8 of ICAA provides that the court of law in front of which a claim is pending related to a dispute, subject to an arbitration agreement, is obliged to terminate the case if the respondent refers to the arbitration agreement within the time limit for submitting the statement of defence. The provision is mandatory and applies irrespective of whether the arbitration agreement envisages arbitration in Bulgaria or abroad. The court may terminate the case unless it finds that the arbitration agreement is null and void or that it has lost its validity or it is impossible to be executed. The court ruling for termination of the case is subject to appeal. If the court decides that it is not prevented from hearing the case, this finding is not subject to a separate appeal, but may be appealed along with the judgment on the merits of the case.

On the other hand, when the claimant has ignored the arbitration agreement and has brought an action to the court, and the respondent within the time limit does not object to the jurisdiction of the court, it is deemed that the parties' consent to arbitrate the same dispute no longer exists and the arbitration agreement is terminated. In this case, the jurisdiction of the arbitration is also terminated and the court of law has to consider the case.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

ICAA provides as a principle that, in any case, the decision of the arbitral tribunal on its jurisdiction is final and subject to no appeal. However, regarding the jurisdiction and the competence of the arbitral tribunal, it should be pointed out that among the grounds for challenging the award, exhaustively listed in Art.47 of ICAA, the following are relevant:

- the subject matter of the dispute is not subject to arbitration (Art.47, para.2 ICAA); and
- the award settled a dispute which had not been provided for in the arbitration agreement or contains decisions on issues beyond the scope of the dispute (Art.47, para.1, item 5 of ICAA).

In the former case, the Supreme Court of Cassation which is the competent court to consider the challenge of the award shall assume that the award is void according to Art.47, para.2, and any party may submit the dispute to the competent court of law, which will consider it in conformity with CPC.

In the latter, when the ground for repeal is under Art.47, para.1, item 5 of ICCA, the Supreme Court of Cassation will refer the case back to the arbitral tribunal for re-trial.

It should be pointed out that when the state court holds that the trial is not within its jurisdiction and it should be referred to arbitration, this ruling binds the arbitral tribunal in its assessment on competence.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

As an agreement, the arbitration agreement has legal effect only *vis-à-vis* the parties to it. Nevertheless, in some cases it has effect *vis-à-vis* a third party.

- Although there is no case law of the courts of law, it is widely held among the Bulgarian arbitration courts that in case of assignment of receivables or debts the arbitration clause included in the respective agreement has legal effect between the assignee and a third party, this third party being a debtor or creditor of the assignor pursuant to the agreement assigned (although between the assignee and the counter-party there is no arbitration agreement).
- The same is applicable in case of a contract for transfer of a commercial enterprise between the assignee and the counter-parties of the assignor pursuant to agreements – part of the commercial enterprise, containing an arbitration clause.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no specific laws or regulations which provide procedural limitation periods for the commencement of arbitrations in Bulgaria. However, the general principles of the Bulgarian Private Law apply, and thus the commencement of arbitration proceedings is subject to a prescription period, which is considered as a substantive law issue. The typical length of the prescription period is five years, but there are exceptions, prescribed explicitly by statutes, which require shorter periods (e.g. three years for periodic payments, etc.).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pursuant to Art.637 of CPC, upon institution of insolvency proceedings, arbitration proceedings under pecuniary civil and commercial cases against the debtor, shall be stopped. However, Art.637 of CPC shall not apply in case on the date of institution of the insolvency proceedings, on another case where the debtor is respondent, the court (or the arbitration court) has admitted for a concurrent hearing of the counter-claim of the debtor or objection for set-off made by him. This provision also governs exceptions, as well as conditions for continuing and termination of the arbitral proceeding, stopped due to institution of insolvency proceedings.

In addition, pursuant Art.637, para.6 of CPC, upon institution of the insolvency proceedings it shall be inadmissible to institute new arbitration proceedings on pecuniary civil or commercial cases against the debtor, subject to several exceptions.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

According to ICAA, the arbitral award has to be based on the applicable law only and, thus, the arbitral tribunal may not decide *ex aequo et bono* or as amiable compositeur. Art.38 of ICAA generally provides that the arbitral tribunal applies the law selected by the parties and in the absence of choice – the law applicable according to the conflict of laws rules that it deems applicable. As far as the seat of the arbitration is in Bulgaria, the arbitral tribunal will apply the Bulgarian International Private Law.

The detailed provisions of Bulgarian International Private Law are codified in the Code for International Private Law (IPLC), but following the accession of Bulgaria to the EU, in the area of the contractual obligations, they are substituted by Rome Regulation I for contracts entered into after December 17th, 2009. In any case, the arbitration tribunal applies the conditions of the contract and takes into consideration the trade customs.

The arbitration tribunal settles the dispute in conformity with the law selected by the parties. When the parties have not specified their choice of applicable law, the arbitration tribunal applies the law indicated applicable pursuant to Rome I Regulation. The general

rule is that the law of the country where the party, required to effect the characteristic performance of the contract, has his habitual residence (established by the IPLC and the Rome Convention) is considered as the applicable one and is combined with a very detailed set of conflict of law rules for a concrete type of contract and thus is not directly applied often.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The freedom of the parties to select the applicable law and the application of the law determined as a governing one by the arbitration court is restricted in several ways:

- Apart from the applicable law (selected or determined according to the conflict of law rules), the over-riding mandatory provisions of the law of the forum also apply.
- The over-riding mandatory provisions of the law of the country where the contractual obligation has to be or has been performed, is also applicable insofar as they make the performance of the contract unlawful.

  In both these cases, the applicable law is supplemented by rules of the law of another country although this is not the applicable law.
- The application of a provision of the applicable law may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

  In this case a provision of the applicable law is not applied despite its principle applicability. According to Art.45, para.3 of IPLC, the arbitration tribunal has to apply another appropriate provision from the same applicable law, and only if (1) there is no such provision in the applicable law, and (2) it is necessary for the settlement of the case, a provision of the Bulgarian law as a law of the forum may be applied by the tribunal.
- Further restriction applies where apart from the choice of law all other elements relevant to the situation at the time of the choice are located in a country other than the one the law of which has been chosen. In such case, the provisions of the law of the other country which cannot be derogated from by an agreement (mandatory provisions) are also applicable.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Usually, the law of the seat of arbitration is applicable also to the arbitral agreement, but the parties may choose another law to apply to the arbitral agreement. Both laws should be adhered to, as the arbitration award will be rendered and respectively challenged in the state of the seat of arbitration. The award may be set aside due to the inability of the dispute to be subject to arbitration, according to the law of the state of the seat of the arbitration.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The law does not provide for any requirements and limitations with relation to the qualification of the arbitrators. In case of arbitration between parties with residence or seat in the Republic of Bulgaria (domestic arbitration), a foreign national may not be an arbitrator (except in the cases when a party to the dispute is an enterprise with predominantly foreign shareholders). The parties may agree that the dispute will be arbitrated by an arbitrator or arbitrators with specific qualifications. The rules of the arbitration courts may provide for requirements to be satisfied by the arbitrators (e.g., to be legal professionals). Usually Bulgarian courts of arbitration maintain a list of arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties fail to agree on the appointment of arbitrators, the appointing authority is obliged to select an arbitrator taking into consideration his or her qualifications as they have been agreed by the parties, as well as all circumstances which ensure the appointment of independent and impartial arbitrator.

The parties may determine the procedure for the composition of the arbitral tribunal. If they fail to agree on the procedure, the default rules of ICAA apply. They provide as an appointing institution:

- in a case of a commercial dispute – the President of the Bulgarian Chamber of Commerce and Industry; and
- in a case of non-commercial dispute – the Sofia City Court.

Usually, when an arbitration court is agreed, its rules provide the arbitration institution (via the president of the respective arbitration court) to act as an appointing authority.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court cannot intervene in the selection of arbitrators (apart from the case where the court acts as an appointing authority as per ICCA rules – see question 5.2), but has the authority to rule on the subsequent challenge of an arbitrator.

If the challenge of an arbitrator by a party is rejected by the arbitral tribunal, the party who initiated it may request, within seven days upon receiving the notification about the decision, the Sofia City Court to decide on the challenge. The court considers the petition in compliance with the CPC rules in respect of appeal of rulings. The applicability of the rule providing for a court review of the tribunal's decision on the challenge of an arbitrator may not be derogated by the parties.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

An arbitrator must be impartial and independent from the parties. The provision of Art.13 of ICAA imposes an obligation to any person who is approached with an offer to be nominated as an arbitrator or is appointed as arbitrator to disclose all circumstances that may raise any justifiable doubts as to his or her impartiality or independence. This obligation remains during the whole arbitration procedure and the arbitrator has to reveal without delay any such circumstances that have arisen after the appointment. In its recent judgment (Judgment number 158 as of December 28th, 2012 on commercial case 709/2012 of Commercial Division), the Supreme Court of Cassation held that the non-disclosure by an arbitrator of facts which are relevant to his independence and to the lack of relations between the arbitrator and a party constitutes ground for repeal of the arbitral award. Moreover, this arbitral award has been repealed on the grounds of *ordre public* since the default of the arbitrator to disclose its relations with the legal representative of one of the parties is in breach of the right of the other party to a fair trial. Furthermore, in this judgment the

Supreme Court of Cassation applied broader criteria for assessment of the independency and impartiality of the arbitrators – it held that this assessment is not based only on formal legal definitions or on relations which are explicitly defined as such by statutes, but that one should apply the statute in order to achieve its aim, not to be limited by the literal meaning of the respective provisions. This judgment is an important step towards the development of a case law on the impartiality and independency of the arbitrators.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Based on the Model Law, ICAA provides basic rules covering all stages of the arbitral process, leaving the parties with vast possibilities to modify or replace most of them with other rules to be agreed among the parties. There are only several mandatory provisions related to the fundamental principles of the arbitration or the public order, from which the parties to all arbitral proceedings cannot deviate, such as the scope of the arbitration, the courts of law intervention, the form of the arbitral agreement, the challenge of an arbitrator, the termination of the powers of the arbitral tribunal; setting aside the arbitral award and recognition and enforcement of the arbitral award are also mandatory and apply to all arbitral proceedings sited in Bulgaria.

So the parties are entitled to choose: an arbitration court or arbitration *ad hoc* to determine the number of arbitrators; the appointment procedures, including the appointment institution; the procedural rules to be followed during the case, including the rules for taking evidence; and the language and the seat of arbitration, etc.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The initial stages of the arbitration proceedings are elaborated in ICAA in a way providing each party with a possibility to present its case. The following procedural steps are required by law:

- The claim and the answer have to be presented within a time period agreed on by the parties or determined by the arbitral tribunal. If the claimant fails to submit the statement of claim within the time limit, the tribunal terminates the proceedings, unless the failure is justified.
- Art.27 of ICAA provides requirements regarding the content of the statement of claim and the statement of defence.
- The respondent may file a counter-claim at the latest with the statement of defence.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no specific rules that govern the conduct of counsel in arbitral proceedings. The general rules of conduct, envisaged in the Attorney Act, are applicable only for legal representation before state courts.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitrators are empowered to decide on: (1) jurisdictional issues; (2) procedural issues (including the rules on gathering of evidence) – in an absence of procedural rules agreed by the parties, the arbitrator decides on the rules to be followed, providing the parties with equal opportunities in the proceedings; (3) merits of the case; and (4) requests for correction and interpretation of the arbitration award.

The arbitrators have the duty to act impartially and independently and to disclose the circumstances, specified in question 5.4.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The relevant act which governs this issue is the Bulgarian Attorney Act. It establishes strict limitations on the ability of lawyers from other jurisdictions to represent parties in Bulgarian judicial proceedings, but they are irrelevant for arbitration proceedings. There are not any restrictions, established in ICCA, based on nationality or legal capacity of the lawyers and legal counsels representing parties to arbitral proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no laws or regulations which provide for immunity for arbitrators.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The Bulgarian courts do not have the power to intervene in procedural issues, which arise during an arbitration proceeding.

Under specified circumstances (set out in Art.47, para.1, items 4 and 6 of ICCA), the Supreme Court of Cassation may subsequently (when considering the challenge of the award) assess the compliance with the mandatory rules concerning the composition of the arbitral tribunal and the notification of the parties for appointment of an arbitrator or commencement of the arbitration proceedings.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Concerning the interim measures ordered by the arbitral tribunal or the court, ICAA adheres to the original text of Art.17 of the Model Law, adopted in 1985. The provisions of the new Chapter IV A of the Model Law, adopted in 2006, are not implemented in Bulgarian law. In principle, the courts of law are competent to pronounce interim measures. Although, according to Art.21 of ICAA, the arbitral tribunal may order one of the parties to undertake appropriate measures for securing the rights of the other, under Bulgarian law, the provisional measures ordered by an arbitral tribunal seated in Bulgaria may not be enforced. CPC rules on the enforcement of

provisional measures are applicable only when the measures are ordered by a court of law.

ICAA does not provide for specific types of provisional measures. Nevertheless, the most effective and most frequently ordered ones – garnishments, real estate liens, etc. may be ordered only by the courts of law and imposed by bailiffs.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The court is entitled to order the preliminary measures, if so requested by the party to the arbitration proceeding in order to secure their rights. ICAA does not provide explicitly for conditions for ordering the provisional measures. So when the Bulgarian law is the applicable procedural law, the arbitral tribunals usually apply the conditions established in the CPC and applied by the courts of law (but the remark regarding their enforceability in question 7.1 should be borne in mind).

The circumstances under which interim measures are imposed by the national courts are:

(1) there is a reasonable possibility the requesting party to succeed on the merits of the case, the determination of the tribunal being based on the relevant written evidence presented;

(2) there is a need for a provisional measure to be ordered; and

(3) the provisional measure will not result in harm not adequately reparable by compensation for damages.

Provided the claim is not filed yet, it has to be filed within a period of time to be determined by the court which may not be longer than one month.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The Bulgarian courts usually deal with the requests for interim relief by a party to an arbitration agreement under the same criteria and within the same periods of time as the requests related to claims filed in front of the courts of law.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

An anti-suit injunction is not allowed under Bulgarian law.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Bulgarian law does not allow either a national court or an arbitral tribunal to order security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Preliminary relief granted by an arbitral tribunal is not enforceable under Bulgarian law. It is generally accepted in theory and practice that the preliminary relief granted by an arbitral tribunal is subject to voluntarily compliance of the parties to the dispute.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

ICAA rules on the taking of evidence are rather general. So the arbitration court usually applies the evidentiary rules agreed by the parties or, in the absence of such agreement, the rules determined by the tribunal and notified to the parties. It is common for the parties to use some rules of CPC on the taking of evidence, which are usually agreed or determined as the applicable ones.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The current legislation does not provide any specific requirements regarding this issue. Each party may ask the other party to disclose a document and the arbitral tribunal decides on the request depending on the relevance and availability of the document and taking into consideration other reasons as well (confidentiality, classified information, etc.). Provided a disclosure is ordered and the party fails to disclose the document, the tribunal may infer that such document would be adverse to the interest of the party. There are no specific provisions regarding the attendance of witnesses. The tribunal may order appearance, but the witness is not obliged to attend the hearing.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Art.37 of ICCA allows the tribunal and a party with the tribunal's approval to request from the competent court of law to take relevant evidence. This opportunity is used usually for the disclosure of documents from a non-party in the proceedings. However, the court may not require the attendance of witnesses before the arbitral tribunal.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

In addition to the above-mentioned (in question 8.1) peculiarities of the rules on the taking of evidence, ICAA stipulates that during the proceedings the tribunal may examine witnesses of facts, appoint expert witnesses or inspect documents, goods or other evidence. It may summon the expert witness upon request by any of the parties or upon its own initiative and oblige the expert witness after submitting his/her report to participate in the hearing in order to give clarifications.

When the taking of some evidence relevant for the case depends on a third party's cooperation, the tribunal on its initiative or at a request of the party concerned may ask the competent court of law to take it. The Bulgarian court of law may summon and examine a witness reluctant to appear voluntarily in front of the arbitral tribunal. If the witness refuses to appear in front of the court of law he/she may be fined and made to appear involuntarily.

There is not a requirement for witnesses to be sworn in before the tribunal. Cross-examination is allowed.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Bulgarian law does not provide any rules on privileged documents in arbitration proceedings, and respectively no rules on waiver of privilege exist.

As per the Bulgarian Attorney Act, attorney-at-law papers, files, electronic documents, computer equipment and other carriers of information are privileged and confidential. Correspondence between an attorney-at-law and a client, irrespective of the manner it is maintained, including electronically, is as well privileged and confidential. So the carriers of this privileged and confidential information may not be used as evidence, including in arbitration proceedings.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

- Majority: Where the arbitrators are more than one, the award is rendered by the majority, unless the parties have agreed otherwise. The arbitrator who does not agree with the award shall set out a dissenting opinion in writing. If a majority cannot be constituted, the award is rendered by the presiding arbitrator.
- Reasons: The award has to contain reasons, unless the parties have agreed otherwise or it is an award rendered on agreed conditions.
- Signatures: The award is signed by the arbitrator or the arbitrators. In the case of arbitration with the participation of more than one arbitrator, the signatures of the majority of the members of the arbitration tribunal shall be considered sufficient if the signatories have stated the reason for the missing signature.

An award by consent may be pronounced on the basis of a joint request of the parties enclosed with the settlement agreed. There is no need to provide reasons in this case.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

According to Art.43.(1) of ICCA, the arbitral tribunal, upon request of either party or on its own initiative, may **correct** the award in connection with any computation errors as well as any other evident factual error made by it. The other party shall be informed for the so requested correction by the petitioner or by the arbitration tribunal if it acts on its own initiative. Each party after informing the other one shall be entitled to **request from the arbitration tribunal to interpret the award**. The request for the correction or interpretation shall be made within a period of 60 days after the receipt of the award unless another time limit has been agreed by the parties. When the arbitration tribunal acts on its own initiative it shall make the correction within 60 days from the announcement of the award. The arbitration tribunal shall make the correction or the interpretation after hearing the parties or after giving them the opportunity to forward written statements within the time limit determined by it. It shall decide on the correction or the interpretation within 30 days from the request. The corrections and the interpretations shall become part of the award.

In addition, the arbitral tribunal may give an **additional award** upon request from either of the parties on claims omitted in the first award. The party that requests the additional award shall inform the other party for the request within 30 days from the receipt of the award. Given the request is well-grounded, the arbitration tribunal renders the additional award within 60 days.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The award may be challenged only on limited grounds, which are equal to those prescribed by the Model Law and the European Convention, and only within a limited period of time – three months from the day the claimant has received the award.

The grounds for challenging the award are listed in Art.47 of ICAA and are the following:

- the party lacked capacity at the time of the conclusion of the arbitration agreement;
- the arbitration agreement had not been concluded or is void pursuant to the law chosen by the parties, and in the case of absence of such a choice, pursuant to this law;
- a party had not been duly notified of the appointment of an arbitrator or of the arbitration proceedings or due to reasons beyond its control it could not participate in the proceedings;
- the award settled a dispute which had not been provided for in the arbitration agreement or contains decisions on issues beyond the scope of the dispute; or
- the constitution of the arbitration tribunal of the arbitration procedure was not in conformity with the agreement between the parties unless it contradicted the imperative provisions of this law (i.e. ICAA), and in the absence of an agreement – in case the provisions of this law had not been applied.

It should be noted that in the latest amendments of ICCA, Art.47, para.2 provides that arbitration decisions handed down in disputes, the object of which is not subject to arbitration, shall be void.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The provision of Art.47 of ICAA is mandatory and none of the grounds for the challenge of the award can be excluded or reduced by the parties.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

In relation to question 10.2 and the mandatory character of the provision of Art.47 of ICAA, the parties cannot expand the scope of appeal of an arbitral award beyond the ground listed in the provision.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Each party may challenge the award. ICAA specifies the competent court for considering the claim, namely the Supreme Court of Cassation. It acts as a court of first instance applying CPC rules for hearing of the case by a first instance court, but its decision is final and is subject to no appeal.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The New York Convention was signed by Bulgaria on December 17th, 1961 and has been in force since January 8th, 1962.

Upon ratification, Bulgaria made a reservation pursuant to Art.1, para.3, sent.I of the Convention, so the New York Convention is applicable to arbitral awards issued in the territory of another contracting state. It is applied in respect of awards issued in the territory of non-contracting states on the basis of strict reciprocity – only to the extent to which those states grant reciprocal treatment of Bulgarian arbitral awards.

The relevant national legislation is ICAA. Art.51, para.2 of ICAA refers to the international instruments to which Bulgaria is a party in respect of the recognition and enforcement of foreign arbitral awards. As a result, no implementing legislation has been enacted. The New York convention is directly applied by the Bulgarian courts and thus any risk of incorrect implementation in the national legislation has been avoided.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Bulgaria is a party to the European Convention for International Commercial Arbitration (see question 2.1 above).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

An award rendered by an arbitration with a place in Bulgaria may be directly enforced in Bulgaria. According to Art.51, para.1 of ICAA, the Sofia City Court issues, upon request of the party, a writ of execution only on the basis of the award and a proof that the award is delivered to the debtor.

Foreign arbitral awards are subject to recognition and enforcement.

According to the provision of Art.51, para.3 of ICAA, the actions for recognition and admission to the enforcement of foreign arbitral awards and of the settlements reached before foreign arbitration courts have to be brought before the Sofia City Court and Arts.118 to 122 of PILC shall apply, *mutatis mutandis*, to the hearing of such actions. The mentioned provisions of the PILC are applicable to foreign arbitral awards only as far as they are compatible with the New York Convention. The enforcement and admission may be refused only on the grounds of Art.5 of the New York Convention. The court cannot retry the case on the merits.

The decision of the Sofia City Court is subject to an appeal in front of the Sofia Court of Appeal, the decision of which may be appealed in front of the Supreme Court of Cassation.

After their recognition and admission, the foreign awards become enforceable in Bulgaria. The court of the enforcement (the Sofia City Court) upon request of the creditor may issue a writ of execution, which will be handed to the creditor only after the decision on enforcement has entered into force – Art.405 of CPC.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Pursuant to Art.41, para.1 of ICAA, when the arbitral award is being served, it becomes valid and binding for the parties and enforceable. Thus, the award possesses *res judicata* which is the same as that of the judgments. Due to the fact that the arbitral award is related to and derives from the arbitration agreement, *res judicata* of the award has the same subjective scope (the category of parties to which *res judicata* applies) as that of the agreement, i.e. it is binding on the parties only, not on third parties.

The award will have *res judicata* and the dispute settled by it cannot be re-examined in court or arbitration proceedings. The final arbitral award shall be binding upon the parties and the public authorities in Bulgaria.

ICCA does not provide for any type of revision of the award, including on the grounds of the discovery of some unknown facts affecting decisively the award. So setting aside as described in question 10.1 is an exclusive recourse against the arbitral award.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Usually, the most fundamental principles of Bulgarian law (e.g. violation of the principle of equal treatment of the parties) are deemed to form the public policy.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

ICAA is silent on this issue, but as a standard practice the arbitration proceedings in Bulgaria are confidential. However, arbitration courts in their rules usually explicitly provide for confidentiality of the proceedings. For example, the Rules of Arbitration of the Arbitration court with the Bulgarian Chamber of Commerce and Industry provides for non-public proceedings.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings cannot be referred to and cannot be relied on in subsequent court or arbitral proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The types of remedies to be awarded and the limits on them depend on the applicable substantive law. Bulgarian law does not provide punitive damages, as well as most of the civil law jurisdictions.

13.2 What, if any, interest is available, and how is the rate of interest determined?

This issue is also governed by the applicable substantive law. If this is Bulgarian law, a statutory interest rate equal to the basic interest rate determined by the Bulgarian National Bank plus 10% is applied to the late payments.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The allocation of the costs is based on the principle that the costs (arbitration fees and expenses, expenses for gathering evidence and reasonable attorneys' fees made) are to be borne by the unsuccessful party.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The arbitration award itself is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no statutory restrictions on third parties funding claims. It is the obligation of the party which brings the claim to provide evidence for the payment of the respective fee and the source of the funds is not examined. Contingency fees are legal and are used in Bulgaria in relation to civil and commercial claims in front of national courts. To our best knowledge, there are no "professional" funders active in the Bulgarian market for legal services.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Bulgaria ratified the Washington Convention on October 4th, 2000.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Bulgaria is party to around 38 BITs. Bulgaria is also party to the Energy Charter Treaty and the Convention on Establishing the Multilateral Investment Guarantee Agency.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

It cannot be concluded that the wording of the Bulgarian BITs has peculiarities far more different from the standard terms and provisions in BITs of the OECD countries.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The sources which govern this issue are both international and domestic. Among the former are the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), bilateral consular conventions to which Bulgaria is a party and general principles of international law. Bulgaria is not a signatory to the European Convention on State Immunity.

The latter category comprises the relevant provisions of CPC, there are not specific statutes which deals with state immunity.

The provision of Art.18, para.1 of CPC stipulates that the Bulgarian courts are competent on claims, a party to which is a foreign state, as well as and a person who has court immunity, in the following cases:

1. in event of a waiver of court immunity;
2. on claims, grounded on contractual relations, where the performance of the obligation shall be in the Republic of Bulgaria;
3. on claims for damages from tort, done in the Republic of Bulgaria;
4. on claims regarding rights to succession property and vacant succession in the Republic of Bulgaria; or
5. on lawsuits, which are under the exclusive jurisdiction of the Bulgarian courts.

The provisions of para.1, items 2, 3 and 4 shall not be applied for legal transactions and actions, performed in execution of official functions of the persons, respectively in relation with the exercising of sovereign rights of the foreign state.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

According to the latest amendments in the Bulgarian legislation, an arbitrator may be an able-bodied citizen of legal age who has not been convicted of an intentional crime of a general nature, has a university degree, at least eight years of professional experience and possesses high moral qualities. A new incorporation in ICAA is also the provision of Art.31, para.2 which provides that each party shall also have the option to check the case remotely, including via the website of the arbitration court.

Another major amendment in 2017 was the revocation of Art.47, para.3 of ICAA, whereas if the subject of the dispute is not subject to arbitration or the arbitration decision contradicts the public order of the Republic of Bulgaria, this no longer is ground for revocation of the award.

As a general trend, the disputes referred to arbitration are related to business transactions and contractual obligations. As a result of the increased arbitration proceedings, there are more cases in front of the Bulgarian courts of law on arbitration-related issues. For that reason, there is a steady tendency for the development of relevant case law of the Sofia City Court (the competent court) on the challenge of arbitrators and of the Supreme Court of Cassation on the challenge of arbitral awards.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Recently, some arbitration courts enacted expedient rules and even rules on electronic arbitration, although there has been no e-arbitration put into operation yet.

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She is actively involved in legal academic activities. In March 2018 for the 4th consecutive year she took part as an arbiter in the Willem C. Vis International Commercial Arbitration Pre-Moot, where the young competitors are always encouraged to acquire valuable experience by her wide expertise and in-depth knowledge in CISG and international arbitration.

Tsveletina is certified by the BCCI for successful training on the issues of the Arbitration Court.

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Georgiev, Todorov & Co. was founded in 1991 as one of the first Bulgarian law firms. Currently we are one of the largest business law firms in the country consisting of seven partners and 52 lawyers who have always been proud of rendering excellent legal service.

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Croatia

Željko Bekina

Bekina, Škurla, Durmiš and Spajić

Damir Kevilj

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The parties can freely agree on domestic arbitration regarding the rights of which they can freely dispose. The arbitration agreement has to be in writing, whether in the form of a separate agreement or as an arbitration clause in an agreement.

It is deemed to have been in the written form if the agreement is incorporated in documents signed by both parties, or if it has been concluded by exchange of letters, telex, facsimile, telegrams or other means of communication that provide a written record of the agreement, regardless of the fact if it has been signed by the parties or not.

1.2 What other elements ought to be incorporated in an arbitration agreement?

There are no mandatory elements of an arbitration agreement, apart from those set out under question 1.1 hereinabove. However, the parties are entitled to determine the language or languages that are to be used in the proceedings. The parties can also determine the place of the arbitration, the rules of procedure and the manner of commencement of the arbitration procedure. Furthermore, the parties can fix in the arbitration agreement if the award shall be final or not, i.e., if it could be challenged before the arbitral tribunal of a higher instance.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The courts mainly stand in favour of arbitration agreements. Therefore, if the parties have entered into an arbitration agreement, the court before which the claim (based on the same grounds and between the same parties) has been filed shall rule that it does not have jurisdiction over the subject matter, annul all undertaken actions and dismiss the claim, unless if it finds that the arbitration agreement is null, that it has ceased to exist or that it cannot be fulfilled.

A plea that the court does not have jurisdiction has to be raised by the defendant no later than at the preparatory hearing, i.e., at the main hearing if the preparatory hearing is not held while arguing the disputed matter, all until he gives his statement of defence. If the claim has already been brought before the court, the arbitration procedure can, nevertheless, be initiated or can be continued, if it had previously started. In addition to this, the award can be made even if the case is still ongoing before the court.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act (published in official gazette no. 88/2001 and which came into force on 19 October 2001) governs the enforcement of arbitration proceedings.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Arbitration Act governs both domestic and international arbitration proceedings provided that they take place in the Republic of Croatia. If the place of arbitration is in the Republic of Croatia, then disputes with and without international element shall be deemed to have been domestic arbitration and shall be governed by the Arbitration Act.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Arbitration Act is based upon the UNCITRAL Model Law. However, these two acts have not been completely harmonised due to recent amendments to the UNCITRAL Model Law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

There is no difference between the rules governing domestic and international arbitration proceedings. Thereto, the same rules apply to both disputes having international and domestic elements – provided that the arbitration takes place in the Republic of Croatia.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The parties can freely agree on arbitration regarding the rights of which they can freely dispose and regarding disputes of which an exclusive jurisdiction of national courts exists.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

An arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

If the parties have agreed to submit a dispute to arbitration, upon the respondent's objection, the court before which the same matter between the same parties was brought shall declare its lack of jurisdiction, annul all actions taken in the proceedings and refuse to rule on the statement of claim, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The arbitral tribunal may rule on a plea that it does not have jurisdiction, either as a preliminary question or in an award on the merits. Should the arbitral tribunal rule on its jurisdiction as a preliminary question, each party, within 30 days from the day of receipt of the subject decision, may challenge the decision before the court. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

If the arbitral tribunal rules on its jurisdiction in an award on the merits, any party may submit a so-called application for setting aside (i.e., a law suit to annul the award of merit).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

In accordance with the Arbitration Act, the arbitration agreement is deemed to have been valid if a claimant files a complaint to the arbitral tribunal and a defendant omits to make a plea in a statement of defence at the latest in which he argued the case that the arbitral tribunal has no jurisdiction over such dispute.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no strict rules prescribing limitation periods for the commencement of arbitration. However, certain substantive acts such as the Civil Obligations Act set forth general rules for claims arising out of civil or commercial relationships. A typical length of these statutes of limitations is three to five years, depending on the nature of the legal relationship.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

The Croatian Bankruptcy Act prescribes that the bankruptcy manager shall take over ongoing arbitration proceedings if a company (participating in the arbitration proceedings) went bankrupt.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The parties determine the law that shall be applied to the substance of a dispute. If the parties to the arbitration agreement failed to fix the law, the court will apply the law that it finds to be closest to the dispute.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

While only disputes arising out of matters, with which the parties can freely dispose, can be referred to arbitration, it has to be noted that the clients cannot dispose of rights in a way contrary to public order.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The rules of law designated by the parties shall govern the formation, validity and legality of arbitration agreements. If the parties failed to designate the applicable law, the law that would usually be applied to the dispute or the law of the Republic of Croatia shall be applied.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The judges of Croatian courts can only be appointed as the presiding arbitrator.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The Arbitration Act provides a default procedure in such events. Thereto, if the parties have not envisaged the procedure that was to

follow, when three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators, thus appointed, shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. If, within 30 days after the receipt of a party's notification of the appointment and notification to appoint an arbitrator, the other party has not notified the first party of the arbitrator it has appointed, or if the two arbitrators have not agreed on the choice of the presiding arbitrator within 30 days after the appointment of the arbitrator that was appointed last, the appointment shall be made (upon a party's request) by the appointing authority.

If the parties have agreed that a sole arbitrator is to be appointed and if they have not reached agreement thereon, a sole arbitrator shall be, at the party's request, appointed by the appointing authority.

If the parties have not provided for another way of appointment, the appointing authority shall be the Commercial court in Zagreb, for matters usually related to commercial relations, and the County court in Zagreb, for all other matters.

In addition to that, and provided that the parties have not decided that some or all activities related to appointment of arbitrators shall be conducted by arbitral institution or some other appointing authority, the appointment shall be made by the president of the courts (either Commercial or County) or a judge designated by the court's president.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court can intervene in the selection of arbitrators if the procedure on the appointment of arbitrators determined by the parties was not followed and a party requested the court (acting as the appointing authority in such events) to make the appointment instead.

While making the appointment, the court shall take into account all the qualifications demanded for the arbitrators in the arbitration agreement, and shall take into account other elements that should ensure the appointment of an independent and impartial arbitrator; while a dispute with international features shall take into account that it would be desirable for the sole arbitrator or the presiding arbitrator to be a person of a different nationality from the parties in dispute.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and to the other arbitrators, unless they have already been informed by him or her of these circumstances.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The Arbitration Act governs the procedure of arbitration sited in Croatia, regardless of whether it is a domestic or international arbitration.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no particular procedural steps that are required by law. The clients may agree on procedural rules that are to be applied in the arbitral proceeding, either by defining them or by making a reference to certain rules, law or some other appropriate way.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no particular rules that govern the conduct of counsel, regarding the Arbitration Act. In relation to that, the parties may agree on the rules of procedure that are to be followed by the arbitral tribunal, either by defining them or by making a reference to certain rules, law or some other appropriate way.

If an agreement on the rules of procedure does not exist, the arbitral tribunal may (if it is not contrary to the provisions of the Arbitration Act) conduct the arbitration in such a manner as it considers appropriate. The authority of the arbitral tribunal implies their authority to define the rules of procedure solely or by making a reference to certain rules, law or some other appropriate way.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

An arbitrator has to be independent and impartial and needs to give the statement on acceptance of his duty in writing. This can also be conducted by signing the arbitration agreement. An arbitrator shall conduct the proceedings so as to avoid unnecessary delay.

An arbitrator needs to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties, unless they have already been informed by him or her of these circumstances.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are some restrictions to the appearance of lawyers from other jurisdictions if they wish to provide legal services in Croatia.

Only lawyers that are registered in the lawyer's registrar by the Croatian Bar can provide legal services in the territory of the Republic of Croatia. Lawyers from the European Union can also provide legal services in the territory of the Republic of Croatia, provided that they are registered in the lawyer's registrar by the Croatian Bar as well.

However, in proceedings before the arbitral tribunal sited in Croatia and only related to disputes having international elements, the clients involved in arbitration proceedings can be represented by lawyers from other countries.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Croatian legislation does not provide for an arbitrator's immunity.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The national courts have jurisdiction to deal with procedural issues arising during arbitration in the following situations: while ruling on the arbitral tribunal's jurisdiction; while acting as the appointing authority; while providing legal assistance in performing evidence and delivery of an award; and while granting interim measures.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The arbitral tribunal may, at the request of a party, grant interim measures. The Arbitration Act defines an interim measure as any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal can order a party to undertake certain measures that the arbitral tribunal considers appropriate in relation to the disputed matter.

Unless the party, against whom the interim measure has been granted, willingly consents to undertake them, the party to whose proposal the interim measure has been granted can also address the amenable court for their execution.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

A court is entitled to grant interim relief in proceedings subject to arbitration. A client in an arbitration proceeding can address the court with his demand for interim measures. Thereto, a client can address the court to grant interim measures, if the other client has not willingly consented to such measure granted by the arbitral tribunal. A demand of the client for interim measures, made either prior or during the course of arbitration, is not contrary to the arbitration agreement.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The courts only exceptionally grant an interim relief provided that all the conditions set out in the Enforcement Law (in relation to interim measures) are met.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The Croatian legal system does not provide for the issuance of an anti-suit injunction.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

In accordance with the Arbitration Act, upon a client's proposal, the arbitral tribunal may grant any interim measure it considers appropriate. *Argumentum a contrario*, the arbitral tribunal may order security for costs, provided that a party makes such a proposal and the arbitral tribunal deems it appropriate.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

In relation to the Arbitration Act, the client can demand the court to enforce an interim measure granted against another client who does not act in accordance with the interim measure issued by the arbitral tribunal.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The Arbitration Act lays down certain evidence that is to be carried out in the course of arbitration, such as witnesses, expert witnesses and documents.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Under Croatian law, an arbitral tribunal has no such powers.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

There are no circumstances under the Arbitration Act that would provide for the assistance of a national court to the arbitral tribunal in relation to ordering disclosure/discovery or attendance of witnesses.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The witnesses, in general, shall be heard at the hearing and without taking an oath. If the witnesses agree, they can be heard outside the hearing and can also provide answers to certain questions in writing, provided that the arbitral tribunal demands a witness to do so. Referring to that, cross-examination is allowed if the rules of procedure defined between the clients provide for it, or if the arbitrators, in lack of those rules, decide that it would be necessary or practical.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The Arbitration Act prescribes that if the clients have not previously stated otherwise, the arbitration proceeding will not be public. All communication with counsels is considered to be privileged in accordance with the Attorneys Act.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The award has to be made in writing. It also has to state the reasons upon which it was based – unless the parties agreed otherwise or if it was made upon the settlement of the clients.

In addition to that, the award also has to contain the date on which the award was made and indicate the place of arbitration. The original copy of the award shall be signed by the sole arbitrator or by all the members of the arbitral tribunal. The award shall be valid even if an arbitrator declines to sign it, provided that the majority of arbitrators have signed the award and that the lack of the arbitrator's signature has been noted on the award.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Within 30 days after the receipt of the award, a party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal. If the arbitral tribunal considers such request to be justified, it shall complete its award.

With the same time period, a party, with notice to the other party, may request the arbitral tribunal to correct any error in computation, any clerical or typographical error, or any error or omission of a similar nature in the award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Under the Arbitration Act, a party is authorised to initiate a proceeding before a court setting aside of an award, in the following situations:

1. Provided that the party initiating such an procedure evidences:
   a) that the arbitration agreement was not concluded or is invalid;
   b) that a party in the arbitral proceedings had no capacity to enter into an arbitration agreement and to be a party to arbitral proceedings, or if a party was not represented properly;
   c) that the party filing the claim for the annulment of an award was not properly informed on the commencement of arbitral proceedings, or if such party was prevented from arguing before the arbitral tribunal, in an illegitimate way;
   d) that the award refers to a dispute not envisaged by the arbitration agreement, or if it does not fall under its provisions, or if it entails decisions on matters exceeding the scope of the arbitration agreement, whereas, if a decision on matters referred to arbitration may be separated from those that are not referred to arbitration, only that particular part of the award referring to provisions not subjected to arbitration shall be annulled if possible;
   e) that composition of the arbitral tribunal or arbitral proceedings were not pursuant to the Arbitration Act or a valid and permissible agreement by the parties, which could have affected the content of the award; and/or
   f) that the award contains no reasons or is not signed properly by arbitrators.
2. If the court finds, even if a client failed to make such a plea (*ex offo*):
   a) that the dispute is not arbitral under the Croatian legal system; and/or
   b) that the award is contrary to public order of the Republic of Croatia.

The claim for the setting aside of an award may be filed within three months after the client (initiating the annulment procedure) has received the award.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The Arbitration Act sets out that the clients cannot waive their right to challenge the award before the national court; neither can they exclude any legally prescribed basis of challenge.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

In accordance with the Arbitration Act, the grounds for the annulment of an award are expressly stated in the Act. However, beyond such numerically provided grounds, the parties can start the court procedure for annulment of the award if new facts or evidence occurred or if the party gained the possibility to use such facts or evidences based on which a more favourable award could have been made for the party. However, this plea can only be made if the claimant, and without his fault, could not have presented those circumstances during the arbitration.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An award can only be appealed before the arbitral tribunal of a higher instance if such possibility has been expressly stated by the clients.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The Republic of Croatia has both signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. The Convention only applies to the recognition and enforcement of awards made in the territory of another contracting

state. In addition to that, the Convention shall be applied to disputes arising out of either contractual or non-contractual relationships that are considered as commercial relationships in accordance with the Croatian legal system. The Arbitration Act is a national act complementary to the Convention.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The Republic of Croatia has neither signed nor ratified any regional Convention regarding the recognition and enforcement of arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Final arbitral awards represent execution deeds that have been enforced by national courts, unless the court determines the existence of certain grounds for setting aside the award. However, it is essential to highlight that only foreign arbitration awards have to be recognised by the court prior to their execution.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The arbitration award, against which the parties have excluded the right of appeal to the arbitral tribunal of a higher instance, is binding and final and has the same effect as the final ruling in a court procedure. In relation to that, if on the disputed matter, the arbitral tribunal has made an award, that matter is deemed to be final and a party is precluded from being reheard in a national court (the court shall dismiss the claim if it finds that the award on the same matter and between the same clients exist). In addition to that, if before the court a matter of existence of some right or legal relationship arises, and if the same matter has already been resolved in an arbitral procedure, than the court shall be bound by the award, unless it deems that, regarding to the certain part of the award referring to the matter in question, grounds for annulment of it exist.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Under the Arbitration Act, the courts shall not enforce an award that is contrary to moral standards of the society. This is a criterion that shall be evaluated in each case and the court shall rule on it *ex officio*.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Unless the parties agree otherwise, arbitral proceedings are confidential. The Arbitration Act prescribes confidentiality of arbitral proceedings, but the parties may agree to make all the information public.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings can be referred to and relied on in subsequent proceedings if the parties agree on such possibility.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Arbitration Act has no provisions on the types of remedies sought in arbitral proceedings. The remedies are prescribed in accordance with the substantial law chosen by the parties, so there are no strict limits on the types of remedies sought in arbitration.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Whether the interest shall be available and in relation to that, how the interest rate shall be determined, depends on the substantial law the parties have chosen.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

In accordance with the Arbitration Act, at a client's proposal, the arbitral tribunal shall, in the award or in a decision by which arbitral proceedings have ended, determine any amount that a party shall pay to another party and shall determine the apportion of such costs borne by each party. The costs include all the costs arising out of arbitral proceedings, including the costs of representation and the arbitrator's award. The arbitral tribunal shall determine the costs taking into account circumstances of the case and especially the outcome of arbitral proceedings.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The Arbitration Act does not provide for special taxes to be levied on awarded amounts. However, the taxation of such sums can be referred to general taxation laws (for instance profit tax and income tax).

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no restrictions for third parties to fund claims; however, as to our knowledge, there are no "professional" funders active in the Republic of Croatia. Contingency fees are legal under Croatian legislation.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The Republic of Croatia has signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The Republic of Croatia is a party to 58 BITs, some of which have not entered into force yet.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The Republic of Croatia has no standard noteworthy language that it uses in investment treaties.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

With respect to jurisdiction of national courts in matters concerning foreigners having immunity, the Civil Procedure Act provides that the international rules shall apply. Furthermore, the Execution Act prescribes that the execution cannot be conducted (including granting interim measures) on the foreign country's asset without the consent of the minister of justice, supported by prior opinion of the foreign affairs minister – unless the foreign country had consented to the execution of the interim measure. Should the execution motion be filed without such an approval or consent of the foreign country, the court shall dismiss the motion.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

There are no noteworthy trends and current issues affecting the use of arbitration in the Republic of Croatia. However, there are some types of disputes that are being referred to in arbitral proceedings more often than in the past which usually refer to disputes arising out of commercial contracts, especially if they have international elements (for instance, if a party to the contract is a legal or natural person having its seat/place of residence outside of the Republic of Croatia).

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Croatian Chamber of Commerce is namely active in the promotion of arbitration and as an option of alternative dispute resolution. Other institutions (involved in organising various educational events) organise seminars, discussion, workshops, etc. on arbitration and try to raise public opinion on the benefits of arbitration.

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The Law Firm Bekina, Škurla, Durmiš and Spajić was established in 2011. The founders of the Firm decided to combine their extensive legal experience to create a new synergy with the formation and work of a modern and flexible law firm. Providing legal services at the highest professional standards is a constant objective of the Firm. The Firm endeavours to continually advance its legal expertise and encourages further professional development for its partners and employees. In relationships with its clients, the Firm aims to position itself as a reliable adviser working in close cooperation with its clients. The Firm has been providing legal services in various fields of law including transactions relating to commercial and company law, mergers and acquisitions, infrastructure projects and concession rights, arbitration and litigation.

The Law Firm is a member of the American Chamber of Commerce in Croatia.

Czech Republic

Vladimír Jašek

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Pursuant to paragraph 1 Article 2 of the Arbitration Act, an arbitration agreement to submit a dispute between parties to be arbitrated by one or more arbitrators or by a permanent arbitral tribunal could be concluded between parties in case of property disputes, with some exceptions.

Pursuant to paragraph 1 Article 3 of the Arbitration Act, an arbitration agreement must be in writing, otherwise an agreement is invalid. The written form is also considered to be fulfilled if an agreement is concluded either by a telegraph, teleprinter or electrical means enabling to capture the content of an agreement and its parties.

Paragraph 3 Article 2 of the Arbitration Act also distinguishes between an arbitration agreement related to an already existing dispute or to any disputes which may arise in the future from a certain legal relationship.

An arbitration agreement could be concluded in form of an arbitration clause in a contract or as a separate agreement. In case an arbitration agreement is related to a consumer contract, then such agreement must be concluded separately from the consumer contract itself, otherwise an agreement is invalid.

1.2 What other elements ought to be incorporated in an arbitration agreement?

It is advisable that the following elements are included in an arbitration agreement – determination of either a specific arbitrator or arbitrators or the manner of their appointment or *vice versa* a permanent arbitral tribunal, the place of an arbitration, its procedural rules and the substantive law applicable to the dispute.

However, if an arbitration agreement is related to a consumer contract, then paragraph 5 Article 3 of the Arbitration Act sets strict requirements to be met, such as information about an arbitrator or permanent arbitral tribunal, the manner of initiation of the arbitration proceedings and its procedural rules, the reward of the arbitrator and anticipated types of costs that may be borne by a consumer, the place of an arbitration, the manner of delivering the arbitration award to a consumer and information about the enforceability of the arbitration award.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Courts in the Czech Republic take into consideration the validity of an arbitration agreement independently from the contract itself and if the legislation conditions are met, then courts and the legislation in the Czech Republic are basically supportive of alternative dispute resolutions such as arbitration, and decisions made in arbitration are equal to and with the same binding and enforceable effects as court decisions.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

In the Czech Republic, the basic legislation for arbitration proceedings is contained in Act No. 216/1994 Coll., the Arbitration Act, as this legal act provides its complex legal framework. In addition, supplementary legislation is also contained in the Code of Civil Procedure as its provisions shall apply *mutatis mutandis* to the arbitration proceedings. In case arbitration includes an international element, relevant provisions are also contained in the Act Governing Private International Law.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

It is irrelevant whether the parties to the arbitration proceedings are domestic or international persons. In both cases, the same provisions of the Arbitration Act apply to arbitration if the arbitration takes place in the Czech Republic.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Arbitration Act amended in 1994 was influenced by the UNCITRAL Model Law; however, there are some differences between the two.

For instance, precautionary measures pursuant to Article 22 of the Arbitration Act may be in contrast to the UNCITRAL Model Law issued only by a court, not by an arbitral tribunal. The Arbitration

Act requirements on the written form of an arbitration agreement are stricter than those of the UNCITRAL Model Law, and pursuant to the UNCITRAL Model Law the arbitrator is not excluded from the arbitration proceedings automatically in case of justifiable doubts of his impartiality; the process of whether there is a reason to do so, takes place, whereas pursuant to the Arbitration Act, there is no such process.

The UNCITRAL Model Law also defines more clearly the act itself with which the end of a period to object to the lack of arbitration jurisdiction is connected, and also contains discretion of the arbitral tribunal to admit the objection later if it is reasonable.

Pursuant to paragraph 1 Article 14 of the Arbitration Act, the proceedings are initiated the moment an action is delivered to the arbitral tribunal, in contrast to the moment the defendant receives the notification of arbitration as it is adjusted in the UNCITRAL Model Law.

Also, pursuant to paragraph 3 Article 19 of the Arbitration Act, the hearing is basically an oral proceeding if the parties do not agree otherwise, as the UNCITRAL Model Law provides an oral proceeding as an option that is fully in the arbitrator's discretion.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Under the Arbitration Act, there are no mandatory rules specifically governing international arbitration proceedings sited in the Czech Republic.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

In general, any case of property dispute could be the subject of the arbitration with some exceptions, such as disputes related to judgment enforcement or incidental disputes which would otherwise fall under the court's jurisdiction.

Arbitration could also take place if the parties seek court settlement in such property disputes. Court settlement is, however, excluded (i) in cases where the procedural proceeding could be initiated without a motion, (ii) in cases regarding a personal status, or (iii) in cases where the substantive law excludes concluding such settlement.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

An arbitral tribunal is permitted to rule on its own jurisdiction, and any party of the dispute may object to the nonexistence of the arbitral tribunal's jurisdiction or the invalidity of an arbitration agreement or its termination. However, parties are only entitled to do so in their first procedural act, with the exception of disputes arising from consumer contracts.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Pursuant to paragraph 2 Article 106 of the Code of Civil Procedure, the existence of an arbitration agreement does not exclude the jurisdiction of the Czech Republic courts by itself, and courts, even in cases of awareness of its existence, still have jurisdiction to take a binding decision until a defendant objects to its existence in his first procedural act at the latest, at which point the court proceedings cannot continue any longer.

After the defendant's objection, the parties are still entitled to declare waiving an arbitration agreement before the court, so the court proceedings may proceed and a court may take a binding decision.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The issue of the jurisdiction and competence of an arbitral tribunal could be brought before a court through an action for the annulment of an arbitration award filed because of an alleged lack of the jurisdiction and competence of an arbitral tribunal.

If an action is brought before a court before an arbitral tribunal issues such arbitration award, then pursuant to paragraph 3 Article 106 of the Code of Civil Procedure the proceedings on an action are interrupted until an arbitration award is issued.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The legislation in the Czech Republic does not allow an arbitral tribunal to assume jurisdiction over any individuals or entities that did not conclude an arbitration agreement.

However, pursuant to paragraph 5 Article 2 of the Arbitration Act, an arbitration agreement is also binding to any legal successor to the party if the parties did not expressly exclude this provision.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Limitation periods are governed by a Civil Code, and, in general, any civil claims are barred for three years after events from which claims are derived take place. Courts in the Czech Republic consider the issues of statute of limitations to be a question of substantive law. Parties are also entitled, with some exceptions, to adjust limitation periods differently and are also entitled to choose a different international substantive law to govern the contract and limitation periods.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pursuant to paragraph 1 Article 140a of the Insolvency Act, if the decision about the bankruptcy is made, then arbitration proceedings shall be interrupted, and as long as this decision stands, arbitration proceedings can no longer proceed. A new arbitration can also no longer be effectively initiated during this period.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Pursuant to paragraph 3 Article 25 of the Arbitration Act and pursuant to Article 119 of the Act Governing Private International Law, the dispute shall be decided pursuant to the applicable law; the parties are free to agree on the substantive law which shall be applied by the arbitrators in deciding their dispute. The parties can also agree on deciding their dispute *ex aequo et bono*.

If the parties fail to do so and the arbitration agreement includes an international element, then the applicable law is decided by the arbitrator pursuant to the relevant provisions of the EU Regulation Rome I or the Czech Act Governing Private International Law.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There are limits to the parties choice of substantive law by public order of the applicable law and the procedural law. If an arbitration agreement is related to a consumer contract, then the arbitrator shall also follow the mandatory consumer provisions of Czech law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Pursuant to Article 117 of the Act Governing Private International Law, the admissibility of an arbitration agreement is assessed in accordance with Czech law. The other requisites of the arbitration agreement are assessed in accordance with the body of laws of the State in which the arbitration award is to be issued.

The body of laws which applies to the other requisites of the arbitration agreement also applies to the form of the arbitration agreement. It is, however, sufficient if the body of laws of the place or places where the statement of will took place is complied with.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Pursuant to paragraph 1 Article 4 of the Arbitration Act, the arbitrator shall be a person with the age of majority, with full legal capacity, with no criminal record, with some exceptions, and with Czech citizenship.

In case of disputes arising from consumer contracts, the arbitrator shall also be selected from the list of arbitrators maintained by the Ministry of Justice and shall have a university degree in law.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In case an arbitration agreement does not include provisions relating to the manner of the appointment of arbitrators, both parties to the dispute shall choose their arbitrator and those arbitrators shall choose another chairman arbitrator.

If the party to the dispute fails to choose his arbitrator or the chosen arbitrators fail to choose another chairman arbitrator, then any party or any chosen arbitrator may request the court to choose one or another.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Pursuant to paragraph 1 Article 8 of the Arbitration Act, any arbitrator is excluded from arbitration in case of any justifiable doubts about his impartiality. If the arbitrator does not voluntarily resign from the function, then any party may request the court to exclude such arbitrator. The court intervenes also in the case stated above in question 5.2.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Pursuant to Article 8 of the Arbitration Act, a person who is about to be an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts of his impartiality, such as his relationship to any party to the dispute, their representatives or to the dispute itself.

Furthermore, in case disputes arising from consumer contracts, a person who is about to be an arbitrator shall also declare if he participated in the last three years to any arbitration whose participant was a party to the dispute.

Pursuant to Article 18 of the Arbitration Act, arbitrators shall perform their duties equally towards each party to the dispute.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Pursuant to Article 19 of the Arbitration Act, (i) parties can agree on the procedural rules, (ii) parties may entrust the choosing of the procedural rules to the chairman arbitrator, (iii) parties may attach the procedural rules to an arbitration agreement, or (iv) parties may also just refer to the Rules of Arbitration of the chosen permanent arbitral tribunal.

If parties do not agree on any procedural rules, then the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no explicit procedural steps required by the Arbitration Act; however, there are some principles immanent to the arbitration. Pursuant to Article 18 of the Arbitration Act, the parties have equal status in the arbitration and the principle of the equality of arms shall be respected as well. Any procedural rules contradicting these principles are invalid.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are not any particular rules that govern the conduct of counsel in arbitration proceedings except for general rules that govern legal practice in the Czech Republic; therefore, local or foreign counsels are obliged to follow the Attorney Act and Code of Professional Conduct of the Bar Association in the Czech Republic. Czech counsel shall also follow those rules if acts in arbitration proceedings are sited elsewhere.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitral tribunal has, pursuant to the Arbitration Act, a wide range of powers, such as entitlement to interrogate witnesses and parties to the dispute; however, the arbitral tribunal is not entitled to force them to do so. Further, the arbitral tribunal is also entitled to examine the evidence presented to the arbitral tribunal voluntarily.

Pursuant to paragraph 1 Article 15 of the Arbitration Act, the arbitral tribunal also has the power to determine its jurisdiction, and pursuant to Article 25 of the Arbitration Act, the main power of the arbitral tribunal is obviously to issue a binding arbitration award.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Pursuant to Article 118 of the Act Governing Private International Law, a foreigner may also perform the role of an arbiter, provided said foreigner has the capacity to undertake legal acts in accordance with the body of laws of the State in which he or she is a citizen.

It is, however, sufficient, if said foreigner has the capacity to undertake legal acts under Czech law. The other requirements for the performance of the function of an arbiter designated for the resolution of disputes arising from consumer contracts are set out in a different legal regulation.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no such laws or rules in the Czech Republic.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Courts may intervene arbitration proceedings only when requested by the parties to the arbitration; for instance, in case an issue of a precautionary measure is needed or in case some evidence needs to be obtained and the arbitral tribunal is not entitled to do so.

Courts may also exclude the arbitrator in case of justifiable doubts about his impartiality and to choose the arbitrator or chairman arbitrator if the party to the dispute or arbitrators fail to do so.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

No. The arbitral tribunal is not entitled to award any type of preliminary and interim relief.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Pursuant to Article 22 of the Arbitration Act and pursuant to the relevant provisions of the Code of Civil Procedure, courts in the Czech Republic can upon request of a party to the dispute grant preliminary relief at any time before or during the arbitration proceedings.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In general, courts do not distinguish between requests by the parties to arbitration proceedings or to court proceedings. Courts in the Czech Republic assess whether the requirements for the granting of preliminary or interim relief are met and whether it is reasonable to adjust the ratios of the parties to the dispute, or if there is a concern about endangering the enforcement of the judgment.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Courts in the Czech Republic do not issue an anti-suit injunction in aid of an arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Pursuant to Article 22 of the Arbitration Act and pursuant to the relevant provisions of the Code of Civil Procedure, the party to the dispute that seeks the issue of a precautionary measure is obliged to provide security in the amount specified by the law.

Courts in the Czech Republic are also allowed to order additional security if the yet-to-be-paid security is clearly not sufficient. In case the party to the dispute fails to do so, the request has to be, with some exceptions, rejected.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Pursuant to the Arbitration Act, arbitral tribunals are not entitled to issue any preliminary relief or interim measures. That being said, courts in the Czech Republic do not provide any enforcement of such procedures.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Parties may agree on the applicable rules of evidence.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

According to the Arbitration Act, the arbitrators may examine witnesses, experts and parties if they voluntarily appear and bear their testimony. Also, other examinations may be carried out only if it has been granted to the arbitrators.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

As stated in the Arbitration Act, procedural measures the arbitrators are unable to carry out themselves shall be carried out by the court upon their request. The Arbitration Act also states that the court shall satisfy such request unless the requested measure is inadmissible according to law. In doing so, the court shall issue all decisions necessary for the realisation of the request.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

There are no regulations regarding the production of written testimony and it is not commonly used in the Czech Republic. Regarding oral testimony, the rules stated in the Code of Civil Procedure would apply, and according to them, the witness must tell the truth and conceal nothing. The witness must also be instructed of the importance of the testimony, of his rights and duties, and of the criminal consequences of a false testimony.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The legislation governing arbitration does not address this matter. The attorney-client privilege is governed by the Act on the Legal Profession that basically states that all communication between a client and an attorney, i.e. outside counsel, is privileged unless waived by the client. In-house counsel is regarded as a regular employee in the Czech Republic and does not profit of the legal privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The arbitral award shall be approved by the majority of arbitrators, elaborated in writing and signed by at least the majority of the arbitrators. The verdict of the arbitral award must be definite and the arbitral award shall contain reasoning unless the parties have agreed that no reasoning is necessary.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Mistakes in writing and calculations as well as other obvious errors in the arbitral award shall be corrected by the arbitrators or by the arbitral tribunal at any time upon the request of any of the parties. Such correction shall be approved of, signed and delivered in the same way as an arbitration award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The arbitration agreement may stipulate that the arbitration award may be reviewed by other arbitrators upon request of any of or both parties. Unless the arbitration agreement stipulates otherwise, the request for a revision shall be delivered to the other party within 30 days from the day of the delivery of the arbitral award to the requesting party. The revision of the arbitral award is part of the arbitration proceedings.

If there is no such agreement between parties, the arbitral award upon its delivery to the parties acquires the effect of a final and conclusive judgment of a court and becomes judicially enforceable.

The only way to challenge an arbitral award, in case there is not an agreement of an appeal between parties, is to present the arbitral award to court within three months after its delivery, but only with the request to quash the arbitral award and for the following reasons:

a) no arbitration agreement can be concluded in the concerned case;

b) the arbitration agreement is null and void for other reasons, was cancelled or does not apply to the concerned case;

c) any of the arbitrators who took part in the case was not called on to decide the case on the basis of the arbitration agreement or otherwise or was not capable of becoming an arbitrator;

d) the arbitration award was not approved of by the majority of arbitrators;

e) the party was not provided with the possibility to discuss the case before the arbitrators;

f) the arbitration award adjudges the party to a performance that was not requested by the entitled party or that is impossible or unlawful under Czech law; or

g) it becomes clear that reasons for resumption (renewal) of civil judicial proceedings are given in the case.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties cannot exclude any basis of challenge stated in the Arbitration Act.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There are no specific provisions regarding the appeal reasons of an arbitral award. However, according to the principle of the autonomy

of the will, the parties may agree on specific reasons for the appeal of an arbitral award in the arbitration agreement.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

There is no set procedure for appealing an arbitral award except the necessity to appeal (to present the request for a revision of the arbitral award) within 30 days from the day of the delivery of the arbitral award to the requesting party, unless the arbitration agreement stipulates otherwise.

According to the decision of the Czech Supreme Court, the revision of an arbitral award is the revision of merits and therefore the whole arbitral proceedings may be repeated from the beginning to the end.

Parties may, of course, constrict the revision procedure in the arbitration agreement. Overall, the possibility of the revision of the arbitral award is not widely used in the Czech Republic.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The New York Convention entered into force in the Czech Republic on 30 September 1993 as the successor State of Czechoslovakia that had signed and ratified the Convention on 3 October 1958 and 10 July 1959, with a declaration that Czechoslovakia will apply the Convention to the recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States, it will apply the Convention only to the extent to which these States grant reciprocal treatment.

According to the Czech Constitution, all promulgated treaties ratified by the Czech Parliament and by which the Czech Republic is bound form a part of the legal order and have a precedence over domestic law. Hence, no domestic Convention-implementing legislation exists.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The Czech Republic is a party to the European Convention on International Arbitration of Geneva, effective since 11 April 1964 and to the Convention of International Centre for Settlement of Investment Disputes, effective since 22 April 1993.

There is a multitude of bilateral treaties concerning the recognition and enforcement of arbitral awards with dozens of different countries.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Czech courts generally treat and enforce an arbitration award of the permanent arbitral tribunals the same way as any court decisions. Regarding the arbitral awards issued by *ad hoc* arbitrators, specifically in consumer cases, the courts are more cautious.

Section 120 of the Act Governing the Private International Law states that an arbitral award issued in a foreign State will be recognised and enforced in the Czech Republic as a Czech arbitral award, if reciprocity is guaranteed. Reciprocity is also considered to have been guaranteed, if the foreign State generally declares that foreign judgments are enforceable under the condition of reciprocity.

The recognition of a foreign arbitral award is not expressed by means of a special court decision; such arbitral award is recognised by means of the fact that it is taken into account as if it were a Czech decision. The enforcement of a foreign arbitral award is subject to a decision of a Czech court which must be duly justified.

Parties are therefore required to file the award with the bailiff (executor) of their choice. The executor shall present the award to the court that shall start the enforcement proceedings by issuing a *sui generis* decision.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The arbitral award upon its delivery to the parties acquires the effect of a final and conclusive judgment of a court; therefore, it has the *res judicata* effect and it is not possible to re-hear the case in a national court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The recognition or enforcement of a foreign arbitral award shall be, according to Czech law, refused, if the foreign arbitral award:

a) is not final and conclusive or enforceable in accordance with the body of laws of the State in which it was published;

b) has been repealed in the State in which it was issued or according to whose body of laws it has been issued;

c) is subject to a defect which constitutes grounds for repealing a Czech arbitral award by the courts; or

d) goes against public order (policy).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

According to Section 19 of the Arbitration Act, the arbitration proceedings are not public. Furthermore, the arbitrators are obliged to keep confidentiality regarding facts they have found out in connection with the execution of their position as an arbitrator unless they were deprived of this obligation. The parties may deprive the arbitrator of the confidentiality obligation. For important reasons, the arbitrator may be deprived of the confidentiality obligation by the chairman of the district court.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings can be referred to freely, with regards to possible confidentiality obligation. The parties may, of course, agree otherwise.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no limits on the types of remedies that are available under the Arbitration Act. However, punitive damages are not known to Czech law, so they would probably not be awarded because of the public policy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

If there is not an agreement between parties on the interest rate, this question depends on the applicable law. According to Czech substantive law, the interest rate on late payment corresponds to the annual repo rate set by the Czech National Bank for the first day of the calendar year in which the default occurred, increased by eight percentage points. As of 1 January 2018, the default interest rate on late payment is 8.5% *p.a.*

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The parties may agree on the allocation of costs in the arbitration agreement. Also, permanent arbitral tribunals issue statutes and rules of procedure that may also determine the rules concerning costs of proceedings and remuneration of arbitrators.

As the provisions of the Civil Procedure Code are subsidiary applied to the arbitration proceedings as well, the general rules of the Civil Procedure Code would apply if there is not an agreement between parties or the regulations of permanent arbitral tribunals.

The basic principle in Section 142 of the Civil Procedure Code states that a party that had full success in the case shall be awarded by the court a reimbursement of the costs necessary to a useful exercise or defence of a right against the party that has had no success in the case. In case of a partial success in the case, the court shall divide the reimbursement of the costs in a proportionate way. Costs of proceedings are, in particular, cash expenses of the participants and their representatives including the arbitral fee, lost earnings of the participants and their legal representatives, remuneration for representation, etc. The costs of the remuneration for representation are determined on the basis of fixed tariffs laid out in the Ministry of Justice Regulation No. 177/1996 Sb. determining fees of attorneys and notaries for providing legal services (the attorneys' tariff).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An arbitral award is generally not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Contingency fees are allowed for Czech attorneys according to Bar regulations in such a way that the amount of the remuneration for the attorney thus agreed must be reasonable. The contractual remuneration may be granted by reference to a share in the value of the thing or the outcome of the thing. However, as a rule, a contractual remuneration determined by a share in the result of a matter cannot be considered as reasonable if that proportion is higher than 25%. There are not many "professional" funders active in the market, but they can be found.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The Czech Republic signed the Convention on the Settlement of Investment Disputes, and it entered into force on 22 April 1993.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The Czech Republic is a party of approximately 80 BITs as well as the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Czech BITs are generally first-generation or European model agreements (except for an agreement with the US, which is a second-generation or US agreement type) which, if there is no dispute between the parties to the dispute arising out of the investment resolved by negotiation or in conciliation, shall commit these contracts almost unconditionally to a solution in the form of arbitration. Provisions on dispute settlement contained in Czech BITs most often refer to ICSID rules or UNCITRAL rules. There is no special language used in Czech BITs.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Pursuant to Article 7 of the Act Governing Private International Law, foreign States are exempt from the jurisdiction of the Czech courts in the case of proceedings based on their actions and acts undertaken when exercising their State, governmental and other public jurisdictions and functions. This exemption also applies to any of their property which has been used or designated for any such actions.

However, the exemption to the jurisdiction of the Czech courts does not apply to any other actions, acts or cases in which it is possible to exercise rights against a foreign State in the courts of another State in accordance with general international law.

The Czech courts shall also not have jurisdiction over individuals, international organisations and institutions which enjoy immunity in the Czech Republic in accordance with international treaties, general international law or Czech legal regulations. This exemption applies to the extent set out in the aforementioned sources of the immunity.

Based on the above, foreign States generally enjoy immunity when acting *iure imperii*, but do not enjoy such immunity when acting *iure gestionis* as a party in civil relationships.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The last important amendment to the Arbitration Act took place in 2012, and since then, only the case law is being settled at the relevant courts. Currently, a significant discussion is taking place in the Czech Republic regarding the independence of the *ad hoc* arbitrator or the appointing authority, specifically with regard to consumer arbitrations.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Arbitration Court at the Chamber of Commerce of the Czech Republic and the Agrarian Chamber of the Czech Republic issued a new Order for Arbitration online, i.e. by email and a secure platform of the Arbitration Court. The New Order Online has been effective since 1 October 2017.

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Chapter 23

Romania


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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The arbitration agreement must observe the validity requirements of any binding agreement under the Civil Code regarding the validity of object and cause and the parties' capacity and consent. The specific requirements of the arbitration agreement are provided in the Civil Procedure Code ("CPC"). A distinction must be drawn between domestic arbitration and international arbitration.

In domestic arbitration, the written form of the arbitration agreement is mandatory and generally sufficient, unless it covers disputes related to the transfer of ownership rights or the creation of another property right over a real estate asset, in which case the notarisation is a condition to the arbitration agreement's validity. The arbitration agreement need not be incorporated into a contract as *instrumentum* (e.g., it may be contained in an exchange of correspondence). Also, the parties can conclude it within the main contract or a separate agreement, or confirm their agreement to submit the matter to arbitration directly to the established arbitral tribunal. The CPC distinguishes between the compromissory clause regarding future disputes and the arbitration submission agreement regarding actual, arisen disputes. In the second case, the subject matter of the dispute must be defined therein under the penalty of the nullity of the arbitration submission agreement. In *ad hoc* arbitration, the compromissory clause must state the method of nominating the arbitrators, while the arbitration submission agreement must specify the arbitrators' names or the method of their appointment, under the sanction of nullity. If institutional arbitration is opted for, the institution's rules shall apply. As to the substantive requirements, we mention that the CPC provides that only parties with full legal capacity may conclude an arbitration agreement, while with regard to the object of the arbitration agreement, it is required that the dispute be arbitrable (see the answer to question 3.1 below). It is noteworthy that, according to the Civil Code, *standard* compromissory clauses (clauses which are prepared in advance for general and repeated use by one party and which are incorporated into the contract without having been negotiated with the other party) are considered "unusual clauses" and must be accepted expressly and in writing by the other party (article 1.203).

In international arbitration, the written form of the arbitration agreement, contained in a written document, telegram, telex, e-mail or other form of communication, is also required under the penalty of the nullity of the agreement. The legal provisions are more flexible with regard to substantive requirements. Thus, an arbitration agreement is valid if it fulfils the terms imposed by any of the following laws: the law designated by the parties; the law governing the subject matter of the dispute; the law applicable to the contract incorporating the arbitration agreement; or the Romanian law.

The principle of separability of the arbitration agreement is recognised in both domestic and international arbitration.

1.2 What other elements ought to be incorporated in an arbitration agreement?

In general, other elements which ought to be incorporated are the seat of arbitration, the choice between *ad hoc* and institutional arbitration and the procedural norms to be followed by the arbitral tribunal (for the case of institutional arbitration, a simple reference to the designated arbitral institution will suffice), the substantive law of the dispute, the language of the arbitration proceedings, and the allocation between the parties of the arbitral costs. The limits to the parties' autonomy in determining the content of the arbitration agreement are the public policy, good morals and the legal mandatory provisions.

In light of the New Rules of Arbitration of the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry adopted on 17 November 2017 and published in the Official Gazette on 27 December 2017 ("2017 CICA Rules of Arbitration") which introduced the expedited procedure, other elements which ought to be incorporated are: whether the parties wish to opt out or to raise the threshold value below which disputes are to be settled following this special procedure.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Romanian courts have consistently shown a degree of pro-arbitration enforcement conduct. Providing the arbitration agreement observes the fundamental requirements of validity and the Romanian public policy, and to the extent the dispute is arbitrable, the national courts respect the will of the parties and proclaim that the agreement has the force of law among them.

While Romanian courts generally interpret pathological clauses so as to give effect to the parties' will to arbitrate, some clauses, such as the ones where the elected arbitral institution could not be identified, have been found truly inoperative.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The CPC regulates the enforcement of domestic arbitration awards and recognition and enforcement of foreign arbitration awards (e.g., articles 612, 614-615, 1.124-1.133 and Book V on *Enforcement*).

Also, Romania ratified the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention"), which has been in force since 1961. Romania also ratified the Geneva Convention on International Commercial Arbitration (1961) ("1961 Geneva Convention on International Commercial Arbitration").

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Both domestic and international arbitration are regulated by the CPC, but in distinct sections thereof. Thus, the provisions of the domestic arbitration are found in Book IV on *Arbitration*, articles 541 to 621, while those governing international arbitration are in Book VII on *International Civil Trial*, Title IV on *International Arbitration and the Effects of Foreign Arbitral Awards*, articles 1.111 to 1.133. However, some provisions (regarding the tribunal's constitution, procedure and award) applicable to domestic arbitration shall apply also to international arbitration, being incorporated by reference, unless the parties provided otherwise or entrusted such matters to the arbitral tribunal (article 1.123).

The international arbitration regime diverges from the domestic arbitration regime mainly in that the rules governing international arbitration are more flexible. For instance, while an arbitration agreement under domestic arbitration is valid only if it meets the Romanian law requirements, in international arbitration the same is valid in accordance with a variety of choice of law options. A notable difference is that in international arbitration the time limits for various procedural steps provided in Book IV are doubled (article 1.115).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The CPC follows the general principles of the UNCITRAL Model Law to a great extent. Nevertheless, some areas of the Romanian arbitration law, such as applications for preliminary orders and interim relief, received significantly less regulation than as provided in the Model Law. Conversely, in some other areas, the Romanian arbitration law provides for more detailed regulation than the Model Law (for instance, the CPC lists the cases where the arbitrator is considered to have breached the standard of impartiality and independence).

Significant departures from the provisions of the Model Law include that, in domestic arbitration, the arbitration clause covering a dispute relating to the transfer of ownership rights or the constitution of a real right over a real estate asset must be concluded in notarised form, under the sanction of absolute nullity (article 548 (2) CPC). Correspondingly, the award rendered in such a dispute must be presented to the court or the notary public for the observance of local formalities (article 603 (3) CPC).

One additional ground for setting aside an award provided by article 608 CPC refers to the scenario in which the Romanian Constitutional Court declared the legal provision subject matter of an invoked plea unconstitutional, after the award had been rendered.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The rules of public policy, core constitutional principles and mandatory legal provisions cannot be derogated from in international arbitration proceedings sited in Romania. Once an arbitral dispute is deemed international, the provisions of articles 1.111 to 1.133 apply thereto. Such mandatory rules include the separability of the arbitration agreement and the requirement that it shall be made in writing (article 1.113 CPC).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Yes, the CPC precludes certain subject matters from being referred to arbitration. The general approach in determining the objective arbitrability of a dispute is based on: (i) its patrimonial nature (i.e., it must concern an economic value) – with explicit types of pure non-patrimonial disputes being excluded from domestic arbitration (limited to civil status, capacity, inheritance, family relations); and (ii) the nature of the rights involved (i.e., the parties may dispose of said rights) (articles 542 and 1.112).

For an international dispute to be arbitrable, the CPC expressly provides that the *lex fori* must not assign exclusive jurisdiction to state courts for said dispute (article 1.112 CPC). The Romanian courts retain exclusive jurisdiction in cases related, *inter alia*, to: the insolvency procedure – opening and conduct of the insolvency procedure; competition – challenge of decisions issued by the Competition Council; administrative disputes; and intellectual property – mainly annulment of trademarks, patents and designs.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The competence-competence principle is regulated by the CPC in both its positive (the arbitrators' jurisdiction to decide over their own jurisdiction) and negative effect (a court vested with an arbitral claim will defer it to arbitration) (articles 554, 579, 1.119 and 1.069).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

In the presence of an arbitration agreement, courts are likely to take a proactive role in examining their jurisdiction and defer the dispute to arbitration. According to the CPC (articles 554 and 1.069), if one of the parties invokes the arbitration agreement, the court will examine if it lacks jurisdiction and, in the affirmative, will defer the dispute to the relevant arbitral institution or, in the case of *ad hoc* arbitration, will dismiss the claim for lack of courts' jurisdiction (the negative effect of the competence-competence principle).

Although the former CPC (abolished in 2013) did not expressly require a court to decline its jurisdiction in such a case (but just to acknowledge lack of competence), the courts' practice, mainly grounded on general provisions regarding jurisdiction and active role, developed in the sense of express declination of jurisdiction.

The courts' approach is now codified under the new CPC, hence a court shall decline jurisdiction in the circumstances.

The court will hear the merits of the case if: (a) the respondent has presented its defence on the merits of the case without invoking the arbitration agreement or, in the case of international arbitration, the objection to jurisdiction has not been raised by the respondent until the first hearing date; or (b) the arbitration agreement is null or, in the case of international arbitration, obsolete or, in both cases, is invalid; or (c) the arbitral tribunal cannot be constituted due to the respondent's manifest fault.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Firstly, courts will address the issue of the jurisdiction and competence of the arbitral tribunal in the circumstances presented above in the answer to question 3.3, in the context of examining their own jurisdiction. The court's standard of review is a *prima facie* one, while the tribunal's standard of review is an *in extenso* one. Furthermore, the courts will address this issue within the proceedings for setting aside the arbitral award on grounds of the tribunal's lack of jurisdiction (article 608 CPC).

A tribunal's decision acknowledging its own jurisdiction can be challenged only with the application for setting aside the arbitral award and, of course, within the *exequatur* procedure. Conversely, if the tribunal finds that it lacks jurisdiction and defers the dispute to the competent court, the award cannot be challenged through the setting aside procedure (article 579 CPC).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Although the CPC does not provide the arbitral tribunal's right to assume jurisdiction over individuals or entities which are not themselves party to an arbitration agreement, it is generally accepted that non-signatories will be bound by the arbitration agreement in cases such as: the assignment of contract, oblique (indirect) actions or the parties' singular or universal successors. Reputed scholars have also debated the extension of the arbitration agreement to third parties in the case of group companies and in the case of group contracts, agency or proxy agreements and in certain exceptional cases of the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry ("Court of International Commercial Arbitration"), the tribunals assumed jurisdiction over non-signatories.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no special limitation periods for the commencement of arbitrations under Romanian law. The Civil Code sets out the general limitation period of three years, but other periods may apply depending on the subject matter of the case. The rules governing the limitation periods are substantive ones and, as such, the arbitral tribunals will apply limitation periods in accordance with the law governing the merits of the case (article 2.663 of the Civil Code).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pursuant to article 75 of the Insolvency Law no. 85/2014, upon opening of insolvency proceedings against a debtor, all judiciary, extra judiciary (including arbitration) and other enforcement procedures concerning receivables against the debtor's estate shall be stayed. After the decision on the opening of insolvency proceedings becomes final, all said procedures shall be discontinued.

National courts' case law confirms that the stay provided by the insolvency law is mandatory in local arbitrations and, as such, arbitral awards issued in cases administered by local courts of arbitrations have been set aside for breaching this public policy rule. We have not identified case law that would indicate the stay measure is applicable in international arbitration.

We note, however, a recent decision rendered by the Bucharest Tribunal whereby the national court admitted the recognition and enforcement of an arbitral award issued in a case administered by LCIA, despite the fact that insolvency proceedings had been commenced in Romania against the respondent during the arbitral proceedings. The court considered that the arbitral tribunal did not breach the Romanian private international law public policy by not staying the proceedings pursuant to the Romanian insolvency law.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Under article 1.120 of the CPC governing international arbitration, the arbitral tribunal will apply the law designated by the parties and, in the absence thereof, the law it deems to be appropriate, taking into consideration the usages and professional rules. Notably, article 1.120 does not expressly require the tribunal to resort to a specific conflict of law rule when deciding the applicable law.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Under article 2.564 of the Civil Code, the application of foreign law (chosen by the parties) is removed if it violates the Romanian private international law public policy. The Romanian legislator considers that such violation occurs to the extent that the application of foreign law would lead to a result incompatible with the fundamental principles of Romanian law or European Union law and with the fundamental human rights. One should add here that the concept is strict and limited. In the same vein, according to article 1.125 of the CPC, the Romanian courts may refuse to give effect to a foreign arbitral award (i.e., an award issued by an arbitral tribunal seated outside Romania) if such award breaches the Romanian private international law public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

According to article 1.113 of the CPC, the arbitration agreement is valid if it fulfils the substantive requirements imposed by either the law designated by the parties, the law governing the subject matter of the dispute, the law applicable to the contract incorporating the arbitration agreement or the Romanian law.

Pursuant to the provisions of the New York Convention, incorporated in the CPC, within the recognition and enforcement proceedings of the arbitral awards, the Romanian courts will check whether the arbitration agreement was validly concluded under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

According to the CPC, any natural person with full legal capacity may be appointed as arbitrator, with the observance of the parties' arbitration agreement (articles 555 and 558). There are, however, certain categories of professionals who are not allowed to serve as arbitrator, such as judges and prosecutors, court clerks, and Competition Council members. The parties may appoint a sole or any uneven number of arbitrators and if they have not determined their number, the dispute shall be heard by three arbitrators – two party-appointed who will select the chairman. In the case of multiple claimants or respondents, the parties with common interest shall name only one arbitrator (article 556).

While their predecessors limited the parties' choice of arbitrators to a closed list of individuals, the 2017 CICA Rules of Arbitration not only extended the list of arbitrators, but also expressly provide that they may opt for an arbitrator from outside of the institute's list.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In the case of the parties' misunderstanding on appointing the sole arbitrator, if one party does not select an arbitrator or if the two party-appointed arbitrators do not agree on the chairman, the party wishing to refer the dispute to arbitration may request the Tribunal at the seat of the arbitration to appoint the arbitrator or, as the case may be, the chairman. The Tribunal will summon the parties and issue a non-appealable decision within 10 days as of the claim being lodged (article 561 CPC).

Of course, if the parties have submitted their dispute to an arbitral institution, the institution's rules shall apply.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes, please see the answer to question 5.2 above.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The arbitrator's independence, neutrality and/or impartiality in domestic arbitration are listed in the CPC under the arbitrators' incompatibility, which may be questioned in cases such as: lack of necessary qualification or other requirements provided in the arbitration agreement; the arbitrator's interest in the dispute; the arbitrator's prior involvement in the dispute, either as counsel to one of the parties or as a witness, as well as any other circumstances giving rise to doubts as to the arbitrator's independence and impartiality (articles 562 and 42 CPC).

In international arbitration, the arbitrator may be challenged if he/she does not have the necessary qualifications as agreed by the parties, for those circumstances provided by the applicable procedural rules or if there is a legitimate doubt as to his/her independence and impartiality (article 1.114 CPC).

Before accepting to serve as arbitrator, the proposed candidate aware of a situation that may affect his/her independence or impartiality must inform the parties and the other arbitrators. Should such situations arise after accepting the appointment, they must be reported forthwith as of their occurrence (article 562 CPC).

The 2017 CICA Rules of Arbitration provide clear provisions for challenging the arbitrators, including express scenarios of incompatibility, coupled with stricter sanctions for conflicts of interest. Moreover, under the 2017 CICA Rules of Arbitration the arbitrators have to sign a statement of independence and impartiality, highlighting any circumstances that may give rise to justifiable doubts with respect to their impartiality or independence, failing which they may not act as arbitrators in the dispute.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

If the parties do not provide within the arbitration agreement the applicable procedural rules or if the arbitral tribunal is not requested to establish such rules and to the extent that certain issues are not covered by the parties' agreement or the tribunal's decision, the provisions of the CPC shall apply. Should the parties decide to conduct arbitration under the rules of a specific institution or organisation, the respective rules shall apply (articles 576, 619 (3), 1.115 and 1.123 CPC).

The rules on international arbitration apply to arbitral disputes arisen out of private law relationships with a foreign element, if the seat of arbitration is Romania and if at least one of the parties did not have, at the time of concluding the arbitration agreement, its domicile or regular residence, or headquarters, respectively, in Romania. In addition, the parties must not have excluded through the arbitration agreement or subsequently, in writing, the application of such rules (article 1.111 CPC).

In case of institutional arbitration under the auspices of the 2017 CICA Rules of Arbitration, the arbitrators are empowered by the parties through their choice of arbitral rules to establish the most optimal procedural rules for their dispute, within the boundaries of the Rules and the mandatory law provisions. In the vision of the architects of the Rules, resorting to the CPC provisions is desirable only in exceptional cases.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Under the former CPC, a highly debated topic was the arbitrability of summary payment claims. This issue was subject to conflicting arbitral awards and court decisions, mainly because the law regulating summary payment claims, including means of challenge, derogated from the common procedural rules. It has been argued that, should the arbitral tribunal retain jurisdiction over a summary payment claim, it should follow the specific procedural rules provided by said special law. Under the new CPC, such a particular

procedural step would be the creditor's obligation to issue a prior notice to the debtor, requesting payment within 15 days. Lacking such a notice may result in the inadmissibility of the claim.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The counsel practising in Romania is subject to Law no. 51/1995, the Lawyers' Statute and the CCBE Code of Conduct for European Lawyers. No separate code of conduct for counsel in arbitral proceedings seated in Romania exists. Article 13 (6) of Law no. 51/1995 states that the same regulations apply to counsel from another jurisdiction while exercising the legal profession in Romania. The CCBE Code of Conduct for European Lawyers applies to Romanian counsel when practising in another Member State of the European Union, with the reserve that counsel may also be subject to the rules of the host state.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The powers and duties of arbitrators under the CPC are similar to those contained in the UNCITRAL Model Law. The powers include the competence to rule over the tribunal's jurisdiction or the ability to order interim measures, while the duties encompass the obligation to disclose conflict of interest or to render the award in light of the rules chosen by the parties.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Law no. 51/1995 imposes tight restrictions concerning the involvement of foreign lawyers before any other judicial and jurisdictional bodies, including national courts and domestic arbitration proceedings. However, article 13 (4) clearly provides that foreign lawyers may practise law in international arbitration proceedings seated in Romania.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The arbitrators' liability is contractual in nature, and can only be triggered for their partial or total failure to perform their duties as arbitrators, and not for their decisions rendered in the resolution of the dispute. Article 565 of the CPC provides the conditions under which arbitrators are personally liable for the damage they cause (i.e., the arbitrators, without justification, resign from their function, do not participate in the arbitral proceedings or do not render the award within the required timeframe, fail to observe the confidentiality of the arbitration, breach other duties acting in bad faith or gross negligence). Similar provisions comprise the 2017 CICA Rules of Arbitration, whereby arbitrators can be held personally liable for wilful or grossly negligent misconduct. Arbitrators may not be found liable for error of law or in general for improper awards.

Romanian scholars have argued that the exclusion or limitation or the arbitrators' liability *ante factum* would be void, as the eventual damages resulting out of the arbitrators' illicit conduct would not be able to be determined.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

National courts may assist the arbitral tribunal in procedural matters where the tribunal lacks jurisdiction or the law expressly provides for the court's intervention. For instance, the arbitral tribunal itself cannot coerce a party to execute an order for interim relief, but must submit the matter to the national courts for the measure's effect to be ensured.

Another matter in which courts may intervene is the appointment of arbitrators. In case of *ad hoc* arbitration, when the parties do not agree on the appointment of the sole arbitrator, when one party does not appoint an arbitrator or if the two party-appointed arbitrators do not agree on the president of the arbitral tribunal, the party interested to initiate the arbitration proceedings may request the national court to appoint the arbitrator or the president of the arbitral tribunal, as the case may be.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

In domestic arbitration, the arbitral tribunal is empowered to grant preliminary or interim relief during the course of the proceedings. The state courts may intervene if the measures taken by the tribunal are not complied with by one of the parties (article 585 CPC).

The arbitral tribunal in an international dispute may grant interim or conservatory measures, absent contrary provisions in the arbitration agreement. If the concerned party resists said measures granted by the tribunal, the latter may seek assistance of the competent state court. Awarding such measures may be subject to the court's own assessment on the appropriateness of the measure and, potentially, to payment of an appropriate security (article 1.117 CPC).

For the first time in Romania, an arbitral institution enables the parties to resort to an Emergency Arbitrator when they are in need of interim remedies before the constitution of the arbitral tribunal. The 2017 CICA Rules of Arbitration introduced the Emergency Arbitrator procedure, in line with the rules of preeminent centres for international arbitration such as the ICC, LCIA, the SCC or SIAC. Upon receipt of an application thereof, the President of the Court will appoint an emergency arbitrator within 48 hours, who will deliver a decision in a maximum of 10 days.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes, the court is entitled to grant preliminary or interim relief – please see the answer to question 7.1 above. The court's intervention in such cases is limited to the preliminary or interim relief, as the case may be; hence it does not have any effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

When faced with requests for interim relief submitted by parties to arbitration agreements, courts generally retain jurisdiction and hear the merits of the request, on grounds of the alternative jurisdiction provided by the CPC to courts and arbitral tribunals.

However, there have also been instances when national courts dismissed a request for provisional measures for lack of courts' general jurisdiction, when the arbitration proceedings were already in course. The court argued that, according to the ICC Rules, after the arbitral file has been transmitted to the arbitral tribunal, the rule is that the latter has the right to issue provisional measures and only in special circumstances the party may request judicial authorities for the same measures; in the court's opinion, no such special circumstances were proven by the claimant.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The CPC does not provide the courts' right to issue anti-suit injunctions in aid of an arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

No, there is no express provision under Romanian law allowing for the national court and/or arbitral tribunal to order security for costs.

However, in light of the 2017 CICA Rules of Arbitration which provide for a broader scope of the interim remedies which an arbitral tribunal may grant, one may consider that an arbitral tribunal has the right to award security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

If the parties resist the arbitral tribunal's decision granting precautionary or interim measures or by which it ascertains factual circumstances, enforcement can only be obtained with the intervention of national courts. However, in general, parties directly request the national courts to grant such measures, upon filing the request for arbitration (see the answer to questions 7.1 and 7.3).

A more debated topic is whether the national courts may enforce partial arbitral awards, specific to international arbitration. It should be noted first that the CPC regulates the arbitral tribunal's right to render partial awards only in international, not domestic arbitration (article 1.121). Although a solid trend of the national courts cannot be identified, there have been instances where courts refused to enforce ICC partial arbitral awards rendered in relation to non-final DAB decisions, on the grounds of the arbitral award not being final and that enforcing it would breach Romanian procedural rules. We also note a recent decision rendered by the Romanian High Court of Cassation and Justice whereby an ICC partial arbitral award in relation to a non-final DAB decision was annulled.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The rules of evidence, as part of the procedural rules applicable to a dispute, are primarily those agreed between the parties in the arbitration agreement or those established by the arbitral tribunal. If the parties have submitted their dispute to an arbitral institution, its procedural rules shall apply. If the parties have not agreed on or if the arbitral tribunal has not been requested to establish the rules of evidence, as well as for those circumstances not covered by the arbitration agreement or by the tribunal's decision in this respect, the rules of evidence provided in the CPC shall apply (articles 576, 1.115 and 1.123).

The 2017 CICA Rules of Arbitration enhance the flexibility of the arbitrators with respect to taking of evidence. In particular, the arbitrators may simplify the procedural setting and tailor the process to suit the particular circumstances of each dispute, for example by identifying the matters which may be decided solely on the basis of written documentation, without the need for witness or expert testimony (Annex 4 to the Rules). Moreover, the Rules provide the arbitral tribunal's right to apply in international arbitrations, with the parties' consent, the IBA Rules on the Taking of Evidence (article 34).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Although the concept of disclosure of documents is not regulated *per se* in Romanian law, the CPC nevertheless provides that the arbitral tribunal may order the parties to submit a piece of evidence under their possession and that it may request public authorities to grant information or provide documents relevant to the dispute (articles 588 and 590). However, if the public authority refuses to comply, the parties or the arbitral tribunal may seek the assistance of state courts.

Also, if a witness of fact or expert witness refuses to testify, the arbitral tribunal does not have the authority to constrain or fine them, but the parties must seek the court's assistance to apply such measures (article 589 CPC).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

As mentioned above in the answer to question 8.2, the court may intervene in cases of witness testimony or of requests to produce addressed to public authorities which refuse to cooperate. State courts may intervene, at the parties' request, in any other case where the course of the arbitration is obstructed (article 547 CPC). In international arbitration, the CPC provides the right for the arbitral tribunal or for the parties, in agreement with the arbitral tribunal, to request the court's assistance when needed for administering any type of evidence (article 1.118).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The production of written and/or oral witness testimony is regulated

by the CPC (please see the answer to question 8.1). Witnesses of fact and expert witnesses will testify without taking an oath. They may also testify at their domicile or workplace, in which case the tribunal will also ask the witness to provide written answers to the tribunal's questions. Although not expressly regulated, cross-examination is generally used in arbitration. If the witness refuses to testify, he/she may be constrained or fined only by state courts (article 589 CPC).

Under the 2017 CICA Rules of Arbitration, the witnesses need not be sworn in, but their written depositions must be submitted in the form of notarised statements, under a legalised signature or by confirmation of the witness' identity by a lawyer (article 36).

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

As far as attorney-client privilege is concerned, in Romania this concept falls under the attorney's obligation to ensure confidentiality concerning any aspect of the case. This obligation pertains to public order, is unconditional and unlimited in time and extends to all the attorney's activities, of its associates, collaborators, employees and to the relationship with other attorneys. Communications between attorneys or between attorney and client cannot, as a rule, be brought as evidence in justice and they may not be divested of their confidential nature. The client may not absolve the attorney of its confidentiality obligation (article 11 of Law 51/1995, articles 8 and 9 of the Lawyers' Statute).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Arbitral awards must be issued in written form and contain (article 603 CPC):

- the composition of the arbitral tribunal, place and date of rendering;
- the parties' name and basic identification data;
- mention of the arbitration agreement;
- object of the dispute and the parties' claims in brief;
- reasons in fact and in law;
- the disposition; and
- the signature of every arbitrator and, as the case may be, of the arbitral assistant.

Dissenting opinions will be drafted and signed separately and will contain reasons.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

In domestic arbitration, the CPC provides the parties' right to request the arbitral tribunal to clarify the disposition of the arbitral award or to eliminate contradictory provisions included therein. Also, if the arbitral tribunal omitted to render its decision on a head of claim, a related or incidental claim, the parties may request the amendment of the arbitral award. Material errors or other apparent errors that do not change the merits of the decision, as well as computation errors may be corrected at the request of the parties or *ex officio* (article 604).

The parties will not bear the costs pertaining to the clarification, amendment or correction of the arbitral award.

The 2017 CICA Rules of Arbitration (articles 48 and 49) comprise similar provisions to the ones found in the CPC.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The arbitral award may only be challenged by way of an application for setting aside, on grounds similar to those provided by the UNCITRAL Model Law (article 608 CPC):

a) the subject matter of the dispute is not capable of settlement by arbitration;

b) the award was rendered in lack of, or under a null or invalid arbitration agreement;

c) the composition of the arbitral tribunal was not in accordance with the arbitration agreement;

d) a party was not present and was not given proper notice of the hearing;

e) the award was rendered after the arbitration term had lapsed;

f) the award contains decisions on matters beyond the scope of the submission to arbitration (*extra* or *ultra petita*);

g) the award contains no disposition and reasons, does not indicate the date and place of rendering or is not signed by the arbitrators;

h) the award is in conflict with public policy, good morals or imperative provisions of law; or

i) if, after the award was rendered, the Constitutional Court found that a law, ordinance or a provision thereof is unconstitutional, in the context of a plea being made in this respect by one of the parties in the course of the arbitral proceedings.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties may waive the right to file the application for setting aside the arbitral award only after it has been rendered and not *a priori*, through the arbitration agreement (article 609 CPC).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, the CPC does not provide the parties' right to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The application for setting aside must be filed before the Court of Appeal at the seat of the arbitration, within one month of communication of the award (articles 610 and 611 CPC). For those claims grounded on the Constitutional Court's decision (see the answer to question 10.1 above), the application for setting aside

must be filed within three months as of the publication of said decision in the Official Gazette.

The statement of defence is mandatory and, in support of the grounds for setting aside the arbitral award, the parties may only bring documents as new evidence (articles 608 and 613 CPC).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Romania has ratified the New York Convention through Decree no. 186/1961, entering two reservations, in that it will apply the Convention:

a) only to disputes resulting out of contractual or non-contractual relationships, considered as commercial under its legislation; and

b) to the recognition and enforcement of awards rendered in the territory of another Contracting State. For those awards rendered in the territory of non-Contracting States, Romania will apply the Convention only on the basis of reciprocity established by a joint agreement between the parties.

The relevant national legislation is to be found in the CPC, Book VII, Title IV, Chapter II on *The Effects of Foreign Arbitral Awards*.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Romania has ratified the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, through Law no. 50/1931 and the 1961 Geneva Convention on International Commercial Arbitration, through Decree no. 281/1963.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Domestic arbitral awards are enforceable titles and can be enforced just like court decisions (article 615 CPC). The obligation to have arbitral awards vested by national courts with writ of execution is no longer in force as of February 2016.

In what regards foreign arbitral awards, they are subject to the recognition and enforcement procedure (*exequatur*) before they can be enforced (article 1.126 CPC). Romanian national courts – in the spirit of the New York Convention – have a pro-recognition and enforcement approach.

The parties must file the request before the Tribunal in which jurisdiction the domicile or the headquarters, respectively, of the respondent is located. If the competent Tribunal cannot be determined, the Bucharest Tribunal shall retain jurisdiction.

With the request, the interested party must submit the arbitral award and the arbitration agreement, subject to super legalisation (article 1.128 CPC). It should be noted that Romania has ratified the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents, which shall apply in relation to states parties to the convention, unless bilateral conventions between Romania and said states provide to the contrary. Romania has entered into such bilateral conventions abolishing the requirement of even the apostille for certain documents, with states such as France or Belgium. Also, should it be the case, a certified translation in Romanian of said documents (in their entirety, not excerpts) must be provided. The aforementioned legal requirement should not apply to the arbitration agreements under a private signature.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Although the CPC only provides that arbitral awards are final and binding (article 606), it is unanimously acknowledged by scholars and courts that arbitral awards, be they national or foreign, are subject to the *res judicata* principle. The *res judicata* has (i) a positive effect, in that the solution given to the issues in dispute cannot be contradicted by subsequent court decisions or arbitral awards, and (ii) a negative effect, in that the dispute may not be reheard between the same disputing parties before a national court or arbitral tribunal. For the negative effect, the courts will apply the so-called "triple identity" test, consisting of the same parties, object of dispute and cause (basis) of the claim between the arbitral dispute and litigation. These conditions do not apply to the positive effect of the *res judicata*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

It is a very high standard, as the Romanian courts' approach has consistently been pro-arbitration enforcement. Indeed, according to Romanian law, recognition and enforcement of an arbitral award may be refused on grounds of public policy if and to the extent that it would lead to an outcome that is incompatible with the fundamental principles of Romanian law, of European Union law or of the fundamental human rights (article 2.564 of the Civil Code). As such, unless we are in exceptional situations of egregious violations of due process rights or of the most fundamental values protected under the public policy regime, an arbitral award made by a properly vested arbitral tribunal under a valid arbitration agreement is enforced by the Romanian courts.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Romanian law governing international arbitration follows the directions of the UNCITRAL Model Law, which left the matter of confidentiality to the parties' express agreement or choice of institution. Nevertheless, the CPC provides in article 565 that arbitrators are liable for any damage caused by breaking confidentiality. In this respect, the 2017 CICA Rules of Arbitration name confidentiality as one of the core principles of the arbitration procedure, listed under article 3. Absent the parties' written consent, the confidentiality of the entire arbitral proceedings is protected by the Court, its President, Management Board, Secretariat, the arbitral tribunal, arbitral assistants and by all those directly involved in organising the proceedings.

Confidentiality agreements are protected by article 53 of the Romanian Constitution, whereby the exercise of rights or liberties can be restrained only in specific circumstances.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Once the parties have made the arbitration proceedings confidential, only by their agreement can the information thereby disclosed be used for other purposes. However, the 2017 CICA Rules of Arbitration provide in article 4 that the awards may, for scientific or academic purposes, be published in part without revealing the name of the parties or prejudicial data. It is not unusual for awards so published to be used by parties in subsequent proceedings, predominantly for proving matters of law.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no specific provisions in the CPC limiting the types of remedies that are available in arbitration. Therefore, all the remedies that are available in litigation are also available in arbitration (e.g., monetary compensation including money due under a contract or damages, specific performance, annulment or termination of a deed, restitution, declarative remedy, interest and liquidated damages). As a note, within enforcement proceedings, punitive damages are excluded under article 907 of the CPC.

13.2 What, if any, interest is available, and how is the rate of interest determined?

If the parties provided for a late payment interest, the rate stipulated in the contract will be applicable. In the absence thereof, the applicable rate will be the legal one, to be determined according to the provisions of Government Ordinance no. 13/2011. The legal interest rate may be different depending on the parties to the dispute as well as on whether the parties' juridical relationship has an international element or not. The National Bank of Romania's official rate is used to determine the legal interest rate, save for international legal relationships where the Romanian law is applicable and the payment is provided for in foreign currency, where the rate is of 6% per year.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The consecrated general rule in domestic arbitration is that the parties have full autonomy to reach an understanding on how the fees, costs and expenses related to the arbitration may be allocated. Lacking an agreement, all such amounts shall be in the responsibility of the losing party, if the other party's claim was admitted on all accounts, or by both parties proportionally, according to the extent to which the partial award was in the other's favour (article 595). Except as otherwise agreed, parties to an international arbitration have to cover the fees and expenses of their appointed arbitrator, or split those of the sole arbitrator or the chairman equally (article 1.122).

On this topic, the 2017 CICA Rules of Arbitration provide that the arbitral tribunal may, at the request of a party and unless the parties had previously agreed otherwise, allow the party to recover any reasonable costs from the other, considering the manner in which the parties conducted themselves with respect to contributing to efficient and expedited arbitral proceedings, as well as any relevant circumstances.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

It depends on the nature of the amount awarded and the circumstances under which the award is issued. For instance, in general, if compensation in the form of damages is awarded, such may be subject to income tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no specific explicit restrictions on third parties funding claims in Romania. With regard to lawyers' profession, however, according to the provisions of the Lawyers' Statutes, the lawyers are prohibited to establish their fees on a *pactum de quota litis* basis whereby their fees entirely depend on the outcome of the case (article 130). Notwithstanding the above, success fees are allowed. To our knowledge, there are no "professional" funders active in the Romanian market.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Romania ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) by the State Council Decree no. 62/1975.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Romania is currently party to Bilateral Investment Treaties (BITs) with about 85 states, of which almost all have ratified the agreement as of March 2018. At the request of the European Commission, the Romanian Parliament passed Law no. 18/2017, in force as of 24 March 2017, approving the termination of 22 BITs Romania concluded with EU Member States. Romania is also party to the Energy Charter Treaty, which it ratified in 1997 through Law no. 14/1997.

Out of the 22 BITs concluded with EU Member States, only the BIT with Denmark has been terminated through parties' consent so far.

In line with the European Commission's request and the provisions of Law no. 18/2017, Romania has also expressed its position against the compatibility of BITs with the European Union treaties, along with other EU Member States such as Spain, Italy, Hungary or

Poland in the recent landmark case of *Slovak Republic v. Achmea B.V.* (C-284/16), whereby the Court of Justice of the European Union ruled that the arbitration clause contained in the Netherlands-Slovakia BIT is incompatible with EU law.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Romania has worded the treaties concluded with non-EU Member States so as not to be incompatible with the exigencies of European Union law. Some of the pre-existing treaties, such as those with the United States and Israel, had to even be amended for this purpose. In order for the treaties to be compliant with the EU principles of free movement of services and freedom of establishment, the provisions pertaining to "most favoured nation" were worded so as not to "oblige one Contracting Party to extend to the investors and investments of the other Contracting Party the advantages resulting from" circumstances akin to being a Member State of the European Union. Similarly, Romanian BITs include provisions not limiting its ability to impose performance requirements or restrictions to the movement of capital as demanded by the security interests of one party.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Romanian Supreme Court and lower courts have generally (especially in non-commercial disputes) upheld the foreign states' immunity regarding jurisdiction and execution in light of the consecrated principle *par in parem non habet jurisdictionem*. While Romania is not party to the 1972 European Convention on State Immunity, it ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides that a State cannot invoke the defence of state immunity before a court of another State which is competent in a proceeding relating to a dispute arising from an arbitration agreement wherein the former State is a contracting party. Nevertheless, the Convention has yet to enter into force, and the Supreme Court denied its application in a case not related to arbitration. There is currently no reported Romanian case law in connection with investor-state arbitration.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Ensuring expedition of the arbitral proceedings and facilitating access to the users by establishing moderate arbitral fees have been among the main goals pursued by the arbitral institutions and users in recent years.

Arbitration, and particularly international commercial arbitration, remains the key alternative to the state judiciary, at least in disputes involving concurrent applicable laws and jurisdictions. There are certain sectors prone to arbitration, such as concessions, the construction industry, public-private arrangements and corporate joint-venture type investment schemes, finance-banking, agriculture, transport and technology of information.

Predominantly, these sectors continue to favour arbitration over litigation or mediation. This is primarily due to the complexity of these types of matter and the intricacies of cross-border commercial disputes, where experienced international arbitrators are better placed and equipped to deal with all of the relevant issues.

Notably, at the beginning of this year the General and Specific Conditions for construction works contracts concluded in relation to the investment objectives financed by public funds over roughly EUR 5m were approved through the Government Decision no. 1/2018. These Conditions of contract come to replace the FIDIC-based former default conditions applied for public procurement construction contracts. The 2018 Conditions provide a CACI rules arbitration clause, replacing the former jurisdiction of the ICC Court.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The freshly enacted 2017 CICA Rules of Arbitration have maintained the trend of modernising the arbitration setting in Romania, and have become aligned with the modern standards of best practice applied by arbitration rules of prestigious institutions.

They simplify standard arbitral proceedings, enhance the impartiality and independence of arbitrators through clear provisions for challenging the arbitrators, and also provide time- and cost-effective arbitration management tools, such as bifurcation, consolidation, long distance communication mechanisms, and preliminary conferences for determining the organisational aspects of the hearings.

The introduction of a fast track arbitration procedure (default simplified procedure under a certain value threshold) and of emergency arbitrator provisions aim to further cater to the parties' needs and specific circumstances of their dispute.

The 2017 CICA Rules of Arbitration have been well-received by the arbitration and business communities. They sparked an interest into further accommodating the arbitration climate in Romania, and initiated opportune conversations of possibly amending the CPC to this end.

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The firm's International Arbitration Practice Group benefits from a dedicated team that has been at the vanguard of Romanian international arbitration for decades. The lawyers combine the expertise and understanding of the arbitration field with industry knowledge, with all senior members having previous extensive experience in commercial matters across the spectrum of major industries.

Chapter 24

Russia


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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The position on many arbitration-related matters in Russian law has changed significantly with the Russian arbitration reform legislation (two federal laws) adopted in December 2015. The reform legislation significantly altered Russia's International Commercial Arbitration Law, dated 1993 (***ICAL***), and completely replaced Russia's pre-existing federal law on domestic arbitration with new legislation (the ***Domestic Arbitration Law***). It also significantly changed the arbitration-related parts of the Arbitrazh Procedural Code (***APC***, which applies to private commercial litigation) and the Civil Procedure Code (***CPC***, which governs non-commercial civil litigation involving individuals). Unless otherwise indicated, all references to the Russian legislation are to the legislation now in force (post-reform).

Pursuant to Article 7 of the ICAL, parties may enter into an arbitration agreement in respect of all or part of their disputes, whether they are of a contractual or a non-contractual nature. An arbitration agreement can take the form of a separate, standalone agreement or an arbitration clause incorporated in a contract. Parties can agree to arbitration either before or after a dispute arises.

It is important for the parties to define the scope of the arbitration clause and the arbitration rules and/or institution precisely. If they fail to do so and their intentions cannot be discerned from the underlying agreement, their agreement may be held unenforceable by Russian courts.

Pursuant to Article 7 of the ICAL, an arbitration agreement must be made in writing. Such a requirement will be satisfied, for instance, where the parties co-sign a contract containing an arbitration clause, or if they exchange letters to the same effect. They can also conclude an arbitration agreement by means of reference to a document containing such agreement. Arbitration agreements made by exchange of electronic messages are also acceptable, provided that the legal requirements for contracts made by electronic exchange have been observed. In practice, these legal requirements are only satisfied where an electronic exchange is signed with a legally compliant electronic signature (a simple e-mail will not suffice).

The parties are also considered to have concluded an arbitration agreement in writing where one of the parties alleges its existence in a statement of claim and the other does not deny its existence in its statement of defence.

Russian law sets out additional requirements in respect of the arbitration of corporate disputes, which impacts arbitration agreements. The notion of corporate disputes (per Article 225.1 of the APC) encompasses all disputes relating directly or indirectly to the management of Russian companies or participation in them. Arguably, the definition of corporate disputes includes all disputes arising out of shareholders' agreements and share purchase agreements in respect of Russian companies. Arbitration clauses in respect of corporate disputes are permitted starting from 1 February 2017. Such clauses can be included in the articles of association of Russian companies.

Arbitration agreements in respect of corporate disputes have to comply with a number of specific requirements.

For example, corporate disputes are subject to adjudication only under the auspices of eligible arbitral institutions: Russian or foreign arbitral institutions that have obtained a special Russian government permit envisaged by the reform legislation (except for the International Commercial Arbitration Court (***ICAC***), which is exempted from the permit requirement). Corporate disputes cannot be referred to *ad hoc* tribunals.

Another requirement is that the seat of arbitration in respect of almost all corporate disputes must be in Russia, and almost all such disputes must be arbitrated under specialised arbitration rules (such rules have already been adopted by some Russian institutions, including the ICAC). Where the dispute has to be arbitrated under such specialised rules, a further requirement is that the parties, the target company and all its shareholders must accede to the arbitration agreement. This requirement may often be difficult or impossible to achieve in practice.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Russian law does not require that any other elements be included in arbitration clauses. However, following the best industry practices, the parties are advised to agree on the seat and language of arbitration, the number of arbitrators and on the applicable law.

In addition, the arbitration reform legislation has allowed parties to institutional arbitration (but not parties to *ad hoc* proceedings) to opt out of a number of provisions of the ICAL by express agreement, i.e. an agreement made by the parties explicitly and not simply by reference to arbitral rules. For example, in institutional arbitration only, the parties may expressly waive the default referral of the appointment and challenges of arbitrators to state courts (Articles 11(5), 13(3) and 14(1) of the ICAL). In institutional arbitration only, the parties may also expressly waive their rights to apply to courts to determine the preliminary issue of jurisdiction (Article 16(3) of the ICAL) and expressly agree on the finality of the award (Article 34(1); see, however, the limitations of finality in question

10.2 below). Should the parties wish to exploit these opt-out opportunities, they should provide for them in their arbitration agreement.

There are also other default rules in the Russian arbitral laws that the parties can modify or exclude. For example, the parties may wish to modify in their arbitration clause the default educational requirements for arbitrators in their Russia-seated arbitration (see question 2.4 below for more detail) and address the issue of safe-keeping of the award and supporting case materials (see questions 2.4 and 6.5 below for more details).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Arbitration agreements and arbitral awards are generally enforceable in Russia and courts are required to refer parties to arbitration where a party invokes a valid arbitration clause before its first submission on the merits. However, Russian courts have, on numerous occasions, refused to enforce arbitration clauses that were not sufficiently clear as to the agreed arbitral rules and/or institution. In order to overcome that negative tendency, the ICAL now expressly provides that, in case of doubt as to the validity and enforceability of an arbitration agreement, the disputed issues are to be resolved in favour of validity and enforceability (Article 7(9)).

Another problematic area has been the enforcement of sole option/unilateral arbitration agreements, where only one of the parties can choose between courts and arbitration. In a ruling of the Higher Arbitrazh Court of 19 June 2012 (*Sony Ericsson*), the court stated that such unilateral agreements, which give one party the right to refer disputes to courts and arbitration, while the other party has the right to refer disputes only to arbitration, are void. The court ruled that the unequal arbitration agreement should be equalised, in that the other party would also have the right to refer disputes to state courts. At the same time, an arbitration clause that enables the claimant (rather than one of the parties by name) to refer a dispute to a court or an arbitral tribunal is acceptable, as it is not considered to create inequality of arms (see the ruling of the Presidium of Supreme Arbitrazh Court No. 11196 of 14 February 2012 and the ruling of the Supreme Court No. 310-ЭС14-5919 of 27 May 2015; technically, both rulings were issued in the context of domestic arbitration, but the same rationale may apply in international arbitration).

Russian courts have also been, and may be expected to continue, refusing the enforcement of arbitral agreements and arbitral awards in disputes considered non-arbitrable under Russian law. In particular, arbitration agreements in respect of corporate disputes, concluded before 1 February 2017, may be unenforceable in Russia (see question 3.1 below for more details).

Russian courts also used to apply the public policy grounds for the refusal of the recognition and enforcement of foreign arbitral awards overly broadly. The situation has improved with the issuance of a helpful guidance by the Higher Arbitrazh Court (see question 11.5 below), although the risks of non-recognition on the public policy grounds have not been removed completely.

Additional issues may arise in specific sectors; for example, Russian courts refused to enforce an international arbitration clause in a Russian concession agreement, finding that Russian legislation relating to this sector only allows such disputes to be arbitrated domestically. Later, the Moscow Arbitrazh Court found that disputes under concession agreements are not arbitrable at all (i.e. they cannot even be arbitrated domestically). This decision had been appealed, and no final decision has yet been rendered (*see decision of the Moscow Arbitrazh Court in case No. A40-93716/2017 dated 14 September 2017*). An inconsistent and/or arbitration-unfriendly approach may also be expected from courts in respect of arbitrability of other disputes involving public elements (e.g., where the dispute is connected with the performance of a state function or the use of state funds).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The enforcement of arbitral agreements and arbitral awards is governed by the ICAL, the Domestic Arbitration Law and the procedural codes (the APC and the CPC). We mostly address below the position under the ICAL and the APC, as these sources are the most relevant to international commercial arbitration.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Russia has separate statutes for international and domestic arbitration, namely the ICAL and the Domestic Arbitration Law (which entered into force on 1 September 2016). They are largely harmonised, and based to a significant extent on the UNCITRAL Model Law. The Domestic Arbitration Law contains a range of detailed and technical rules adapted to purely Russian disputes. These include mandatory rules not found in the Model Law, such as arbitrator qualification requirements and rules on the operation of arbitral institutions. Importantly, some of these domestic provisions apply also to international arbitrations seated in Russia, pursuant to Article 1(2) of the ICAL (see questions 2.3 and 2.4 below for more details).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Even prior to the recent arbitration reform, the ICAL was closely modelled on the 1985 UNCITRAL Model Law with minor deviations. The reformed ICAL includes just a few adoptions from the 2006 version of the Model Law. For example, following Article 17 of the new Model Law, the ICAL no longer limits the scope of interim relief that may be granted by the tribunal to measures in respect of the subject-matter of the dispute. Other 2006 Model Law revisions, such as Article 2A and Chapter IVA, with its extensive provisions on interim relief, were not reflected in the ICAL.

The key differences between the reformed ICAL and the Model Law can be summarised as follows.

(1) The determination of the international nature of arbitration in the ICAL differs from that in the Model Law. For instance, a foreign seat and/or the parties' agreement that the subject-matter of the dispute is related to more than one jurisdiction are insufficient to render the dispute "international" under the ICAL. Also, in addition to the standard Model Law, language covering cross-border commercial disputes, disputes relating to foreign investments in Russia and Russian investments abroad are in any event considered international (Article 1(3) of the ICAL).

(2) The revised ICAL follows the Model Law in designating courts as assistance and supervision authorities (as defined in Article 6 of the Model Law). However, for international commercial arbitration proceedings under the auspices of the ICAC and Maritime Arbitration Commission (***MAC***), the Chairman of the Chamber of Commerce and Industry of

the Russian Federation, rather than the courts, is designated as the supervisory authority for arbitrator nominations, replacements and challenges (see Clause 11 of Annex I and Clause 10 of Annex II to the ICAL).

(3) The provisions on arbitral agreements in the ICAL are Model Law-based at their core, but are more extensive and detailed. For example, the ICAL:

(a) provides for the possibility of including arbitration agreements in stock exchange and clearing rules and corporate charters (Articles 7(7) and 7(8));

(b) contains a default rule that an arbitral agreement in a contract applies to any transactions between the same parties made with the purpose of the performance, modification and termination of the main contract (Article 7(10));

(c) provides that, in the event of assignments (change of parties), the arbitration agreement remains in effect as between the assignor and the assignee (and, in the event of the transfer of obligations, remains binding for both the initial and the new obligor) (Article 7(11)); and

(d) contains a default rule that a contractual arbitration clause applies to disputes relating to entry into the contract, its effectiveness, modification, termination, validity and to the restitution obligations arising from its invalidation (Article 7(12)).

(4) The ICAL allows parties to opt out (by express agreement) of the Model Law-based provisions regarding referral to assistance and supervision authorities in matters of arbitrator appointments and challenges and on the preliminary issue of jurisdiction (Articles 11(5), 13(3), 14(1) and 16(3)); they may also agree on the finality of the award (Article 34(1)). All of these opt-out and finality agreements are only possible in the context of institutional arbitration.

(5) Unlike the Model Law, the ICAL does not contemplate arbitrators deciding cases *ex aequo et bono*.

In addition, the ICAL now provides that in respect of arbitrations seated in Russia, certain provisions of the Domestic Arbitration Law, which depart from the Model Law, apply by reference (see question 2.4 below for more detail).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Mandatory rules can be found in international treaties in which Russia participates, such as the New York Convention (1958) and the European Convention on International Commercial Arbitration (1961). These rules apply directly and override national laws in the event of conflict.

Secondly, a number of mandatory procedural rules are included in the ICAL, for instance:

(a) the requirement that arbitration agreements be made in writing (Article 7);

(b) the autonomous nature of the arbitration agreement and the tribunal's right to rule on its own jurisdiction (Article 16);

(c) the equal treatment of the parties (Article 18); and

(d) the form and mandatory elements of an arbitral award (Article 31).

In addition, Article 1(2) of the ICAL provides that in international arbitrations seated in Russia, the Domestic Arbitration Law shall regulate "… *the issues connected with the creation and operation in the Russian Federation of arbitral institutions…, safe keeping of arbitration case materials and entering of changes to legally-significant registers in the Russian Federation based on arbitral awards, the relationship between mediation and arbitration procedures, as well as requirements applicable to arbitrators as well as liability of arbitrators and arbitration institutions*…". By implication, this would lead to application by reference of the following mandatory rules of the Domestic Arbitration Law:

(a) personal requirements for arbitrators, such as minimum age, full legal capacity and absence of a criminal record/convictions (except those that have been expunged) (Articles 11(8) and 11(9));

(b) the prohibition on appointing as arbitrators any former judges, advocates, notaries, investigators, prosecutors and other members of law enforcement bodies who have been dismissed for unethical conduct (Article 11(10)) and other individuals who are banned from acting as arbitrators by Russian federal laws (Article 11(11));

(c) the default requirement that the sole arbitrator or the chairman of the tribunal must possess a Russian higher degree in law or similar foreign degree that is recognised in Russia (Article 11(6)); in respect of arbitration tribunals, the parties may agree that the chairman does not have to comply with these standards, so long as at least one other member of the tribunal does (Article 11(7));

(d) provisions regarding the tribunal's duties to send the award/ruling on termination of the arbitral proceedings and case materials for safe-keeping to an institution chosen by the parties after completion of the proceedings (or, absent such choice, to a competent Russian court) (Article 39);

(e) a rule that records in public registers (such as the state registries of legal entities and real estate) and shareholders/securities registries can only be changed on the basis of an arbitral award where such award is supported by a writ of execution issued by a Russian court (Article 43);

(f) mandatory provisions regarding the creation and internal functioning of arbitral institutions in Russia (Chapter 9) (including, in our view, mandatory rules preventing institutional conflicts of interest, Article 46);

(g) the arbitral institution's liability to the parties for misadministration of the case (on a gross negligence basis), with the option to provide for increased institutional liability in the arbitration rules (Article 50); and

(h) arbitrators' immunity from civil liability to the parties, with the exception of liability for damage caused by a crime ("civil claim in a criminal case") (Article 51).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Non-arbitrable disputes are now primarily defined in the APC (as to commercial disputes) and the CPC (as to private non-commercial disputes).

The expressly non-arbitrable categories of disputes under the APC, as amended under the reform legislation (Article 33), include:

(a) insolvency disputes;

(b) disputes arising out of public officials' refusal to register a legal entity in the state register of legal entities;

(c) intellectual property disputes involving organisations responsible for the collective management of copyright and related rights or falling within the exclusive competence of the Court for Intellectual Rights due to their public nature (e.g., IP registration challenges);

(d) disputes arising from administrative and other public law matters;

(e) class actions (however, multi-party actions in corporate disputes may, in principle, be arbitrated);

(f) privatisation disputes;

(g) disputes relating to public procurement (with a reservation that, in the future, public procurement disputes may become arbitrable, provided that an appropriate arbitral institution is designated for such disputes by separate federal law);

(h) disputes over compensation for environmental damage;

(i) certain corporate disputes (Article 225.1(2) of the APC):

(i) disputes about the convocation of general shareholders' meetings;

(ii) disputes arising out of notarisation of transactions in respect of participation interests in Russian limited liability companies;

(iii) challenges to the acts, resolutions and actions (or failures to act) of public and municipal bodies, private entities performing public-law functions, and public officials;

(iv) disputes concerning "strategic" Russian companies as defined in Federal Law No. 57-FZ on Foreign Investments in Business Entities of Strategic Importance for the Defense of the Country and the Safety of the State of 29 April 2008 (the ***Strategic Investments Law***); there is a carve-out from this restriction – disputes over share ownership in "strategic" companies can be arbitrated, unless they arise under a transaction that required approval under the Strategic Investments Law;

(v) disputes relating to mandatory tender offers and squeeze-out procedures under chapters IX and XI.1 of Federal Law No 208-FZ on Joint-Stock Companies of 26 December 1995; and

(vi) disputes over the expulsion of participants from legal entities.

In addition, certain types of professional sports disputes are non-arbitrable under Russian legislation on sport. Article 22 of the CPC also defines a range of private disputes that cannot be arbitrated, including family and employment disputes, as well as disputes over compensation for personal injury.

The arbitration reform legislation provides that corporate disputes may only be referred to arbitration, and arbitration clauses can only be made with respect of such disputes, after 1 February 2017. Earlier arbitration clauses in respect of such disputes are deemed unenforceable, but the reform legislation does not specify if this only applies to arbitration clauses made after 1 September 2016 (the date when the reform legislation became effective) or also to earlier arbitration clauses. There is room to argue that the provision in question has no retroactive effect. However, a conservative interpretation suggests that there is a risk of invalidity of all "corporate" arbitration clauses (including those in M&A agreements and shareholders' agreements in respect of Russian target companies) made before 1 February 2017. Such conservative interpretation is also consistent with Russian practice before the reform.

Russian courts follow a restrictive approach with respect to the arbitrability of disputes involving public elements. Recently, Russian courts have found that any dispute under a contract performed for public purposes and paid from the state budget is non-arbitrable (see *resolution of the Moscow Region Arbitrazh Court in case No. A41-97770/2017 dated 5 March 2018, resolution of the Moscow Region Arbitrazh Court in case No. A40-126512/2017 dated 26 January 2018*). Moreover, in late 2017 the Supreme Court of the Russian Federation asked the Constitutional Court of the Russian Federation to opine on the arbitrability of disputes arising from the procurement of goods by state-owned entities (which is not formally deemed public procurement and is not listed as non-arbitrable in the APC and the CPC). This request has not yet been considered by the Constitutional Court. The Russian courts' position regarding arbitrability of procurement contracts entered into by state-owned entities, and potentially their position towards the arbitration of contracts with public elements, more generally, is expected to be shaped by the interpretation to be issued by the Constitutional Court.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Both the ICAL and the Domestic Arbitration Law recognise the principle of *competence-competence*. Pursuant to Article 16 of the ICAL (which closely follows the Model Law), an arbitral tribunal may decide on its own jurisdiction. In particular, the tribunal may rule on a defence that it has no jurisdiction as a preliminary matter. Where the tribunal rules on the preliminary question of jurisdiction and the ruling confirms jurisdiction, either party may apply to a competent court to challenge that decision. In institutional arbitration only, the parties may expressly agree to waive the right to such referral.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Following the New York Convention approach and based on Article 148(1)(5) of the APC, Russian courts are to terminate the proceedings ("leave the claim without consideration") and refer the parties to arbitration, provided that the defendant objects to the court's jurisdiction and invokes the arbitration agreement before its first submission on the merits. The exception is where the court finds that the arbitration agreement is invalid, inoperative or cannot be performed. In such situations, the court proceedings will continue.

For instance, the Supreme Court of the Russian Federation recently held that the claimant's financial problems cannot serve as an excuse for non-compliance with an arbitration agreement. A company brought a claim to state court despite an agreement in the contract referring all disputes to the SCC, relying on its inability to pay the arbitration fee. The Supreme Court supported the lower court, which had rejected the claim on the basis of Article 148(1)(5) of the APC (see *Ruling of the Supreme Court of the Russian Federation in case No. A56-13914/2016 dated 12 July 2017*).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

If a tribunal decides on its jurisdiction (as a preliminary question) and confirms the jurisdiction, the parties may apply to a competent court to challenge this decision, unless they have expressly waived such right (in institutional arbitration only – Article 16 of the ICAL); there is no recourse to courts where the tribunal decides on jurisdiction as a preliminary matter and finds that it has no jurisdiction. Importantly, the arbitration may continue while the court proceedings are pending (Article 16(3) of the ICAL):

(a) if a party commences court proceedings in disregard of the arbitration agreement and the other party objects to the court's jurisdiction (see question 3.3 above for more details);

(b) if a party applies to set aside an award issued in a Russia-seated arbitration, unless the right to apply for setting aside has been waived by the parties' express agreement, as is permitted for institutional arbitration only (see Article 34(1) of the ICAL; also see question 10.2 below on finality);

(c) in recognition and enforcement proceedings in Russia; and

(d) in deciding whether to grant a request for judicial assistance in evidence gathering (such requests must be denied where the court finds the dispute non-arbitrable – Article 27 of the ICAL; see question 8.3 below for more details).

As concerns the standard of review in respect of the tribunal's decision on jurisdiction, given the absence of any special rules on this type of review, the court may review the tribunal's reasoning and findings *de novo* (without restriction).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The default position under Russian law is that the tribunal has no jurisdiction over parties who have not consented to the arbitration in writing (i.e., parties who have not signed the arbitration agreement, nor agreed to be joined to an arbitration).

Obviously, the arbitration agreement would apply not only to the signatory parties but also to their successors. Furthermore, Article 7(11) of the ICAL expressly provides that, in the event of an assignment of claims and/or transfer of obligations, the arbitration agreement will apply to all relevant parties (i.e., the assignee, assignor, and the initial and new obligors).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

As a matter of Russian law, limitation periods are substantive rather than procedural, and are defined in substantive and not procedural legislation.

There is a special choice of law rule in respect of limitations (Article 1208 of the Russian Civil Code (***Civil Code***)), which provides that the law applicable to the parties' substantive relationship will also apply to limitations, with the result that even in Russia-seated arbitrations and Russian court proceedings, foreign limitation periods may apply.

As concerns the limitations periods in Russian substantive law, the generally applicable statute of limitations is three years, starting from the date when the claimant knew or should have known of the infringement of his rights and of the identity of the proper respondent. In any event, the limitations period cannot exceed 10 years from the infringement (Articles 196 and 200 of the Civil Code).

These general rules are customised in respect of certain types of claims (e.g., special limitation periods in respect of claims for invalidation of transactions under Article 181 of the Civil Code). There are also certain types of claims to which limitations do not apply, including, most importantly, claims of property owners to stop the infringement of their rights (*actio negatoria*).

There are also special rules in the Civil Code regarding the interruption and resumption of limitation periods (the latter applies only to individuals).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Bankruptcy proceedings as such are non-arbitrable under Russian law. Claims to recognise a Russian party as bankrupt (insolvent) are within the exclusive jurisdiction of state courts (Article 33 of the Bankruptcy Law and Article 33 of the APC). However, this rule does not cover all possible situations where insolvency and arbitration proceedings overlap.

One potential area of overlap relates to claims by a court-appointed insolvency receiver seeking invalidation of transactions under the Bankruptcy Law (e.g., transactions involving preferential treatment of creditors or aimed at creditor avoidance). Generally, such disputes are to be viewed as falling within the exclusive jurisdiction of Russian courts and are therefore non-arbitrable. However, exceptions may apply, e.g., where Bankruptcy Law (e.g., "financial assistance", external management/receivership) procedures are discontinued by the time of the court hearing in respect of an invalidation claim brought by the receiver.

As to the consequences of Russian insolvency proceedings for pending arbitrations, they depend on the applicable Bankruptcy Law procedure:

(a) from the moment that the judicial supervision (наблюдение), financial rehabilitation (финансовое оздоровление) or external receivership (внешнее управление) procedures begin, financial claims may only be brought against the debtor as part of the bankruptcy case (except claims for "current payments", i.e., the financial liabilities that arise after commencement of the insolvency case) (Articles 63(1), 81(1) and 94(1) of the Bankruptcy Law); and

(b) from the moment that the winding-up procedure (конкурсное производство) is introduced, essentially all claims against the debtor (with very few exceptions, e.g., claims seeking vindication of property and invalidation of transactions) can be advanced only as part of the insolvency proceedings (Article 126 of the Bankruptcy Law).

If claims or counterclaims are brought against the debtor in arbitration before commencement of Russian insolvency proceedings, the Bankruptcy Law does not require discontinuation of the arbitration, i.e., it may continue and an award may be issued. However, in practice, the enforcement of an arbitral award in any such arbitration becomes increasingly problematic:

(a) after the commencement of insolvency proceedings, the recognition and enforcement of arbitral awards against the debtor will only be permitted if it does not violate the rights and interests of other creditors (see, e.g., the ruling of the Supreme Court No. 305-КГ15-5805 of 9 October 2015);

(b) following the introduction of judicial supervision (наблюдение), the recognition and enforcement of an arbitral award is possible only as part of the Russian insolvency case (item 3 of Information Letter No. 96 of 22 December 2005 of the Higher Arbitrazh Court), unless the recognition procedure was initiated before judicial supervision. However, in either case, enforcement through the Russian bailiff system is essentially blocked after that point; and

(c) according to Higher Arbitrazh Court Ruling No. 8141/12 of 13 November 2012, an arbitral tribunal ceases to have jurisdiction and must discontinue proceedings once a winding-up procedure (конкурсное производство) commences in respect of the Russian debtor, because the dispute falls within the exclusive jurisdiction of Russian courts from that point. This position also implies that any award issued against the debtor after the introduction of a winding-up procedure is likely to be unenforceable.

Counterparties of insolvent Russian debtors need to develop their strategy in a pending arbitration with these issues in mind, and monitor the development of the Russian insolvency case. As a practical matter, if they plan to seek enforcement in Russia, they would need to present their claims in the Russian insolvency proceedings and/or demand recognition of their award in such proceedings not later than two months after the winding-up procedure begins (because

the list of creditors' claims accepted in the insolvency proceedings and eligible for asset distributions will be closed after that deadline, according to Article 142(1) of the Bankruptcy Law). Importantly, if a creditor brings claims as part of a Russian insolvency case, it needs to make sure that similar proceedings are not pending in arbitration (otherwise, the insolvency court may refer the parties to an arbitration based on Article 148(1)(5) of the APC).

For instance, recently the Arbitrazh Court of the West Siberian Region rejected the claim of a bankrupt company, which was brought to a state court in violation of an arbitration agreement, on the basis of Article 148(1)(5) of the APC. In that case, a bankrupt company submitted a contractual debt recovery claim to a state court despite the fact the contract referred all disputes to arbitration. The claimant argued that the arbitration agreement had become unenforceable due to its inability to pay the costs of ICC arbitration. The court found that the existence of bankruptcy proceedings in respect of the claimant does not release it from performance of the contract and does not render the arbitration agreement unenforceable (see *resolution of the Arbitrazh Court of the West Siberian Region in case No. A81-4101/2016 dated 19 January 2018*).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

First and foremost, the tribunal is to apply the rules of law chosen by the parties (Article 28(1) of the ICAL). If the parties have not made such a choice, the tribunal should determine the applicable substantive law based on the choice of law rules that the tribunal considers applicable (Article 28(2)), also taking into consideration the parties' contract and the applicable trade usages (Article 28(3)).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Russian private international law contemplates a variety of scenarios where overriding mandatory rules may apply, irrespective of the otherwise applicable law.

Pursuant to Article 1192(1) of the Civil Code, the parties' choice of applicable foreign law and/or the application of the choice of law rules will not prevent the application of "super-mandatory" provisions (norms of direct application) of Russian law. These overriding rules must apply either because this is dictated by the rules in question themselves, or due to the special importance of the rules for the protection of the parties' legitimate rights and interests. For example, requirements of the Strategic Investments Law are likely to be deemed overriding. However, there is no well-established list of overriding Russian rules and, in general, which norms may be recognised as such is decided on a case-by-case basis.

According to Article 1192(2) of the Civil Code, when applying the laws of any jurisdiction, the court may take into account the overriding mandatory rules of law of another country that has a close connection with the dispute, having due regard to the purpose and nature of such rules and the consequences of their application or non-application. According to the default interpretation rules of the Civil Code, the term "court" would also include arbitration tribunals.

According to Article 1193 of the Civil Code, in exceptional cases, a foreign substantive rule of law will not be applied where its application would clearly contradict Russian public policy. In such cases, relevant Russian law rules may be applied instead.

Finally, Article 1210(5) of the Civil Code provides that the parties' contractual choice of law of a particular country will not prevent the application of any substantive mandatory law of another country, provided that the parties' relationship is actually connected only with that other country.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Russian law does not contain any special choice of law rules concerning the formation, validity or legality of arbitration agreements, leaving this issue open to interpretation by arbitral tribunals and courts.

When determining the validity of foreign arbitral agreements in the absence of the parties' express choice, Russian courts are most likely to apply the law of the seat of arbitration; however, other scenarios (including the application of Russian law) cannot be ruled out.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The default position is that the parties are free to select arbitrators. They may agree on requirements to and/or on desired qualifications of arbitrators (Article 11(1) of the ICAL). However, in respect of arbitration seated in Russia, the parties' choice of arbitrators is limited by certain statutory requirements (see question 2.4 above for more details).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The parties are free to decide which arbitrator or arbitrators will resolve the dispute (Article 11(1) of the ICAL) or agree on the appointment mechanism (including by reference to agreed arbitral rules which contain such mechanism (Article 11(2)).

In the absence of the parties' agreement on arbitrator appointment, the default mechanism is as follows (Article 11(3) of the ICAL):

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon application of a party, by the competent Russian court; and

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the competent court.

If the parties agreed on the appointment mechanics (including by reference to arbitral rules) but the appointment is deadlocked (e.g., the parties or their appointed arbitrators cannot agree on the steps required for appointment), any party may apply to the relevant Russian court to secure the appointment, unless the parties' agreement contemplates some other method of securing the appointment (Article 11(4) of the ICAL).

A court appointing an arbitrator must have due regard for any qualifications required of the arbitrator by the agreement of the parties, and must ensure that the arbitrator will be independent and impartial (Article 11(6) of the ICAL).

In institutional arbitration only, parties may by express agreement waive the right to refer appointment issues to courts (Article 11(5) of the ICAL).

Referral of the appointment issues to courts is novel for Russian law (these rules were introduced as part of the arbitration reform) and it remains to be seen how well the courts will perform this function and in particular how they will choose arbitrators.

In respect of the ICAC and MAC, the appointing authority is the Chairman of the Chamber of Commerce and Industry of the Russian Federation, and not the courts.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Courts may play a role in resolving deadlocked appointment procedures, either where the parties' agreed appointment mechanism stalls, or where the parties have not agreed on a mechanism. See question 5.2 above for more details.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The general position is that arbitrators must be impartial and independent. However, these general standards of impartiality and independence are not developed or particularised in the ICAL or other statutory laws in Russia. More detailed rules on independence and impartiality can be found in the arbitral rules.

In order to give the parties more guidance, in 2010, the Chamber of Commerce and Industry of the Russian Federation published non-binding Rules on Independence and Impartiality of Arbitrators, influenced by the IBA Guidelines on Conflicts of Interest in International Arbitration. These rules may be used for reference (for example, in ICAC proceedings in Russia).

According to Article 12(1) of the ICAL, when a person is approached in connection with his possible appointment as an arbitrator, he or she shall disclose, in writing, any circumstances which may give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator must inform the parties about any such circumstances that arise during the arbitral proceedings.

A party can challenge an arbitrator if it has sufficient grounds to believe that an arbitrator is not impartial and independent or does not satisfy the requirements established by the law or agreed by the parties. However, it may only challenge its own appointed arbitrators if the circumstances giving rise to the challenge became known only after the appointment (Article 12(2) of the ICAL).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Article 19 of the ICAL provides that parties are free to agree on the procedure of arbitration (including by application of agreed arbitral rules), subject to compliance with the applicable mandatory requirements of the ICAL and (if applicable) the Domestic Arbitration Law. In the absence of the parties' agreement on the procedure, the arbitral tribunal may establish the arbitral procedure as it considers appropriate, subject to compliance with the applicable mandatory rules.

The applicable procedural rules for international arbitration are set out in Chapter V of the ICAL, which follows the Model Law.

As regards Russian domestic arbitration, the starting position is the same as in the ICAL, i.e., the parties' and the tribunal's freedom to determine the procedure. However, Russian domestic arbitration is subject to more detailed and complex default rules than international arbitration; for example, regulating mandatory elements of the parties' submissions and the allocation of costs.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

In international arbitration, there are few mandatory steps to be taken. One step that is required is the submission by the claimant, within the period of time agreed by the parties or determined by the arbitral tribunal, of a statement of facts and circumstances on which its claim is based, as well as of the relief sought. The respondent must submit, within the applicable time limit, his defence in respect of the claimant's submissions, unless the parties have otherwise agreed (Article 23 of the ICAL). The parties may submit with their statements all documents that they consider to be relevant, or add a reference to the documents or other evidence that they intend to submit. If the claimant fails to submit a compliant statement of claim without good reason, the tribunal is to terminate the proceedings (Article 25 of the ICAL).

Each party is required to provide its submissions and evidence to the other party, as well as to the arbitral tribunal (Article 24(3) of the ICAL).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no generally applicable rules in Russia governing the conduct of counsel in proceedings in Russia and elsewhere. The only exception applies to Russian advocates, i.e., licensed members of the bar organisation (адвокатура). Their activities are regulated by Federal Law No. 63-FZ on Advocate Activities and Advocacy in the Russian Federation of 31 May 2002 (the ***Advocacy Law***). The Advocacy Law requires advocates to adhere to the Code of Professional Ethics for Advocates adopted by the advocates' professional body, and generally to act diligently and in good faith in the best interests of the client. To be clear, Russian law does not require lawyers (including trial lawyers) to be advocates, and does not require admission to the bar as a pre-condition to practising law. Accordingly, most Russian legal professionals (including a large number of trial lawyers) are not advocates and are therefore not covered by the Advocacy Law. This has no impact on their standing as far as handling litigation and arbitration matters is concerned, with the only exception being that they cannot claim "advocate's secret" in respect of client information (see question 8.5 below for more details).

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Under the ICAL, arbitrators (sitting as sole arbitrators or as tribunals) have a wide range of procedural powers; for instance, the power to:

(a) decide on challenges (Article 13);

(b) resign in cases where they are unable to act (Article 14);

(c) rule on jurisdiction (in a separate award on a preliminary question or in a final merits award (Article 16));

(d) order interim measures that they consider appropriate, as well as security in respect of such measures (Article 17);

(e) conduct the arbitration in such manner as they consider appropriate (subject to any agreement of the parties and the applicable mandatory procedural rules (Article 19));

(f) decide on the seat of arbitration where the parties have not agreed on the seat or on a mechanism to determine it (Article 20(1));

(g) determine a hearing venue different from the seat of arbitration (unless this contradicts the parties' agreement (Article 20(2));

(h) determine the language(s) of arbitration where the parties have failed to agree, and order that documents submitted by the parties be translated (Article 22);

(i) set deadlines for the parties' procedural submissions (unless the parties agreed on different deadlines) and allow the parties to change or abridge their pleadings (unless the tribunal considers this inappropriate) (Article 23);

(j) decide whether to hold oral hearings or rule based on documents only (subject to any agreement between the parties and the applicable procedural rules) (Article 24(1));

(k) terminate the proceedings due to a failure to submit the particulars of the claim (Article 25) and where the tribunal finds that continuation of the proceedings has become unnecessary or impossible (Article 32(4));

(l) appoint one or more experts to report to the tribunal, and compel the parties to supply such experts with relevant information and/or access to goods and property to be inspected (Article 26(1));

(m) in institutional arbitration only, request assistance from a competent Russian court in taking evidence, or permit a party to request such court assistance directly (Article 27); and

(n) determine the applicable law based on the choice of law rules the tribunal considers appropriate (Article 28).

Arbitrators are also subject to a number of legal duties, including to:

(a) promptly disclose any circumstances likely to give rise to reasonable doubts as to their impartiality and independence (Article 12);

(b) treat the parties equally and ensure that they are given the opportunity to fully present their case (Article 18);

(c) resolve the dispute in accordance with applicable law and with due regard for the parties' contract and usages of trade (Article 28);

(d) terminate the proceedings upon settlement and (if requested, and in the absence of objection from the tribunal) render an award on the agreed terms (Article 30);

(e) terminate the proceedings where the claimant withdraws the claim (unless the respondent objects to termination and the tribunal recognises his interest in a final decision) (Article 31);

(f) issue a final reasoned award in writing, which complies with the legal requirements set out in Article 31 of the ICAL; and

(g) make corrections or provide clarifications to an award at the justified request of a party (the tribunal may also make such corrections spontaneously) (Article 33).

The ICAL determines that the chairman may be empowered by his co-arbitrators or by the parties to decide procedural issues unilaterally. Substantive issues are always to be decided by a majority vote, unless the parties agree otherwise (Article 29). In addition, Article 39(1) of the Domestic Arbitration Law imposes an additional obligation on the chairman or sole arbitrator to send the award (or the ruling terminating the proceedings) and any case materials remaining with the tribunal to the arbitral institution or to a competent court for safe-keeping, within one month of the end of proceedings. This provision applies to international arbitrations seated in Russia as well.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Advocacy Law regulates foreign advocates' activities in Russia. According to Article 2 of that law, foreign advocates may provide legal assistance in the Russian Federation on matters of law of the country from which they come from, provided that they are registered in a special Russian registry of foreign advocates. While this provision appears to apply to the representation of clients in Russian courts, it is unclear if it also applies to representation in arbitration. In any event, there appear to have been no instances of foreign representatives being prevented from participating in Russia-seated arbitrations, or sanctioned for participating.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Article 51 of the Domestic Arbitration Law expressly establishes immunity from civil liability for arbitrators (except liability for damage caused by a criminal offence, i.e., a "civil claim in a criminal case"). This rule applies by reference to international arbitrations seated in Russia. The arbitration reform legislation also guarantees arbitrators' immunity from being called as a witness in civil and criminal cases (with respect to matters which the arbitrator may have learned as a result of acting in his capacity as arbitrator).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Russian courts are the supervisory authority for matters of arbitrator appointment (Article 11 of the ICAL), challenges (Article 13) and the replacement of arbitrators who cannot perform their duties (Article 14). An exception applies to international arbitrations at the ICAC and to MAC arbitration, where the Chairman of the Chamber of Commerce and Industry of the Russian Federation is charged with supervisory duties.

Courts are also the supervisory authority (in all proceedings, including ICAC and MAC) for determining the issue of the jurisdiction where the tribunal decided on that matter as a preliminary question (Article 16).

Parties to institutional arbitrations may, by an express agreement, waive recourse to the courts on any of these matters.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Upon application of a party, the arbitral tribunal may order such interim relief as it considers appropriate and order counter-security in respect of such relief (Article 17 of the ICAL). Such orders are binding on the parties. However, they are not capable of being enforced through the Russian courts.

Article 17 of the ICAL also recognises that, based on the parties' agreement (including by reference to the arbitral rules), an arbitral institution may be given the authority to order interim measures prior to the formation of the tribunal. For example, in ICAC and MAC proceedings, prior to the formation of the tribunal the Chairman of the ICAC or MAC can order early provisional measures (see Clause 10 of Annex I and Clause 5 of Annex II to the ICAL).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Russian arbitrazh courts have the power to grant interim relief in support of arbitrations (such measures may be granted either where arbitral proceedings have yet to begin, or where the arbitration is seated abroad). Interim relief may be granted if the court is satisfied that the failure to do so may impede or prevent the future enforcement of an award or otherwise result in significant harm to the applicant (Article 90(2) of the APC).

The list of relief that may potentially be granted is open-ended, but includes asset freezing orders as well as orders enjoining the respondent or other parties from disposing of the object of the dispute (Article 91 of the APC).

Interim relief applications shall be considered by the judge *ex parte* on an urgent basis.

Neither an application for interim relief nor the outcome of the application will affect the tribunal's jurisdiction.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In order for the injunction to be granted, the court will consider the urgency and the adequacy/proportionality of the relief sought. In practice, absent clear evidence of a real risk of asset dissipation or other substantial evidence of urgency, Russian courts are generally reluctant to grant interim relief.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The open-ended list of possible injunctive relief in the APC leaves open whether a Russian court may grant an anti-suit injunction. Although the possibility of Russian anti-suit orders is discussed in scholarly commentary, the prospects of obtaining and maintaining such relief through the Russian court system appear uncertain. There have been only a few attempts to obtain anti-suit relief from the Russian arbitrazh courts. In the most recent cases, Russian courts first issued anti-suit injunctions stopping domestic arbitration but then lifted the ban, on the grounds that such measures violated a party's fundamental rights.

For completeness, foreign anti-suit injunctions are unenforceable in Russia (see, e.g., Information Letter of Presidium of the Supreme Arbitrazh Court No. 158 dated 9 July 2013).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Russian law is silent on the power of courts and arbitral tribunals to order security for costs relating to arbitration. Article 17 of the ICAL as amended by the arbitration reform legislation and Article 91 of the APC are sufficiently broad to allow such an order, at least in theory. However, it is unclear whether the general provisions on interim relief provide a sufficiently solid legal foundation upon which a security for costs order can be based.

It remains to be seen whether the new version of Article 17 of the ICAL will be used in Russia for the purposes of obtaining security for costs. We are unaware of any successful practice of obtaining such an order from a court in Russia.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Russian courts will not enforce orders of preliminary relief and interim measures granted by foreign arbitral tribunals. Only final awards on the merits are enforceable (see, e.g., the ruling of the Presidium of the Higher Arbitrazh Court No. 6547/10, dated 5 October 2010).

With regard to interim relief granted by Russian arbitral tribunals, the position is essentially the same. Unlike final arbitral awards, they may not be enforced through the state judicial system.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The basic rule is that each party must prove its case. The admissibility, relevance and weight of the evidence are to be decided by the arbitral tribunal absent any specific agreement between the parties on these matters (Article 19(2) of the ICAL).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

These issues are not regulated specifically under Russian law. The tribunal may order a party to disclose evidence (exercising the powers granted under Article 19 of the ICAL to determine the arbitral procedure), but there is no mechanism in Russian law for the tribunal to compel such disclosure. There is also no legal basis for the tribunal to order disclosure from third parties, and no mechanism for the tribunal to compel third parties to disclose. Additional disclosure options may be available through state courts (see question 8.3 below). An arbitral tribunal does not have the power to demand the attendance of witnesses.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Russian law does not enable courts to intervene spontaneously in these matters. However, Article 27 of the ICAL allows an arbitral tribunal (or the parties, with the tribunal's permission) seated in Russia and operating under an institutional aegis to seek court assistance in evidence gathering. This provision has been supplemented by the new Article 74.1 of the APC, which provides a procedural mechanism for the courts to address disclosure assistance requests.

The request for assistance must specify the evidence to be gathered, i.e., written (documentary) or material evidence or other documents/materials.

The court is to address an eligible request within 30 days (Article 74.1(4) of the APC). The request can only be denied if:

(a) it contemplates the gathering of evidence that is not covered by Article 74.1 of the APC;

(b) fulfilment of the request may violate the rights and lawful interests of third parties who are not parties to the arbitration;

(c) the request is made in support of a dispute that is non-arbitrable;

(d) the request contemplates the gathering of information that constitutes a state secret; or

(e) the request seeks collection of confidential information (professional/office secret (служебная тайна), commercial or other legally protected secret), provided that such information relates to third parties who are not parties to the arbitration (Article 74.1(4) of the APC).

If the request is granted, it will be executed in an open hearing, with a summons to the parties of the arbitration. This means that evidence gathered by the court will be inspected during the court hearing and subsequently made available to the requesting party (Articles 74.1(6) and (7)).

However, Russian law does not vest national courts with the power to compel the attendance of witnesses in an arbitration.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

There are no specific rules regulating witness testimony in arbitrations under Russian law. As a matter of common practice, which may or may not be followed by a tribunal in any particular case, written witness testimony can be submitted. However, normally oral testimony at the hearing would be expected in such a case (with cross-examination). Overall, Russian arbitration practice tends to be less focused on witness examination as compared to the practice in common-law jurisdictions, and the practices in respect of witness evidence and examination may differ from those in other jurisdictions. In particular, the swearing in of witnesses in arbitrations is not normally used in Russian practice.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Russian law does not recognise legal privilege, and offers no baseline rules protecting communication with lawyers from disclosure. An exception applies to communications obtained by an advocate (licensed member of the bar organisation) working on a client mandate, which are protected from disclosure by the so-called "advocate's secret". While such protected documents cannot be obtained from the advocate, they may still be discoverable from the client.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 31 of the ICAL establishes the relevant requirements. Namely, an award shall be made in writing and shall be signed by the sole arbitrator or by at least the majority of an arbitral tribunal. If any signatures are missing, the award must specify the reason. The award must also indicate:

(a) the reasons on which it is based;

(b) the remedies/claims granted and dismissed;

(c) the arbitration fees and costs and their allocation between the parties; and

(d) the date of the award and the seat of arbitration.

There is no legal requirement that every page be signed (nor any requirement that the award be bound or stamped). However, in practice, arbitrators often sign each page and bind the sheets together to prevent disputes as to its authenticity.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

An arbitral tribunal may clarify or correct its award at its own initiative or upon the application of a party made within 30 days of the issuance of the award (Articles 33(1) and (2) of the ICAL).

Furthermore, either party may request that the tribunal issue an additional award if the first award issued fails to resolve all of the claims advanced. Such a request must be made within 30 days of the party's receipt of the award, and, if the tribunal accepts the request, it must issue the additional award within 60 days (Article 33(3) of the ICAL).

The ICAL envisages that a Russian court hearing an application to set aside an award may suspend the proceedings to let the tribunal resume the arbitration and take the appropriate steps to eliminate the defects (Article 34(4) of the ICAL). Further details are provided in Article 232 of the APC: the suspension may be granted at the request of a party to the arbitration for a time period not exceeding three months. Such requests may only be granted if the set-aside grounds are remediable, i.e., where:

(a) a party was not duly notified/served or was unable to plead its case;

(b) the award is outside the scope or terms of the arbitration agreement; or

(c) the tribunal or the arbitral procedure did not comply with the parties' agreement or federal law.

If such suspension of court proceedings is granted, the tribunal may reopen the arbitral proceedings (at the request of any party, which needs to be made within the suspension period) for the purpose of taking the necessary remedial action (Article 33(5) of the ICAL).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Arbitral awards may not be appealed in Russia. However, the parties (or, as explained in question 10.2 below, non-participants) may request that the competent court set aside an award, on grounds similar to those found in the Model Law.

An award may be set aside if:

(1) the party seeking the setting-aside proves that:

(a) one of the parties to the arbitration agreement was under some incapacity (была в какой-то мере недееспособна) or the arbitration agreement is invalid under the law applicable to such agreement or, where the parties failed to decide on such law, under Russian law;

(b) the party was not duly notified of the appointment of an arbitrator or of the arbitral proceedings (including the date and place of the hearing), or was unable to present its case for other valid reasons;

(c) the award was rendered in relation to a dispute that is outside the scope of the arbitration agreement, or contains resolutions on matters that are beyond the scope of the arbitration agreement (in the latter case, if the resolutions that are within the scope of the arbitration agreement can be separated from those falling outside the scope, only the defective decisions should be annulled); or

(d) the composition of the arbitral tribunal or the arbitral procedure did not comport with the agreement of the parties or federal law (Article 34(2) of the ICAL).

(2) The award may also be set aside by the court *ex officio* if the court determines that:

(a) the subject-matter of the dispute is not capable of settlement by arbitration according to federal law (i.e., the dispute is deemed non-arbitrable under Russian law); or

(b) the arbitral award contradicts Russian public policy.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Article 34(1) of the ICAL provides that the parties to an institutional arbitration may expressly agree on the finality of an award. Such an agreement would preclude the parties' applications for setting aside. However, Article 230(2) of the APC contemplates that the applications to set aside an award on the grounds described at question 10.1 above may be submitted not only by the parties but also by third parties who did not participate in the arbitration, provided that the award determines their rights and obligations. Such parties would not be bound by the parties' agreement on finality. Given that awards are not supposed to be binding on non-participating third parties, it is debatable whether an award can ever compromise third-party rights or obligations. One potential example would be an award recognising the rights of the claimant in respect of property to which a third party also lays claim, but it remains to be seen how court practice will develop on this point.

Prosecutors are also entitled to seek the annulment of an award, to the extent the award infringes state or municipal interests (and the state or municipality did not take part in the proceedings) (Article 230(3) of the APC). A further test to be satisfied for such prosecutor claims is that the dispute relates to matters within the scope of Article 52 (1) of the APC, e.g., invalidation of void transactions made by state authorities or state companies and vindication of state/municipal property. The parties' agreement on the finality of the award would be insufficient to prevent such an application.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The grounds for setting aside are mandatory and cannot be expanded by the parties.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

As explained in question 10.1 above, arbitral awards cannot be appealed, but a party to the arbitration (or, as explained in question 10.2 above, a non-party) may apply to have an award set aside.

The set-aside application must be filed within three months of receipt of the award by the applicant. The application should be submitted to the arbitrazh court at the seat of arbitration or (if the parties so agree) to an arbitrazh court at the location of either party (Article 230(4) of the APC).

A prosecutor or a non-participant whose rights have been negatively affected by an award may file a set-aside application to the arbitrazh court at the seat of arbitration no later than three months after they knew or should have known of the award (Article 230(5) of the APC).

The application to set aside is adjudicated by the arbitrazh court in a hearing with summons to the parties. In preparing for the hearing, the court may request the arbitration case materials from the arbitral institution or from the court that is acting as file custodian (see question 1.2 above).

Set-aside applications are to be resolved by the arbitrazh courts within one month from the date of receipt of the application to set-aside (Article 232(1) of the APC).

An arbitrazh court ruling on a set-aside application can be appealed to a higher (cassation) court within one month after the issuance of the ruling (Article 234(5) of the APC).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Russia, as the legal successor to the USSR, participates in the New York Convention. The Convention was signed by the USSR on 29 December 1958 and became effective for the USSR on 22 November 1960. The USSR made a reservation that it will apply the Convention in respect of arbitral awards made in the territories of non-contracting states only on a reciprocal basis.

The ICAL and the civil litigation codes (the APC and CPC) contain provisions on the recognition and enforcement of foreign arbitral awards that are consistent with the New York Convention and the UNCITRAL Model Law. In the event of any conflict, the Convention prevails over national laws.

One unusual feature of Russian legislation that is not found explicitly in the New York Convention or the Model Law is the procedure for declarative recognition without enforcement. In respect of awards that do not require enforcement against assets, Russian law contemplates the reversal of the customary roles of the parties: it is

not for the award beneficiary to seek recognition and enforcement, but for the losing party to seek judgment to block recognition in Russia. See question 11.3 below for more details.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Russia participates (as the legal successor to the USSR) in the European Convention on International Commercial Arbitration of 1961.

It also participates in the CIS Convention on the Procedure for Resolving Disputes Connected with Entrepreneurial Activity (also known as the 1992 Kiev Convention), which provides for the mutual enforcement of arbitral awards.

Finally, as the legal successor to the USSR, Russia participates in the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation (1972), a treaty that regulates, among other things, the enforcement of arbitral awards in disputes between Communist Bloc countries. It is unclear whether this convention remains in force today.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Based on the New York Convention and national legislation, foreign arbitral awards are to be recognised and enforced in Russia in the absence of relevant grounds for refusal. Russian courts' approach to these grounds was once controversial (especially with respect to the interpretation of "public policy"). The situation has improved to some extent, especially in light of useful guidance from the Higher Arbitrazh Court on public policy (see question 11.5 below). However, the risk of non-enforcement on public policy and other grounds remains.

In practical terms, the recognition and enforcement of an award may be frustrated by "guerrilla tactics" by the respondent or related parties. One common example is where the award creditor, or more often its shareholders, challenge the validity of the underlying contract in Russian courts, then use the resulting judgment to oppose the enforcement in Russia. The room for the commencement of such court proceedings by shareholders has been reduced by recent changes to the Russian civil legislation, which suggest that the challenging shareholder is bound by an arbitration clause in the underlying contract. Other potentially disruptive tactics of debtors include the use of Russian bankruptcy proceedings to block a pending foreign arbitration (see question 3.7 above for more details) and opposing the enforcement or launching parallel litigation based on alleged non-arbitrability of the dispute as a matter of Russian law (see questions 1.1 and 1.3 above).

The practical steps for recognition and enforcement are as follows:

(1) In order to secure the enforcement of a domestic arbitration award or an international award rendered in Russia, the award creditor should apply to the court for a writ of execution (исполнительный лист). No separate recognition proceedings are necessary. The application must be submitted to the arbitrazh court that has territorial jurisdiction at the debtor's residence or, if the debtor's address is unknown, at the court of competent jurisdiction at the location of the property against which enforcement is sought. The parties may also agree that applications for writs of execution are to be filed with the arbitrazh court at the seat of arbitration or the location of the award creditor (Article 236 of the APC).

The filing must include originals or duly authenticated copies of the award and of the arbitration agreement (Article 237(4) of the APC). Documents in foreign languages must be translated into Russian, with the translator's signature verified by a Russian notary.

The application is heard by a single judge at a hearing with summons to the parties, within one month.

If an application for enforcement and an application for setting aside are both filed with respect to the same award, then proceedings in respect of the later-filed application must be stayed (Article 238(6) of the APC).

The court's ruling in respect of the application to enforce the award may be appealed to a higher (cassation) arbitrazh court within one month.

(2) In order to secure the recognition and enforcement of a foreign arbitral award in Russia, the judgment creditor must file an application to a Russian arbitrazh court (Articles 242 and 243 of the APC). The proceedings are largely similar to those described in respect of applications for writs of execution, except that:

(a) the parties may not change the territorial jurisdiction of courts by agreement. The application must be filed with the arbitrazh court of competent jurisdiction at the debtor's residence or, if the debtor's address is unknown, at the court having jurisdiction where the property is located; and

(b) the application must be resolved within one month from its receipt by the arbitrazh court.

Once the Russian arbitrazh court issues a ruling recognising the foreign award, a writ of execution is issued, allowing enforcement through the Russian bailiff system. The award creditor must apply for the writ of execution within three years of issuance of the award. If the award beneficiary misses this deadline for good cause, the deadline may be modified by the court (Article 246 of the APC). Once a writ of execution has been issued, it can be enforced through bailiffs for an additional three years (Article 321(1) of the APC).

(3) Foreign declaratory awards are automatically recognised in Russia, unless a person whose interests are infringed by such award applies to a Russian court opposing recognition (Article 245(1) of the APC).

The opposition must be filed by the interested party to the arbitrazh court at its place of residence/location, or at the place where it has its assets (and if it has neither an address nor assets in Russia, to the Moscow Arbitrazh Court (Article 245.1(3) of the APC)), within one month of learning of the award. The interested party must show how the award infringes its interests.

For all practical purposes, opposition to declaratory awards is essentially identical to proceedings for the recognition and enforcement of a foreign award (the difference being that the losing party initiates the procedure).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Under Article 150 of the APC, a Russian arbitrazh court shall terminate with prejudice any proceedings if the same matter has been decided in a binding arbitral award rendered in proceedings between the same parties and on the same grounds (unless the court has set aside the award or refused to issue a writ of execution).

Apart from that preclusive effect, the Russian procedural codes do not expressly attach any other significance (including *res judicata*

effect) to findings in an arbitral award, although parties could argue that parties to an arbitration are prevented from denying in a subsequent litigation or arbitration their own statements and/or facts that were conclusively established in the arbitration.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

In order to streamline court practice, the Presidium of the Higher Arbitrazh Court issued Information Letter No. 156, dated 26 February 2013, on public policy issues. The Higher Arbitrazh Court clarified that it considers public policy to be only those fundamental provisions of law that are mandatory and universal, have social and public significance, and comprise the basis of the economic, political and legal system of the state.

According to the Higher Arbitrazh Court guidance, a violation of Russian public policy includes, for example, a breach of the overriding mandatory rules that protect the sovereignty and security of the state, the interests of major social groups and the constitutional rights and freedoms of individuals. A mere disparity between the applicable foreign and Russian law, or the fact that the enforcement of a foreign award could cause adverse economic consequences, are insufficient to invoke the public policy exception to enforcement. It is also inappropriate, under the Information Letter, to challenge/object to a foreign award on merits under the guise of a public policy argument.

As further clarified in the Information Letter, public policy includes not only substantive elements but also procedural elements. The letter cites, as an example, the issuance of an arbitral award in manifest breach of the principles of impartiality and independence.

The Information Letter advances a balanced and relatively narrow approach to public policy and aims to restrict the use of the public policy exception as a "catch-all" ground to refuse recognition. This reasonable and restrictive approach has been followed by the courts. For example, the Information Letter provides that foreign awards of liquidated damages or penalties may in principle be unenforceable in Russia on public policy grounds; however, the party opposing the enforcement of the award must establish that such liquidated damages or penalties were abnormally high and disproportionate, or that the inclusion of such provisions in the parties' contract was a result of abuse of powers by one of the parties (e.g., exploitation of the debtor's weak negotiation position by the creditor). In line with this guidance, Russian courts up to and including the Supreme Court upheld a foreign judgment that upheld a high contractual penalty, despite the debtor's arguments that such payment was disproportional and of a punitive nature (Ruling No. 307-ЭС15-4010 dated 21 May 2015). However, the Information Letter does not guarantee a narrow application of the public policy concept by all Russian courts, and there have been recent examples where courts applied public policy expansively.

For example, the Moscow Arbitrazh Court refused to enforce an arbitral award rendered in Singapore. The court found that parties to the dispute (two Russian companies) had no management bodies, representative offices or branches in Singapore and therefore, given the domestic nature of the dispute, adjudication of the dispute in Singapore would violate the public policy of the Russian Federation. This decision was overruled by the court of cassation and sent back to the court of first instance for re-hearing (*resolution of the Moscow Region Arbitrazh Court in case No. A40-219464/16 of 14 March 2017*).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Domestic Arbitration Law expressly establishes the confidentiality of arbitral proceedings by default. By contrast, the ICAL does not contain such default rules. In practice, confidentiality is often addressed in the arbitration rules (for instance, there are confidentiality provisions in the ICAC Rules).

In the absence of specific provisions on confidentiality in international arbitrations, general statutes on confidentiality/protection of information (such as Federal Law No. 98-FZ of 29 July 2004 on Commercial Secrets, Federal Law No. 152-FZ of 27 July 2006 on Personal Data, and Federal Law No. 395-1 of 2 December 1990 on Banks and Banking Activities (each as amended)) shall apply.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings. There are no rules in the ICAL or the APC to prevent such use of information.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Russian law does not prescribe the remedies that arbitration tribunals can order. However, only civil-law remedies may be awarded.

Damages are clearly among the remedies that can be awarded by tribunals. Punitive damages are not envisaged by Russian law. Liquidated damages in a strict sense (i.e., as a measure of damages for a breach of obligation) are not envisaged. However, the new Article 406.1 of the Civil Code, introduced in 2015, allows the parties in a commercial relationship to pre-agree a "compensation" of losses that may be caused by occurrence of circumstances other than a breach of contract (for instance, as a result of frustration of the parties' contract, third-party claims, etc.).

Following the Higher Arbitrazh Court guidance on public policy (see question 11.5 above), foreign awards of liquidated damages may be enforceable, unless they are found to be abnormally high and abusive.

Other types of remedies may be available, depending on the applicable law. For instance, if Russian law applies, additional remedies may include interest and penalties, which are generally enforceable in Russian law, but may potentially be reduced to ensure proportionality.

13.2 What, if any, interest is available, and how is the rate of interest determined?

There are no rules specifically regulating the interest that a tribunal may or should award.

However, if Russian law applies to the dispute, interest will be awarded (in the absence of a contrary agreement) as a remedy for non-performance of financial obligations at the "key rate" (ключевая ставка) of the Bank of Russia in the relevant periods (Article 395(1) of the Civil Code).

There are also separate rules for so-called "statutory interest" to which a creditor is entitled for the use of his funds (for instance, in a situation of deferred payment for delivered goods) if the parties agreed to apply the statutory interest rate, or if the law specifically provides for such interest. Statutory interest is calculated at the "key rate" of the Bank of Russia for the relevant period – Article 317.1 of the Civil Code.

There are also complex rules in the Civil Code relating to the relationship between interest, penalties and damages and the possible reduction of penalties and interest, which go beyond the scope of this questionnaire.

For completeness, there is also a specific rule in the Civil Code (Article 308.3(1)) that a court may award a creditor a fair and proportionate amount to be paid by the debtor for non-performance of the judgment. The term "court" under the Civil Code includes an arbitral tribunal, so arguably an arbitral tribunal may award such a payment. As clarified in the ruling of the Supreme Court of the Russian Federation of 24 March 2016 No.7, Article 308.3 applies in respect of non-performance of non-monetary obligations (i.e., it does not apply to late payments).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

These issues are not addressed in the ICAL. As a matter of practice, costs are usually borne by the losing party, while the successful party recovers arbitrators' fees and expenses, fees and expenses of the arbitration institution and its own reasonable legal costs and expenses. However, such cost allocation is ultimately at the tribunal's discretion, subject to any agreement between the parties and the applicable arbitration rules.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

There are no special taxes in Russia in respect of arbitration awards. However, depending on the facts surrounding the award, the issuance of the award or payment of the awarded amount may result in tax liability.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Russian law does not specifically regulate third-party funding of arbitrations. Such activities are not expressly prohibited and therefore may be carried out, subject to proper structuring and documentation (e.g., in respect of any assignment of claims and interest therein). For now, however, arbitration and litigation funding are not widespread in Russia.

Contingency fees of lawyers are not expressly prohibited as a matter of law, but courts have held such fee arrangements to be unenforceable. For example, the Ruling of the Constitutional Court No. 1-P of 23 January 2007 held unenforceable a success fee arrangement that made payments to lawyers conditional on the positive outcome of a court hearing. Various aspects of success fee arrangements have been reviewed by the courts, but the Constitutional Court's position has never changed.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Russia signed the Washington Convention on 16 June 1992. However, it has not ratified the ICSID and is not bound by it.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

According to the most recent data, Russia has signed over 75 BITs (some of them currently pending ratification).

The Energy Charter Treaty was signed by the Russian Federation in 1994 and provisionally applied, pending ratification, which never took place (the significance of the Energy Charter Treaty's provisional application provision has been the subject of Russia's successful request to have the Dutch courts set aside the award to Yukos shareholders). In 2009, Russia withdrew from the ECT.

Russia is also party to the Eurasian Economic Union Agreement signed by Russia, Kazakhstan and Belarus on 29 May 2014 (and acceded since then by Armenia and Kyrgyzstan), which provides a full suite of investment protections, along with a binding investor-state arbitration mechanism.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Russia has developed the Guidelines on the negotiation of BITs which were approved by Resolution No. 992 of the Government of the Russian Federation, dated 30 September 2016. These Guidelines supersede the 1992 and 2001 model BITs and lay out recommendations as to the contents of future BITs (rather than set out the text of a model BIT).

Most Russian BITs in force extend protection to otherwise-qualifying legal entities that are owned or controlled by investors of a third party. The exception is the Russia-Japan BIT, which in certain circumstances excludes the application of most-favoured nation (***MFN***) treatment to companies that are under the "decisive influence" of third-party nationals.

All Russian BITs in force (with the exception of the treaties with Ukraine and Armenia) include a fair and equitable treatment clause, though this protection may not always be available, as described below. The wording of the fair and equitable treatment provision in Russian BITs is generally standard. Only a few BITs (e.g., the treaties with Canada and France) refer to fair and equitable treatment as being "in accordance with principles of international law". In a departure from earlier Russian BIT practice, the 2016 Guidelines do not envisage that future BITs should contain a fair and equitable treatment clause. At the same time, the drafters contemplated the inclusion of a prohibition against arbitrary treatment, stipulating that laws and other regulations of general application "shall be applied reasonably, objectively and impartially".

The 1992 model BIT provides that the MFN regime will not apply to benefits under free trade agreements, customs or economic unions, as well as under double-taxation treaties and other fiscal agreements. The 2001 model BIT adds to this list of carve-outs any agreements with former republics of the USSR. It also provides that the Contracting Parties will accord to each other a regime no more favourable than that imposed by the WTO (see, e.g., the BITs with Venezuela, Jordan and Singapore). Most Russian BITs contain exceptions along these lines. The 2016 Guidelines specify that an MFN clause cannot be used to import dispute resolution mechanisms from other treaties.

The 1992 and 2001 model BITs, like the majority of Russian BITs, do not include umbrella clauses and the 2016 Guidelines also do not envisage the inclusion of such clauses in Russia's future BITs. Only 12 Russian BITs in force contain umbrella clauses (those with France, China, Germany, Greece, Denmark, Japan, Korea, Kuwait, the Netherlands, Switzerland, Turkey and the UK).

Most Russian BITs concluded prior to 1992 include an arbitration clause of limited scope, providing consent to resolve only disputes related to the "amount or mode of payment of compensation for expropriation" (the BITs with Belgium/Luxembourg, Finland and Spain). The scope of the arbitration clause of several other BITs is limited to questions regarding the breach of the free transfer provision, as well as the amount of compensation for expropriation (the BITs with Austria, Germany, Switzerland, Korea, the Netherlands and the UK). Arbitration clauses in more recent Russian BITs, as well as the 1992 and 2001 model BITs and the 2016 Guidelines, are broad.

The 2016 Guidelines recommend that future BITs provide for the possibility of consultations between state parties to the BIT with a view to rendering a binding interpretation of the provisions of the BIT raised in a dispute. Such consultations can be initiated at any time after the host state is notified of the dispute. In a novel development, no arbitration can be commenced pending the outcome of such consultations: if the arbitration has already been commenced, it shall be suspended until the consultations have concluded.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

State immunity rules are found in the APC, CPC and Federal Law No. 297-FZ on the Jurisdictional Immunities of a Foreign State and the Property of a Foreign State in the Russian Federation of 3 November 2015 (the ***Immunities Law***), which entered into force on 1 January 2016. The Immunities Law is largely based on the UN Convention on Jurisdictional Immunities of States and Their Property (2004).

The general default rule under the Immunities Law is that foreign states have immunity from lawsuits in Russian courts, including immunity from interim measures and execution of judgments. However, foreign states may not invoke immunity from jurisdiction in court proceedings in the following cases:

(1) if a foreign state consents to the jurisdiction of a Russian court with regard to a particular case;

(2) if the dispute is of a civil-law/commercial nature, particularly disputes in connection with:

(a) participation of a foreign state in a commercial transaction and/or performance of entrepreneurial or other business activity;

(b) participation in legal entities or organisations without the status of a legal entity;

(c) intellectual property;

(d) maritime vessel operation;

(e) ownership and management of real estate in Russia and certain movable property (e.g., received by way of succession or gift); relations concerning administration of property;

(f) compensation for injury (damage); and

(g) labour disputes; or

(3) if the foreign state waived the immunity.

Property of a foreign state located in Russia can be seized in order to execute a judgment, provided that such property is not used to perform sovereign functions.

The Immunities Law also states that all jurisdictional immunities of a foreign state may be restricted on a reciprocal basis (i.e., in retaliation for similar treatment of the Russian Federation and its property by a foreign state).

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The most important recent development is the Russian arbitration reform legislation, which entered into force on 1 September 2016.

The reform had profound implications for arbitration users and institutions. Arbitration users are assessing the impact of the reform, in particular in respect of their existing dispute resolution clauses in M&A contracts. Some uncertainty in this regard is likely to remain pending development of court practice under the reformed legislation.

The interim period under the reform legislation, during which Russian arbitral institutions were required to obtain a government permit to administer arbitrations, ended on 1 November 2017. At present, there are just three eligible arbitral institutions in Russia for general commercial arbitration (ICAC, the Arbitration Centre with the Institute of Modern Arbitration and the Arbitration Centre with the Russian Union of Industrialists and Entrepreneurs), but the number may rise with time. At the moment, there is unlikely to be any further significant reform in the arbitration field in Russia.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Russian arbitration institutions that received a government permit developed new arbitration rules based on the reform legislation. These include "ordinary" arbitral rules and specialised rules for corporate dispute arbitration. The ICAC adopted a set of separate rules governing arbitrations of specific types of disputes:

- Arbitration Rules for International Commercial Arbitration;
- Arbitration Rules for Domestic Disputes;
- Arbitration Rules for Corporate Disputes; and
- Arbitration Rules for Sports Disputes.

The new arbitration rules became effective on or before 1 February 2017. The new rules were also adopted by the Maritime Arbitration Commission (***MAC***). Furthermore, new or updated versions of the ICAC and MAC documents governing their organisational structure, administrative matters and the scale of arbitration fees were adopted.

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Freshfields Bruckhaus Deringer is an international law firm with almost 2,800 lawyers in 17 jurisdictions across the world. The firm's market-leading international arbitration practice offers a comprehensive range of services in commercial and treaty arbitration, litigation-supporting arbitrations, alternative dispute resolution, and regulatory affairs. The group specialises in energy, construction, infrastructure, shareholder and joint venture disputes and has extensive experience under all major arbitration rules, including the ICC, ICSID, LCIA, UNCITRAL and ICAC (MKAS). The firm focuses in particular on Russian disputes, involving teams in Moscow, London and Paris working in close cooperation. The firm has recently secured awards totalling billions of dollars for its clients.

Chapter 25

Turkey


Orçun Çetinkaya


Burak Baydar

Moroğlu Arseven

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

In Turkish legislation, domestic and international arbitrations are regulated under different codes. Within this scope, the Turkish International Arbitration Code ("**TIAC**") (*Law No. 4686*) (*published in the Official Gazette dated 5 July 2001 and numbered 24453*) will be applied if:

- the conflict has a foreign element and the arbitration seat is chosen in Turkey; or
- the parties or arbitrators chose to apply TIAC at their own discretion.

On the other hand, the arbitration agreement will be subjected to the 11th Section of the Code on Civil Procedure (*Law No. 6100*) (*published in the Official Gazette dated 4 February 2011 and numbered 27836*) ("**CCP**") if the conflict does not have a foreign element. Nevertheless, both laws stipulate the same requirements for arbitration agreements. Accordingly, neither CCP or TIAC will be applicable to disputes arising from real rights concerning immovables or disputes that are not at the parties' disposal. Arbitration agreements can be concluded by placing an arbitration clause into a contract or as a separate agreement. In both cases, the arbitration agreement constitutes an independent agreement. In fact, since the arbitration is an exemption to the state's judicial remedies, the will of the parties to arbitrate must be clear and definite.

An arbitration agreement must be in writing. In case the agreement (i) is included in a document signed by the parties, (ii) is transmitted into a communication instrument such as letters, telex, fax or into electronic form, and (iii) is claimed by the claimant in the statement of claim but the defendant did not object its existence in the statement of defence, it should be deemed that an arbitration agreement exists.

1.2 What other elements ought to be incorporated in an arbitration agreement?

An arbitration agreement must comply with the general principles of contract law, otherwise it will be deemed null and void. It should further address a specific legal relationship between the parties and whether it is based on a contract or not. Also, according to well-established case law, the arbitration agreement must be definitive and explicit, which means that the parties' will must be to solely address and solve the possible conflicts in an arbitration court only, rather than in the state courts. In that regard, arbitration agreements that authorise both a state court and an arbitration court at the same time will be deemed null and void since it is not definitive. As per article 424 of CCP, parties are free to agree on which rules of procedure are to be applied so that they can agree their own procedures or refer to any institutional rules. In the event that the parties do not make such an agreement, the sole arbitrator or the arbitral tribunal conducts the arbitration proceedings in accordance with the 11th Section of CCP.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Turkish courts are legally required to enforce valid arbitration agreements regarding an arbitrable dispute and traditionally tend to be arbitration-friendly. Also, Turkey ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), which ensures that foreign and non-domestic arbitral awards will not be discriminated against and such awards will be recognised in Turkey, unless specific conditions stipulated in the New York Convention take place. Thus, it is safe to say that Turkish courts widely respect the prohibition of *révision au fond* and are likely to recognise arbitration awards, unless those awards contradict Turkish public policy rules.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

As mentioned above, arbitration proceedings are regulated under various pieces of legislation:

- **Domestic Arbitration:** CCP contains provisions that apply to disputes that have (*articles 407 to 444*):
  - no foreign element; and
  - Turkey agreed as the place of arbitration.
- **International Arbitration:** The only specific code relating to international arbitration proceedings is the TIAC. The TIAC contains the primary provisions to be applied in disputes:
  - with a foreign element where Turkey is the agreed place of arbitration; or
  - where the parties, arbitrator or arbitral tribunal have agreed that the TIAC will apply.

Also, since Turkey ratified the New York Convention, the ratification and enforcement of arbitral awards rendered in the territory of another member state is subject to the provisions of the New York Agreement.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

As a matter of fact, awards ruled within the scope of CCP are enforceable from the time they have been rendered without any need for additional procedural action. On the other hand, foreign arbitral awards can be enforced in Turkey in accordance with the New York Convention or the Law on Private International Law and Procedural Law No. 5718 ("**LPPL**").

Arbitral awards rendered in countries that are not parties to the New York Convention are recognised and enforced in Turkey under the provisions of the LPPL.

The important difference between the New York Convention and the LPPL is with regards to the determination of the "foreign element" of an award.

While "the principle of territoriality" is accepted by the Convention, the LPPL has not defined a "foreign arbitral award".

The TIAC, which applies to all international arbitrations that take place in Turkey, is based on the UNCITRAL Model Law with some amendments, and these amendments are mostly taken from Swiss international arbitration law.

Domestic arbitration in Turkey is governed by CCP, which entered into force in 2011.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The TIAC and relevant articles of CCP governing arbitration are based on the UNCITRAL Model Law; this is because the legislator actually aimed to provide compliance between Turkish legislation and international arbitration rules.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Among the mandatory rules are those that ensure due process, equal treatment and the right to be heard (article 423 of CCP), i.e. the rule requesting independence of the arbitrator and the rule allowing the challenge of arbitrators. Furthermore, the provision on arbitrability cannot be modified by the parties, and the same is true for the rule defining *lis pendens* and the provision giving the state court judge authority to render judicial assistance.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

A dispute related to immoveable property is not arbitrable if it has arisen from immoveable property "in Turkey" and the dispute concerns real rights. If the immoveable property is located outside Turkey, there would be no concern in respect to its enforcement.

Family law disputes, administrative law disputes and criminal issues cannot be referred to arbitration due to the principle that only disputes that are subject to the parties' will are arbitrable. As an exception to administrative law disputes, Law No. 4501 stipulates that disputes arising from concessions, specifications and contracts regarding public services can be subjected to arbitration.

The Turkish Court of Appeals held that bankruptcy disputes and labour law disputes are not arbitrable. An exception is that only disputes arising from the termination and consequences of the termination of the employment contract are arbitrable.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

As per article 422 of CCP, an arbitrator or the arbitral tribunal can rule on its own jurisdiction. The objection regarding the incompetence of the arbitrator or the arbitral tribunal must be done with the rebuttal petition, at the latest. The arbitrator or the arbitral tribunal examines the objection regarding its incompetence as a preliminary question and decides in this regard. If it decides that the arbitrator has competence over the case, it continues the arbitration proceedings and gives an award. However, the tribunal's decision regarding jurisdiction may be challenged during the annulment proceedings.

An arbitration award may be annulled by the courts if it is determined that the sole arbitrator or the tribunal: (a) decided on its competence or incompetence in violation of the law; (b) decided on a matter that falls beyond the scope of the arbitration agreement; (c) did not decide the entirety of the claim; or (d) decided on a matter that exceeds the arbitrator or the arbitral tribunal's authority. For instance, the Court of Appeals annulled the award of an ICC tribunal that dismissed the dispute due to lack of jurisdiction. It was found that the dispute was within the tribunal's jurisdiction according to the agreement between the parties.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

In cases where a party commences court proceedings despite having a valid arbitration agreement, the defendant should object to such filing as a preliminary objection. Otherwise, the court would conclude that the parties have agreed on the jurisdiction of the national courts. For the sake of clarity, even if the defendant's decision on the court's jurisdiction changes during the proceedings, the defendant will not have a chance to challenge the court's decision. In other words, in the absence of a preliminary objection, the courts will not have a proactive approach in favour of the arbitration agreement.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Turkish courts can address the issue of the jurisdiction and competence of the arbitral tribunal according to article 439 of the CPP and article 15 of TIAC should a lawsuit be filed. It should, however, be a matter covered by an arbitration agreement providing for arbitration in Turkey. Turkish courts can also review the arbitral tribunal's jurisdiction and competence provided that one of the parties asked for the assistance of the court. Such assistance could cover the nomination of arbitrators, the enforcement of interim measures or the taking of evidence. Equally, a foreign tribunal's jurisdiction and competence may be examined in enforcement proceedings under the New York Convention.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

In principle, Turkish laws do not allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Article 10/B of TIAC provides that where parties are silent on this issue, the sole arbitrator or the arbitral tribunal will render the award on the substance within one year from the appointment of the sole arbitrator or within one year of the date of the first minutes of the meeting of the tribunal where there is more than one arbitrator.

If both parties will determine the arbitrators according to the arbitration agreement, the time starts on the date on which the claimant notifies the respondent of his appointment; or if the name of the arbitrators are stated in the agreement, on the day which the counter-party receives a request for the settlement of the dispute by arbitration.

The time for the arbitration proceedings are deemed to have started from the date when a party has submitted its request for arbitration either to the arbitrators nominated in the arbitration agreement or in default of such designation in the agreement, from the time when a party has initiated the procedure for the constitution of the arbitral tribunal.

Another time limitation is that the parties then have a statutory obligation to commence the arbitration within 30 days if they obtained an interim measure or interim attachment from a court before the date of commencement of the arbitration.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

If a party loses its legal capacity pursuant to the law at the place of its incorporation upon insolvency, it loses its capacity to participate in Turkish arbitration proceedings. However, if a party is taken under bankruptcy protection or administration, then it will be entitled to become a party to arbitration.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Parties can choose the applicable law under Turkish law. Arbitrators are bound by the choice of the parties under the principle of party autonomy. If the parties have not chosen the law to be applied to the substance of the dispute, the sole arbitrator or arbitral tribunal decides according to the law with which they consider the dispute to be most closely connected.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

According to Turkish law, parties are free to choose the applicable law. Directly applicable rules of Turkish law, however, take priority over the mandatory rules of chosen law by the parties without exception. Directly applicable provisions of Turkish law are the rules which are enacted for keeping, protecting and running the state's organisation, and are aimed at reaching the state's financial, social and political targets. Such rules are implanted to serve and grant public benefits.

Even though, on some occasions, the mandatory rules of certain Turkish laws overlap with the directly applicable rules of the Turkish legal system, it is not always the case. Thus, even though the applicable law's rules contradict with the mandatory rules of Turkish law, the applicable law will prevail. For instance, as stated by the 19th Chamber of the Court of Appeals, in the case of the termination of a distributorship agreement, the issue of whether the distributor can request portfolio compensation must be evaluated according to English law, as the parties have opted for English law in the first place, dismissing the objection of the Turkish party that Turkish law should be applied as portfolio compensation as amongst the obligatory rules of Turkish legislation.

Another exemption to the applicable law chosen by the parties is if the applicable rules of the chosen law clearly contradict with Turkish public order. This means that if the applicable rule of law chosen by the parties is untenably against Turkish public order, the relevant provisions of Turkish law will prevail. In its precedents, the Court of Appeals Assembly of Civil Chambers ruled that facts which severely undermine or are against the principle of good faith, society's moral values, general principles of law and the civil liberties stated under the constitution are deemed to be against Turkish public order.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Turkish arbitration law follows the principle of *favor validitatis*. The arbitration agreement is valid if it conforms: (i) to the law chosen by the parties for the arbitration agreement; (ii) to the law applicable to the substance of the dispute; or (iii) to Turkish law as *lex arbitri*.

Furthermore, the arbitration clause of a contract is generally considered to be valid and binding even if the main contract is invalid or non-existent as per the principle of severability.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Parties are free to select the sole arbitrator or members of the arbitral tribunal in Turkey. This includes the determination of the number, nationality, qualifications and appointing authority of the arbitrators. However, the number of the arbitrators should be an odd number. No requirements are sought in respect of professional qualifications or educational background of the candidates for arbitrators, but if the number of arbitrators is more than one, at least one of them should be appointed among the lawyers with more than five years of experience.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties fail to appoint an arbitrator, they can apply to the competent court to do so. Also, the parties may agree on an appointing authority to nominate the arbitrators in the arbitration agreement. This authority may be an institute or an individual. The appointing authority may be selected by the parties in their arbitration agreement. In case the arbitration agreement does not consist of any provisions in the arbitration agreement concerning the number of arbitrators, the arbitral tribunal will consist of three arbitrators by default.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

In case the parties fail to agree on the sole arbitrator or whether the dispute in question will be resolved by a sole arbitrator, a party may ask the competent court to appoint the sole arbitrator.

In an arbitration with three arbitrators, if a party fails to appoint its 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 their appointment, the appointment shall be made, upon request of a party, by the competent court.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Prior to his/her nomination, an arbitrator is obliged to disclose any information that could prejudice his/her impartiality and/or independence. Also, in case such circumstances change, the arbitrators are under the obligation to inform the parties immediately.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The parties are free to determine the arbitration procedure. Further, they may refer to a law or international or institutional arbitration rules. If there is not such agreement between the parties, the arbitrator or the arbitral tribunal carries out the arbitration proceedings:

i. in a manner it deems suitable by considering the rules of the law (article 424 of CCP); and

ii. as per the provisions of the law (article 8 of TIAC).

Having said that, the arbitral tribunal must ensure that each party is treated equally and granted the right to be heard in adversarial proceedings irrespective of the procedure chosen by the parties.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties are free to determine the procedural steps subject to the requirements of due process (equal treatment and right to be heard), which require that the proceedings be adversarial, and the need for a request for arbitration.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Even though there are no laws, rules, or ethical conduct aimed at the conduct of counsels in arbitrations in Turkey, there are other regulations dealing with counselling, and representation, which could be relevant to the standards of counsel in arbitrations.

Counsel in Turkey are subject to certain provisions of the Turkish Advocacy Law and the Professional Rules of the Turkish Bar Association. In accordance with those rules and principles, Turkish lawyers have an obligation of professional secrecy. The Professional Rules prohibit counsel from influencing witnesses, but explicitly allow them to contact witnesses in arbitral and supranational proceedings.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitrators in Turkey have the power to determine the procedure if the parties have not done so. They can issue conservatory measures and other interim relief. The arbitrators should turn to the courts at the seat of the tribunal for the enforcement of such orders and other assistance in case they think that without the court's assistance they will not conduct the proceedings. Also, as per article 419 of CCP and article 7 of TIAC, in the event an arbitrator does not fulfil his/her duty, without a just reason, he is obliged to compensate the damage of the parties which arose due to such non-fulfilment, provided that the parties did not agree otherwise.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Foreign lawyers cannot practise law in Turkey in relation to Turkish laws and legal issues arising in Turkey. More importantly, foreign lawyers cannot represent clients before Turkish courts.

However, this rule and principle is not applicable to arbitration proceedings sited in Turkey. The parties are free to select lawyers from other jurisdictions as arbitrators or counsels. Hence, there are no restrictions to a party's right to be represented by a person of its choice in arbitration proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no Turkish laws or rules granting arbitrator immunity. In Turkey, an arbitrator may be liable for breach of his or her duties, and the parties may not waive liability for gross negligence or wilful intent in advance. Due to the specific nature of the arbitrator's role, it is generally stated that liability should be limited to gross negligence and wilful intent.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The sole arbitrator or the arbitral tribunal may request the assistance

of a competent civil court of first instance or commercial court, depending on the subject matter of the arbitration, in taking evidence. Also, if the arbitrator/s will be selected by the parties but the arbitrator could not be selected for any reason, then, depending on the subject matter of the arbitration, the competent civil court of first instance or the commercial court will select the arbitrator upon the request of one of the parties.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The arbitral tribunal may order an interim measure of protection or an interim attachment during arbitral proceedings, should any of the parties request it. However, the arbitral tribunal cannot grant interim measures or interim attachments which require enforcement by execution offices or official authorities. Also, the arbitral tribunal cannot grant protections which bind third parties.

As per article 414/2 of CCP, the court may decide on the enforceability of the temporary injunction given by the arbitrator or the arbitral tribunal upon the request of one of the parties, provided that a valid arbitration agreement exists.

As per article 6 of TIAC, if one of the parties does not fulfil the interim measure of protection or interim attachment given by the arbitrator or the arbitral tribunal, a counter-party may request the assistance of the court with a claim for an interim measure of protection or interim attachment.

As stated above, the right to seek the assistance of the court regarding interim measures is only granted to the parties on certain conditions in Turkish arbitration legislation.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

According to Turkish law, parties can request an interim measure of protection from a court or an interim attachment before or during arbitral proceedings. The parties' application to court for such a relief and/or court's relief would not have any of the jurisdiction of the arbitration tribunal. Also, the court's decision on an interim measure of protection or an interim attachment will not constitute a breach of the arbitration agreement, according to article 6 of TIAC.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The courts do not take a different approach towards interim relief requests of parties to an arbitration agreement. They evaluate the request according to Turkish legislation.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Turkish courts do not give anti-suit injunctions. However, parties can object to an arbitration before the court within the time limitations set forth by CCP. If such objection is accepted, then the court shall dismiss the action on procedural grounds.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The Turkish International Arbitration Law does not provide security for cost against the risk. However, there is no provision either preventing arbitrators to order parties to provide security as an interim measure. Equally, in the arbitration agreement, parties can determine the circumstances in which the tribunal will order security which is not prohibited by Turkish law.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Turkish courts may decide on the enforceability of the temporary injunction given by the arbitrator or the arbitral tribunal in Turkey upon the request of one of the parties (please refer to question 7.1). On the other hand, the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in other jurisdictions are not recognised in Turkish legislation. Furthermore, they cannot be recognised as per the New York Convention since these temporary measures are not qualified as arbitral "awards".

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The parties may submit their evidence with their written statements or they can make references to the evidence that they will submit later (article 10/d of TIAC). The sole arbitrator or the arbitral tribunal may appoint experts for specific issues. The parties, however, should submit their evidence within the time frame set forth by the sole arbitrator or arbitral tribunal.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The arbitral tribunal is not entitled to enforce disclosure in cases where a party does not provide the other party or the arbitral tribunal with documents, information or evidence.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

In cases where the arbitrator or the arbitral tribunal is not provided with the documents, information or evidence that are needed to resolve the dispute, the arbitrator or arbitral tribunal can request the assistance of the competent court of evidence (article 432 of CCP). In that case, the courts can order the disclosure of evidence by the relevant governmental bodies and third parties in possession of the relevant evidence. According to article 243 of CCP, Turkish courts can summon witnesses by serving them citations. According to article 245 of CCP, if these witnesses do not show up before the court despite the fact they were duly served, the courts can order the police to summon these witnesses before the court by force.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The parties may decide on the procedure during their arbitration. Generally, written witness statements are accepted as evidence. More frequently, the parties submit expert reports. Experts and witnesses can be questioned by the arbitrators and cross-examined at a hearing. In arbitrations in Turkey, experts and witnesses are not formally sworn in, but the arbitrators remind them of their duty to tell the truth.

The parties and their counsel decide on conflicts, if any, on a case-by-case basis.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

In arbitration proceedings in Turkey, it is not certain which law applies to issues of privilege. The arbitral tribunal, however, will be able to rely on the rules of privilege of more than one jurisdiction, such as the rules of the jurisdiction where the document is situated, and the law of the party that is requested to disclose the material.

There is no question that Turkish lawyers who acted as counsel have the obligation and protection of professional secrecy. However, the ambiguity in this respect will remain in the case of counsels who are not lawyers admitted to the Bar.

Similarly, privilege will apply to a correspondence between a party and his/her attorney, provided that this correspondence concerns the professional legal representation of a party or a third party. There is no clarity as to whether privilege will apply only to outside but not in-house counsel. It is unclear whether the arbitrators have a privilege of their own.

There is no settled practice in Turkey to be able to comment that state authorities have, in certain cases, *de facto* respected the privilege of the arbitrators.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

As per CCP and TIAC, the award must be in writing. The award must be dated and signed by the sole arbitrator or the members of the arbitral tribunal. It is not expected that arbitrators must sign every page. If there is a dissenting opinion, it must be signed by the arbitrator who dissented. The reasoning of the award and legal reasons must be stipulated, as well. The award must be rendered in an adversarial procedure guaranteeing the parties' equal treatment and right to be heard to avoid set-aside challenges. In principle, the award must be resolved by the majority of the members of the arbitral panel. In case of the absence of a majority, the award may be rendered by the chairperson alone. Further, names, surnames, titles and addresses of the parties, name/s, surname/s of the sole arbitrator or the arbitral tribunal, seat and the date of the arbitration must be present on the award and it must state that an annulment lawsuit can be filed against the award.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The sole arbitrator or arbitral tribunal may correct *ex officio* or upon the parties' request any computational and typographical errors in the award. Each of the parties may make an application with a request for an additional award concerning relief sought in the arbitration proceedings but that is omitted from the award. The decision concerning any correction, interpretation or an additional award shall take the form of an addendum and shall constitute an integral part of the award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

As per Turkish legislation, the only way to challenge an arbitral award is by the action for a full or partial annulment. Article 15 of the International Arbitration Law sets forth the grounds for annulment which are i) invalidity of the arbitration agreement, ii) appointment of arbitrators by not complying with the procedures set out in the arbitration agreement or in law, iii) failure to issue an award within the agreed period of time, iv) decision of the arbitrator on a matter exceeding the scope of the arbitration agreement, v) unlawful decision of the tribunal on its competence, vi) violation of procedural rules affecting the substance of the award, and vii) violation of the principle of equality of the parties. In addition, the court can annul the award if i) the award is contrary to public order, or ii) the non-arbitrability of the subject-matter. Such action must be filed before the Regional Courts of Justice within a month as per CCP and 30 days as per TIAC following the notification date of the award. The decision of the Regional Court of Justice can be subjected to a review by the Court of Appeals.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

According to article 15 of the International Arbitration Law, the parties may partially or fully waive their right to file an action for annulment.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties are free to provide for an appeal before a second arbitration tribunal. They cannot, however, expand the scope of review by Turkish courts.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

As mentioned above, the only judicial remedy that may be applied against an arbitral award is an action of annulment. According to the latest amendments made on CCP and TIAC, an action of annulment against an arbitral award can be filed before the Regional Court of Justice, the decisions of which are subjected to a review by the Court of Appeals. On the other hand, actions for the recognition and enforcement of foreign arbitral awards can be filed before the court of first instance. The decisions rendered by the court of first

instance as a result of the recognition and enforcement action can be subjected to a two-layered appellate review: the first review shall be made by the Regional Court of Justice; and if the decision of the Regional Court of Justice is subjected to an appeal, then the second (and final) review shall be made by the Court of Appeals.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Turkey ratified the New York Convention in 1992 with two reservations. Accordingly, foreign awards rendered in another signatory state on disputes which are classified as commercial under the Turkish Commercial Code will be enforced according to the New York Convention.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Turkey has not signed or ratified any regional conventions concerning the recognition and enforcement of arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Turkish courts are more reluctant than they used to be to second-guess an arbitral tribunal's determination on the issues. This is a positive development, of course, which can be perfected if a specific chamber at the Court of Appeals is authorised to review appeals in this respect. This way, the precedents will be uniform and unexpected decisions from local courts will be prevented. Precedents are quite important in that public policy is an excuse that could be widened or narrowed depending on a variety of circumstances. To avoid such an unforeseeable interpretation, a single authoritative guidance from the Court of Appeals is needed. However, a new layer has been introduced in the Turkish Court's system as of July 2017, which is called the Regional Courts of Justice, and it is too early to evaluate the consequences of such layer.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

According to Turkish law, a final award that is enforceable in Turkey is also binding in Turkish national courts and arbitral tribunals sitting in Turkey. However, it should be stated that only the operative part of the award is binding, not findings of fact or legal reasoning that is not part of the operative part of the award. The finality of the award will have to be considered under the *lex arbitri*, the enforceability under Turkish law and, therefore, under the New York Convention in case of a foreign award.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The violation of public policy must be obvious and clear. This violation could relate to substantive and procedural issues too.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Neither the International Arbitration Law nor CCP regulate the confidentiality of arbitral proceedings. The parties should surely be able to agree to keep the arbitration proceedings confidential by putting a confidentiality clause in the arbitration agreement or choosing institutional rules where the proceedings are kept confidential, such as the Istanbul Arbitration Centre.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The parties can use/refer to the information disclosed in arbitral proceedings in subsequent proceedings, provided that they have not restricted it in the arbitration agreement. However, in practice, as the parties give utmost importance to confidentiality in arbitral proceedings, they generally do not consent to the subsequent use of information shared in arbitral proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Under Turkish law, punitive damages are not recognised; therefore, an arbitral award sentencing punitive damages can be annulled due to the breach of public policy.

The arbitral tribunal may not grant remedies or relief with respect to matters that are not in the scope of the arbitration agreement. Therefore, if the parties have limited the subjects on which the arbitral tribunal may decide, then relief or remedies shall be in the scope of this agreement. For instance, if the parties have decided in the agreement that any relief may not be granted regarding issues such as the cancellation of the agreement or loss of profit, then the arbitral tribunal shall not grant remedies or relief thereof.

The parties authorise arbitrators as well as determine the limit of their authorisation by making an agreement. Accordingly, in a claim for the nullity of an arbitral award, the remedies or relief, which are in the scope of the arbitration agreement are separable from those which are not. Consequently, the arbitral award may be partially annullable within this context. Further, the arbitral tribunal may not grant remedies or relief more than what the parties request.

The arbitral tribunal that is strictly bound by the parties' request will not grant remedies or relief with respect to matters that are not within the scope of the arbitration agreement and beyond the request of the parties.

In addition, since punitive damages are not recognised under Turkish law, any arbitral award regarding the payment of punitive damages would be contrary to Turkish public order and would result in the setting aside of the award.

13.2 What, if any, interest is available, and how is the rate of interest determined?

There is no restriction in Turkish arbitration law with regard to interest. The interest will be determined in accordance with the applicable law to the dispute. In principle, the parties may state the interest to be applied for a specific commercial relation as long as the rate is not in contradiction with the good faith principle.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The International Arbitration Law is silent on this issue. This is determined by the arbitration rules chosen by the parties. In case there are no such rules, the arbitrators have discretion on this.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

There is no particular tax on Turkish arbitral awards. However, the fees of the arbitrators are, in principle, not exempt from Turkish VAT or withholding tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

In principle, contingency fees *in lieu* of ordinary attorneys' fees are not permissible, but contingency fees in addition to a guaranteed base fee ("no win, less fee" agreements) are considered to be permissible to a certain extent.

Third-party funding is currently neither prohibited nor regulated under Turkish law. In parallel, Turkish courts have not yet had occasion to express their position on the nature, validity and enforceability of third-party funding agreements. The situation is more promising in the field of arbitration, especially in international commercial arbitration and investment arbitration. The number of Turkish parties that had recourse or at least sought to obtain funds from third parties has seen a significant increase in recent years in parallel with the increasing number of high-value disputes. On the other hand, currently, there is no professional provider of third-party funding active in Turkey.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The Convention was ratified by Turkey on 27 May 1988.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Turkey is party to many Bilateral Investment Treaties ("**BITs**") and to the Energy Charter Treaty. Turkey has signed BITs with 94 countries. However, Turkey is a dualist country, where an international treaty must be ratified and announced to be a part of the national legal system. Consequently, Turkey is a party to 76 BITs as of today.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Turkey's BITs tend to follow the same structure and have similar language, but there is no binding model agreement and no language is necessarily followed.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Turkish state or its state entities can enter into arbitration agreements with other parties if the matter is arbitrable. Besides, in 1999, the Turkish Constitution was amended to make concession contracts arbitrable. This way, parties were allowed to conclude a private law contract with an arbitration clause as opposed to the administrative courts' exclusive jurisdiction. While Turkish courts can be asked to enforce an award against a state or state entity, only the commercial assets of the states can be enforced. However, no attachment can be placed on the state's assets, as Turkey and the state entities pay their debts willingly.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The Istanbul Arbitration Centre ("**ISTAC**") was recently established and has been drawing much attention. It has been widely discussed that a new approach to the adjudication of commercial disputes is urgently needed in Turkey. Turkish lawyers, parties, judges and expert witnesses have all become frustrated by the way commercial disputes are handled in Turkey by state courts, *ad hoc* arbitral bodies and local arbitration institutions.

In this regard, ISTAC has already been granted an opportunity to gather momentum, becoming the arbitration centre which stakeholders in Turkey have long awaited. In addition, ISTAC has the advantage of strong government support to make the country a financial hub, which makes an arbitration centre necessary.

Fifteen arbitration cases have been filed before ISTAC so far and nine of them have been already finalised. Due to the judicial problems in Middle Eastern countries as well as the disruptions arisen in the arbitration centres of Dubai and the Middle East, ISTAC is expected

to extend its portfolio in the following years. We are optimistic about this initiative moving forward, and hope it continues to gain traction and momentum in the near future.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The General Assembly of ISTAC unanimously approved the ISTAC Arbitration Rules ("**Rules**") on 26 October 2015. In the answer to this question, we review ISTAC's Rules, its fast-track arbitration mechanism, Emergency Arbitrator system, fee structure, compare the Rules with several established arbitral institutions, and discuss areas where the Rules may develop in the future.

Unlike the majority of international arbitral institutions, ISTAC has introduced a separate fast-track system in addition to its normal Rules. The move is encouraging and sufficiently self-explanatory for the Turkish business world, which is traditionally sceptical towards arbitration. Since the Turkish commercial courts are notorious for their slow pace and inefficiency, the expedited process might be the factor which sways parties towards ISTAC.

Unless the parties agree otherwise, ISTAC's Fast-Track Arbitration Rules ("**Fast-Track Rules**") will automatically apply to disputes where the total claim amount and claims within the counterclaim (if any) are less than TRY 300,000 (on the date the arbitration commences). However, the parties can also agree to apply the Fast-Track Rules for disputes exceeding this amount (article 1 of the Fast-Track Rules).

ISTAC has followed recent international trends and introduced the Rules for Emergency Arbitrators ("**Emergency Rules**"). The Emergency Rules represent another effort by ISTAC to be the most modern arbitral institution in the region, capable of addressing urgent matters. The Emergency Rules are attached to the Rules as Annex 1.

The Emergency Rules will apply if a party applies to the secretariat to appoint an emergency arbitrator before the file has been sent to a sole arbitrator or the arbitral tribunal. The parties can agree in advance that the Emergency Rules will not apply.

The Emergency Rules do not prevent any party from seeking an interim conservatory measure from the courts, either before or after applying for an emergency arbitrator. A court application for such a measure should not be deemed to be an infringement or waiver of the arbitration agreement, or a waiver of the right to apply for an Emergency Arbitrator (article 1/3 of the Emergency Rules).

ISTAC's competitive fee structure could potentially attract many market players, seeking to avoid high official costs associated with other dispute resolution forums, such as commercial courts and other arbitration institutions.

ISTAC generally follows the fee structure established by the ICC, although ISTAC's tariff appears to be more cost efficient for lower-value disputes. However, ISTAC's tariff is occasionally slightly higher than the ICC's, due to each structure using different dispute limits.

ISTAC's fees by comparison to Turkish Commercial Courts can be seen in the table which can be viewed in the original document at: http://www.morogluarseven.com/news/complete-guide-rules-istanbul-arbitration-centre.

ISTAC's tariff for arbitrators is also reasonable compared to other institutions. Arbitrator fees are determined *pro rata* to the amount of the dispute, with a minimum arbitrator fee of TRY 2,000 (Annex 3 of the Rules).

The parties should bear in mind that those fees exclude any tax liability which arbitrators face. Therefore, in practice, an additional 18% to 22% will be added to an arbitrator's fee, depending on VAT and stoppage requirements. A table demonstrating this can be viewed in the original document at: http://www.morogluarseven.com/news/complete-guide-rules-istanbul-arbitration-centre.

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MOROĞLU ARSEVEN

Moroğlu Arseven is a full-service law firm with broadly demonstrated expertise and experience in business law. The firm engages heavily in foreign investment projects, commercial and investment arbitrations, complex commercial and corporate litigation, structured financial transactions, as well as construction projects. Clients include national, foreign and multi-national commercial, industrial and financial enterprises.

The firm's primary purpose in representing and advising clients is to provide and implement clear, applicable and pragmatic solutions, focusing on the specific needs of our clients' transactions, legal questions, or disputes. This includes attorneys adopting a holistic approach to the wider legal and commercial situation, integrating individual expertise and collaboration between corporate advisory, intellectual property, tax and dispute resolution teams, among other practice areas. Moroğlu Arseven was selected as Turkish Law Firm of the Year at *The Lawyer* European Awards on 15 March 2018.

European Union Overview

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Over the last 12 months, investment arbitration in particular has continued to be the subject of intense scrutiny in the European Union (EU). First, in the case C-284/16 between the Republic of Slovakia and Achmea BV, the European Court of Justice (ECJ) issued, on 6 March 2018, what will become, in all likelihood, a landmark decision in the long-running debate regarding the future of intra-EU bilateral investment treaties (BITs). Second, the EU continues to push for wider use of its alternative Investor-State Dispute Settlement (ISDS) mechanism with which it intends to replace investment arbitration. This agenda has been met with some success as certain countries outside of the EU are considering its implementation. Finally, in this overview, we will look at the potential impact on international arbitration of Europe's new General Data Protection Regulation (GDPR), which recently entered into force.

Investment Arbitration

Intra-EU BITs

The future of intra-EU BITs continues to be at the heart of an ongoing debate between the European Commission and some Member States and arbitral tribunals. The Commission contends that all intra-EU BITs are, in principle, incompatible with the EU's exclusive competence to regulate intra-EU investments. Conversely, a number of Member States and arbitral tribunals have opposed the Commission's contention. So far and to the best of our knowledge, arbitral tribunals have not declined jurisdiction over disputes brought under intra-EU BITs.

However, this year saw a significant development. For the first time, and for reasons detailed below, the ECJ ruled on the issue in its much anticipated *Achmea* decision. The ECJ decided that certain provisions of EU law preclude the mechanism for investor-state dispute resolution in the Netherlands-Slovakia BIT.

By way of brief background, Slovakia challenged the jurisdiction of an arbitral tribunal constituted under the UNCITRAL arbitration rules pursuant to the dispute resolution provisions in Article 8 of the BIT between the Netherlands and the Slovak Republic. Slovakia argued that Article 8 was incompatible with EU law, notably because it violates the exclusive competence of the EU judicial system to interpret EU law. Slovakia contended that this exclusive competence arises from the series of EU treaties which are binding on all Member States and which entered into force (for Slovakia) in 2004, i.e. after the intra-EU BIT between the Netherlands and Slovakia entered into force. As a result, and relying on Article 30 of the Vienna Convention on the Law of Treaties (which provides that "*When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*"), Slovakia claimed that Article 8 was deprived of any effect following Slovakia's accession to the EU. Slovakia therefore argued that the arbitral tribunal lacked jurisdiction. The arbitral tribunal dismissed Slovakia's jurisdictional objection and ruled in favour of Achmea. Slovakia then filed a setting-aside application before the German courts (as the seat of arbitration had been determined by the tribunal to be Frankfurt) and contended that the arbitral tribunal had wrongly failed to decline jurisdiction.

The German court referred the case to the ECJ requesting a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The question posed was whether Articles 18, 267 and 344 of the TFEU "*preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date*".

The decision came out on 6 March 2018. The ECJ ruled that: "*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, 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.*"

To reach this conclusion, the ECJ first considered that arbitral tribunals constituted pursuant to Article 8 of the BIT between the Netherlands and Slovakia may have to interpret or apply EU law. Second, it decided that the arbitral tribunal in *Achmea* was not a part of the EU judicial system within the meaning of Article 267 TFEU. As a consequence, the tribunal could not make a reference to the ECJ in a dispute that may concern the application or the interpretation of EU law. Third, as the arbitral tribunal in this matter had the power to determine the seat of arbitration (and consequently the extent of the national court review, if any, of its award), the choice of the arbitral tribunal could potentially prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, notably by selecting a seat outside the EU. Therefore, the ECJ concluded that Article 8 of the BIT was incompatible with EU law as it may result in disputing EU parties falling outside of the jurisdiction of the

preliminary ruling procedure provided by Article 267 of the TFEU, and which is considered the cornerstone of the EU judicial system.

The ECJ's ruling echoes the opinions previously expressed by the European Commission. However, the question remains whether *Achmea* heralds the end of intra-EU BIT disputes decided by arbitral tribunals. To seek to answer this question, one must address two key issues.

Firstly, which intra-EU BIT ISDS clauses are actually targeted by the ECJ's decision?

The ECJ started its analysis by determining that the ISDS provision in the Netherlands-Slovakia BIT and similar clauses effectively give jurisdiction to arbitral tribunals to interpret or apply EU law. The ECJ's reasoning was made in the abstract, without reference to any specific invocation of any specific EU law raised in the dispute between Achmea and Slovakia. Some commentators consider that the *Achmea* decision effectively renders ineffective the ISDS provisions in all intra-EU BITs because many of their ISDS provisions are similar to Article 8 of the Slovakia-Netherlands BIT. However, the analysis is slightly more nuanced.

In light of *Achmea*, Member States faced with a dispute brought by a European investor may argue that the resolution of the dispute depends on the application of EU law. If, in these circumstances, an arbitral tribunal constituted under another intra-EU BIT was to rule that it had no authority whatsoever to apply or interpret EU law (even as a matter of fact) and that the dispute before it does not relate to the application of EU law, one might debate whether the *Achmea* decision would have any effect on the jurisdiction of this arbitral tribunal.

Even in instances where arbitral tribunals constituted under an intra-EU BIT apply and interpret EU law, the impact of *Achmea* is uncertain – as the ECJ relied in part on the *Achmea* arbitral tribunal's ability to choose the seat.

There may be ISDS clauses in intra-EU BITs providing for a seat of arbitration which (i) is within the EU, and (ii) entitles the courts of the seat reviewing the award to refer any question of EU law dealt with by the arbitrators to the ECJ. In these cases, disputes might not fall outside of the jurisdiction of the preliminary ruling procedure. Hence, it remains to be seen whether those ISDS provisions would be held to be incompatible with EU law.

Conversely, a dispute resolution clause in an intra-EU BIT that refers investment disputes to the International Centre for Settlement of Investment Disputes (ICSID) would be more likely to run afoul of the ECJ's reasoning, as no EU court would be able to review the award or refer EU law issues to the ECJ. One of the fundamental facets of the ICSID Convention is that it creates a "self-contained regime", including a specific process for post-award remedies, which exists entirely without reference to national courts.

Disputes between investors of an EU Member State and another Member State, arising out of an alleged breach of a multilateral agreement, such as the Energy Charter Treaty (ECT), might also be affected by the decision in *Achmea*. For instance, Article 26 of the ECT provides that the arbitral tribunal shall determine disputes before it in accordance with the ECT, the applicable rules and the principles of international law. Whether this clause also implies that the arbitral tribunal may have to apply and interpret EU law is yet to be determined. In light of the *Achmea* decision, and as discussed above, this is a key issue in order to assess the compatibility of Article 26 of the ECT with EU law.

More generally, whether multilateral investment treaties are affected by the ECJ's ruling is also uncertain. In *Masdar Solar & Wind v. Spain*, the tribunal considered "*that the Achmea Judgment has no bearing upon the present case*". The tribunal further held that the *Achmea* decision "*cannot be applied to, multilateral treaties, such as the ECT*".

In this regard, additional developments are expected in the near future. Spain is attempting to obtain the setting aside of the ECT arbitral award issued in the case of *Novenergia v. Spain*. In these proceedings, Spain has requested that the Swedish courts seek a preliminary ruling from the ECJ as to the compatibility of the arbitration provisions in the ECT with EU law.

The examples above illustrate that, for the time being, one should be cautious about any blanket application of the *Achmea* ruling.

The second issue to address is whether the *Achmea* decision heralds the end of arbitration claims under intra-EU BITs that are, *prima facie*, impacted by the ECJ's ruling. What will happen if an investor of one Member State decides to bring a claim against another Member State before an arbitral tribunal constituted pursuant to a clause similar to that of Article 8 of the BIT between the Netherlands and Slovakia? Is this investor necessarily facing a dead-end? For reasons set out below, this is uncertain.

Arbitral tribunals may continue to find that they have jurisdiction despite the *Achmea* ruling. The question is then whether their awards will be enforceable – especially if the seats of these arbitrations are outside of the EU. If the answer to this question is that they may be enforced, investors may still have an enforceable remedy under the relevant intra-EU BIT.

Within the EU, enforcement of these awards may likely be deemed contrary to public policy. Moreover, the European Commission could prevent Member States from paying out such awards without the Commission's consent. It recently did so with Spain through a decision published on 26 December 2017. The Commission referred to the award rendered in *Eiser v. Spain*. It observed that any compensation granted by an arbitral tribunal to an investor on the basis that Spain modified its legislation aiming to support the generation of renewable energy could constitute an illegal state aid pursuant to Article 108(3) TFEU. It is important to note that this position is likely to be challenged before the ECJ. For example, in the *Micula v. Romania* case, the investors are challenging the Commission's similar decision that Romania's compliance with the award would constitute illegal state aid. A decision in this case is expected at the end of this year.

While there is no definitive answer to the question of whether these awards are enforceable outside of the EU, Article V of the Convention provides two relevant grounds for denying enforcement of such awards: (i) the arbitral tribunal wrongly found that it had jurisdiction over the dispute; and/or (ii) the award has been set aside.

When the seat of the arbitration is within the EU, such awards will, in all likelihood, be set aside, leaving the courts outside the EU with the possibility of denying enforcement on the basis of Article V of the New York Convention.

As for awards handed down by tribunals seated outside the EU, EU Member States will likely request that enforcement is denied on the basis that the arbitral tribunal should have declined jurisdiction. Again, there should be some interesting developments on these issues in the near future. For example, in the case of *Novenergia v. Spain* (discussed above), the investor filed an action before the US District Court of the District of Columbia, seeking enforcement of an arbitral award issued in Stockholm against Spain.

The ECJ ruling in the *Achmea* case does not finally settle the debate surrounding intra-EU investment claims, and numerous questions remain unanswered. The coming months should provide some clarity because numerous parties have relied on the *Achmea* ruling in arbitral proceedings as well as in setting-aside and enforcement proceedings. A number of instructive awards and rulings on the validity of these awards are therefore anticipated.

In the meantime, it is worth noting that Poland and the Netherlands have decided to terminate all of their intra-EU BITs and that the Dutch aerospace company Airbus has recently withdrawn an intra-EU investment treaty claim against Poland, very likely in consideration of *Achmea*. It is reported that Airbus will now refer the matter to the Polish courts. This may be a harbinger of future trends, with investors, in light of the ECJ's ruling, opting to turn to national courts rather than arbitral tribunals to rule on state measures adversely affecting their investments.

ISDS

After concerns were raised about traditional ISDS mechanisms (lack of transparency and independence and lack of appellate review, to name but a few), the EU has consistently taken an approach seeking to adjust ISDS mechanisms. Following the free trade agreement (FTA) between the EU and Vietnam of 2016 and the FTA with Canada of 2017 (CETA), the European Commission continues to negotiate FTAs that envisage the establishment of a permanent, multilateral mechanism to settle investment disputes. For example, with regard to the EU-Mexico FTA, which is currently being negotiated, the Commission released a statement according to which the "*EU-Mexico agreement fully implements the new EU approach to investment protection and investment dispute resolution by fundamentally reforming the old-style ISDS system. It establishes a standing international investment court system composed of a Tribunal of First Instance and an Appeal Tribunal*". Likewise, with regard to the EU-Japan agreement, the EU stated that it "*has tabled to Japan its reformed proposal on the Investment Court System*" (ICS) and added that for "*the EU, it is clear that there can be no return to the old-style Investor to State Dispute Settlement System (ISDS)*". At this stage, it seems likely that the EU will continue to push for the inclusion of the ICS in all future FTAs that it negotiates.

As for the convention establishing the ICS, the Council of the EU published its negotiation guidelines in March 2018. According to these, the convention should notably:

- allow states to bring agreements under the jurisdiction of the ICS;
- establish a first instance tribunal and an appeal tribunal, with the latter being able to review decisions of the former on the grounds of errors of law, manifest errors in appreciation of the facts or serious procedural shortcomings;
- provide for transparency of proceedings;
- ensure that the decisions of the ICS benefit from an effective international enforcement regime; and
- provide that the members of the court should:
  - be subject to stringent requirements regarding their qualifications and impartiality;
  - receive permanent remuneration; and
  - be appointed for a fixed, long and non-renewable period of time.

Based on the above, there can be no doubt that the political will to establish the ICS is present (at least at an EU level) and that progress has been made towards its establishment. However, it still needs to overcome some serious hurdles.

First and foremost, in light of the *Achmea* decision, it is debatable whether the envisaged ICS is compatible with EU law. Indeed, critics highlight that the ECJ ruled that international agreements signed by the EU or its Member States must not breach the principle that the ECJ "*has exclusive jurisdiction over the definitive interpretation of EU law*". These critics thus argue that the ICS may very well breach this principle. This debate is far from purely theoretical. Last September, Belgium requested the ECJ to provide an opinion on the compatibility with EU law of the ISDS mechanism within CETA, which makes clear reference to the ICS. Another landmark decision is therefore awaited.

Second, in May 2017, the ECJ held that the ISDS mechanisms established within FTAs signed by the EU "*fall within a competence shared between the European Union and the Member States*". As a result, these ISDS mechanisms may not be established until such time as all EU Member States have agreed to these ISDS provisions. The government (or parliament) of any EU Member State therefore has the power to effectively derail the establishment of the ICS.

In any event, all this uncertainty ensures that the EU will continue to draw the attention of an arbitration community eager to know whether it is facing a paradigm shift in the resolution of investor-state disputes through the establishment of the ICS.

GDPR and Arbitration

In May 2018, Europe's new GDPR entered into force. The GPDR replaces the EU Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, but it carries on many of the fundamental principles in that directive. For example, the GDPR again provides that individuals whose personal data was processed within the EU have a right of information as well as a right to access their data.

There are, however, some significant differences between the GDPR and the directive. For example, companies processing the data of Europeans must comply with the GDPR even if these companies operate from outside the EU. This was not the case with the directive. Another major difference is that the GDPR provides for significantly increased fines for non-compliance (up to 4% of annual global turnover or €20 million – whichever is greater).

These differences generated sufficient publicity and have grabbed the attention of numerous economic players. Because of the more serious risks associated with the GDPR, major businesses have invested heavily to ensure that they are in compliance. Likewise, the arbitration community has not escaped debates surrounding the GDPR.

Indeed, various commentators have recently questioned whether compliance with the GDPR is possible within the context of arbitral proceedings. A pertinent example is what happens when counsel organise and review material to assess a claim's prospects of success. If that material contains personal data relating to the opposing party (which it almost certainly will), then (according to the GDPR) the counsel is processing data. In theory, in light of the right to information under the GDPR, the opposing party should thus be informed of the review of its data and the purpose of this review. In practice, doing so may jeopardise the litigation strategy because the opposing party would obviously conclude that its counterpart is envisaging an action against it.

The solution some commentators suggest is for the GDPR simply not apply to arbitration. This is a possible scenario by application of Article 23 of the GDPR, which permits an exception to the GDPR for the protection of "*judicial proceedings*", so long as Member States pass legislation to this effect. In this regard, Ireland's Data Protection Act 2018 provides that a number of rights and obligations provided for in the GDPR do not apply "*to personal data processed for the purpose of seeking, receiving or giving legal advice*" or "*to personal data in respect of which a claim of privilege could be made for the purpose of or in the course of legal proceedings*". It remains to be seen if other EU Member States will adopt similar legislation and, more generally, how the arbitration community will address the GDPR.

The EU will thus continue to draw the attention of the arbitration community for years to come. The impact of the GDPR, the validity of dispute resolution clauses contained in intra-EU BITs, and the development of the EU's proposed ICS are all major topics that are far from being resolved.

Acknowledgment

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Andorra

Cases & Lacambra

Miguel Cases

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Article 10 of the Andorran Arbitration Act 47/2014, of 18 December 2014 (hereinafter "AAA") establishes the following requirements:

- 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 appointing procedure contained in an arbitral institution rule.
- The arbitration agreement may adopt the form of clause in an agreement.
- The arbitration agreement will, if the arbitration agreement is contained in an adhesion contract, have its validity and interpretation governed by the rules applicable to such contracts.
- The arbitration agreement, whatever form it takes, 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.

1.2 What other elements ought to be incorporated in an arbitration agreement?

There are several elements that can be agreed by the parties and are often included in the arbitration agreement, although the AAA does not contain any mandatory provisions in this sense. These elements are: the place of arbitration; the language or languages to be used in the arbitral proceedings; the qualifications that the arbitrator or arbitrators must have; the procedure to be followed by the arbitrators in conducting the proceedings; and, if it is the case, the applicable law to the dispute.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The AAA is a young law that entered into force on 22 January 2015 and accordingly there is not a specific case law-based approach. Notwithstanding that, we believe that arbitration is approached by the national courts as an opportunity to improve judicial protection rights that assist the parties.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Firstly, the AAA governs the enforcement of arbitration proceedings, pursuant to articles 59 and 60, in order to enforce a domestic award, and pursuant to article 61 in respect of the recognition and enforcement of foreign awards.

On 11th February 2015, the Andorran Official Gazette published the adherence of the Principality of Andorra to the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Accordingly, the fact of being the state number 156 adhering to this standard fully aligns Andorra as an arbitration-friendly jurisdiction.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

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:

- Domestic form requirements do not apply to international arbitration agreements.
- The validity of the international arbitration agreement will be analysed according 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.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The AAA is not specifically based on the 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.

There are many differences between the AAA and UNCITRAL Model Law, which are:

(i) The UNCITRAL Model Law establishes in its article 7 (2) that the arbitration agreement shall be in writing. On its side, the AAA does not establish any formal requirement.

(ii) The UNCITRAL Model Law establishes that the parties can bring an action before a court based on an arbitration agreement, and the court can find that agreement to be null and void, inoperative or inapplicable of being performed. It is also said that, when this action has been brought, arbitral proceedings may be commenced or continued, and an award may be made, while this issue is pending before the court.

Article 9.5 of the AAA establishes that parties may reject the arbitration agreement and go through the judicial system. Even if a party does not expressly reject the arbitration agreement, filing a claim before the judicial court will have the equivalent effect of rejecting the arbitration, if the defendant files any writ before the court which is beyond the court's jurisdiction.

(iii) In respect of interim measures, the AAA does not contain the reference established in article 17.J of the UNCITRAL Model Law: "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

(iv) The UNCITRAL Model Law provides in article 22 that parties are free to agree on the language or languages of the arbitral proceedings. Should the parties fail to reach an agreement, the arbitral tribunal will determine the language or languages. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation of such evidence into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

According to article 43.2 of the AAA, unless arbitrators or parties have drawn up an agreement regarding translations of documents, writs and documents written in English, Spanish or French will not need translation.

(v) The UNCITRAL Model Law states in article 24 that, unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

AAA foresees in article 45.3 that oral hearings can be conducted by videoconference if arbitrators or parties agree on this matter. Article 45.4 establishes that all oral hearings must be recorded in writing.

(vi) AAA establishes in article 52.2 that the arbitrators must deliver the award within six months from the date of submission of the defence or the expiration of the deadline thereof. This term may be extended by the arbitrators for a period of two months under a duly justified decision. Article 52.7 establishes that arbitrators have to specify how they voted and explain the reason for their vote.

The UNCITRAL Model Law declares in article 28 that the arbitral tribunal shall decide the dispute in accordance with the rules of law that are chosen by the parties as applicable to the substance of the dispute.

(vii) Article 71.4 of the AAA establishes that parties can, at any point, reject the action and set aside the award. The UNCITRAL Model Law does not contain any provision in this sense.

(viii) Finally, article 71.6 of the AAA provides that a resolution granting the *exequatur* can be appealed before the *Sala Civil del Tribunal de Justicia of Andorra*. Article 71.7 establishes that a resolution denying the *exequatur* can be appealed before the Plenary of the *Tribunal de Justicia* of Andorra. The UNCITRAL Model Law does not contain any provision in this sense.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

AAA rules, as the nature of arbitration requires, are almost all non-mandatory in order to give the parties involved the power to create their own rules and process. Nevertheless, there are certain aspects which are regulated by mandatory rules:

- Labour and consumer arbitrations are excluded from the Act's scope (article 2.3 of the AAA).
- The requirements of the arbitration agreement (article 10 of the AAA).
- The requirements for being an arbitrator, the fact that the number of arbitrators must be odd, the requirements of the independency and impartiality of arbitrators throughout the arbitration, challenges of the arbitrators and the provision relating to the fact that arbitrators may rule on their own jurisdiction (articles 14, 16, 19, 21, 27 of the AAA).
- The mandatory criteria that must be met in order to get an interim measure (article 29.1 of the AAA).
- The formality of the written claim and the response statement, with their minimum contents and structure (article 44 of the AAA).
- The principles of equality, hearing and *audi alterem partem* must be respected during the arbitration (article 67 of the AAA).
- The regulations regarding the arbitrator's award, its execution, correction, recognition and impugnation (articles 49 to 60 of the AAA).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The AAA establishes in article 2.3 that consumer and labour arbitration are excluded from its scope. At the same time, in article 3.1 it is established that arbitration under the AAA is allowed for all matters of which the parties are free to dispose.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Article 27.1 of the AAA incorporates the *kompetenz-kompetenz* principle, so arbitrators may rule on their own jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

There is still no case law on this matter in the Principality of Andorra. Nevertheless, article 9.5 of the AAA establishes that if a defendant consents to it and does not file a lack of jurisdiction before the court, parties are judged to have rejected the arbitration process in favour of the judicial system.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The court can address the issue of the jurisdiction and competence of the national arbitral tribunal when a claimant initiates a proceeding before the court, and the defendant files a lack of jurisdiction because there is an arbitral agreement (article 9.5 of the AAA).

The decision issued by the court may be appealed before the *Tribunal de Justícia d'Andorra* (article 56.2 of the Qualified Justice Act of the Principality of Andorra).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

According to article 10 of the AAA, it will be possible as long as the parties express their willingness to submit to arbitration all or certain disputes arising between them in respect of a given legal relationship.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no limitation periods prescribed for the commencement of arbitration, but they will directly depend on the running time of the statute of limitations of the rights and actions issued to initiate the arbitration, which are regulated in substantive laws.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Article 13 of the AAA establishes:

"*The declaration of insolvency proceedings alone does not affect arbitration agreements signed by the insolvent debtor. When the jurisdictional body understands such clauses or agreements may cause harm to the insolvency creditors, it may rule suspension of their effects, all without prejudice to the provisions set forth in the international treaties.*"

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

It is regulated in article 49 of the AAA, which provides the following:

1. In the first place, the arbitrators will decide the dispute in accordance with the applicable law chosen by the parties. Any designation of the law or legal system of a given State will be construed, unless otherwise indicated, as directly referring to the substantive law of that State and not to its conflict-of-law rules.
2. Failing any precision by the parties, the arbitrators will apply the rules they deem appropriate.
3. The arbitrators will decide *ex aequo et bono* only where explicitly authorised by the parties to do so.

In all cases, the arbitrators will decide in accordance with the terms of the contract, having regard to standard practice in connection with the transaction.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Article 41.4 of the AAA establishes:

"*Failing any indication by the parties, the place of arbitration determines the applicable law to the arbitration of the controversy, the arbitration agreement, the arbitral proceedings (lex arbitri), the national courts with competence to assist and control arbitration, constitution of the arbitrators, the grant of interim measures and the nationality, form and the action to set aside the final award.*"

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Article 41.4 of the AAA provides that, failing any indication by the parties, the place of arbitration determines the applicable law to the arbitration agreement. Article 10 of the AAA governs the formation, validity and legality of arbitration agreements.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to establish the number of arbitrators, subject to the requirement that they appoint an odd number thereof (article 16.1 of the AAA). There is also a second limitation in article 18.1 of the AAA: three arbitrators are mandatory in case of multiple parties.

Persons in full possession of their civil rights may be arbitrators, unless prevented therefrom by legislation to which they may be subject to in the practice of their profession (article 14.1 of the AAA). Moreover, according to article 14.3 of the AAA, when there are over three arbitrators, at least one must be a jurist. Finally, it also has to be taken into account that nobody should be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties (article 14.4 of the AAA).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Article 17 of the AAA regulates the default procedure in case the parties' chosen method for selecting arbitrators fails.

In an arbitration conducted by a single arbitrator, failing the agreement of the parties, the arbitrator will be appointed by the arbitral institution. If the arbitral institution also fails to agree on an arbitrator, the arbitrator 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 an arbitrator within 30 days of the 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 arbitral institution. If the arbitral institution also fails, arbitrators will be appointed by the court at the request of a party.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

According to article 17 of the AAA, failing the parties' agreement on a procedure for appointing the arbitrator or arbitrators, the court will appoint them.

The court also appoints arbitrators when: (i) one or both parties do not act according to the appointment proceedings; (ii) the parties or two arbitrators do not come to an agreement regarding the appointment proceedings; and (iii) a third party, including an arbitral institution, does not act according to the appointment proceedings.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

These requirements are regulated under article 19 of the AAA, which establishes that:

- Arbitrators may not maintain any personal, professional or commercial relationship with the parties or their representatives.
- Persons proposed to act as arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.
- Except as otherwise agreed by the parties, the arbitrator may not intervene as a mediator in the same dispute.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

According to article 40.1 of the AAA, the parties are free to determine the arbitration procedure.

Furthermore, article 15 of the AAA foresees the possibility of institutional arbitration being commissioned to an arbitral institution such as the Chamber of Commerce of the Principality of Andorra.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings, always respecting the mandatory rules contained in the AAA. Mandatory rules regarding arbitration procedures are:

- The mandatory criteria that must be met in order to get an interim measure (article 29.1 of the AAA).
- The formality of the written claim and the response statement, with their minimum content and structure (article 44 of the AAA).
- The principles of equality, hearing and *audi alterem partem* must be respected in the arbitration (article 67 of the AAA).
- The regulations regarding the arbitrator's award, its execution, correction, recognition and impugnation (articles 49 to 60 of the AAA).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no provisions in this sense in the AAA, but Andorran lawyers must comply with the rules of ethics contained in the "Estatut i Normes Deontològiques 1993" and the Code of Conduct for European Lawyers ("CCBE").

Article 4.5 of the CCBE provides that the rules governing the lawyer's relationship with the judges also applies with the arbitrators.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The AAA gives the following powers to arbitrators:

- the right of designation, acceptance or refusal, and the right to reject when the arbitrator cannot perform its functions (article 22);
- the ability to decide over its own jurisdiction and the validity of the arbitration agreement (article 27);
- the ability to appoint experts, although parties can challenge this (article 47);
- the ability to apply interim measures (though it should be noted that parties can avoid this by including, in advance, in the arbitration agreement a clause limiting an arbitrator's powers in this area) (article 28); and
- to issue partial awards (article 49).

And the following duties:

- to decline his designation when the arbitrator does not consider himself independent or impartial, revealing all the facts and circumstances that justify it (article 19);
- to complete his functions until the end of the arbitration procedure (article 22);
- to comply faithfully and accurately with the received assignment (article 25);
- to have a civil liability insurance policy (article 25.3);

- to treat the parties according to the principles of equality, to give them the opportunity to defend their rights, and to act with loyalty and promptness during the procedure (article 42);
- when the arbitration is according to law, the arbitrator has to justify his decision (article 52); and
- the award shall be written and finalised; in order to end the procedure, the requirements specified in article 53 are met.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Act 48/2014, of 18 December, on the practice of law and the Andorran Bar Association, establishes that it is a major breach to practise law without being registered with the Andorran Bar Association.

Nevertheless, the practice of law is defined in article 3.2 as relating to "defending the parties in whichever administrative or judicial proceeding" and does not mention arbitrations. Nor is there any provision restricting the appearance of lawyers from other jurisdictions when a foreign law, not the Andorran one, has to be practised.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no rules or laws providing for an arbitrator's immunity. Nevertheless, article 25 of the AAA establishes arbitrator liability for damages in case of improper performance of their duties based on bad faith, temerity or wilful misconduct.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

According to article 9 of the AAA, courts have jurisdiction over arbitration assistance and supervision:

- to appoint and dismiss court-appointed arbitrators;
- to provide court assistance for the collection of evidence;
- to adopt interim measures;
- to enforce and recognise awards; and
- to rule on the application for setting the award aside.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Arbitrators can award interim measures and preliminary orders according to articles 28 and 30 of the AAA. The interim measures can be awarded in order to:

- Maintain or recover the *status quo* during the arbitration.
- Avoid any damage or interference with the arbitration.
- Preserve some assets in order to execute the final award.
- Preserve evidence that could be relevant in order to resolve the arbitration.

A preliminary order can be awarded in a way that guarantees that it cannot be overruled by any successive interim measures.

Arbitrators do not need the assistance of the court to award interim measures or preliminary orders.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Articles 9 and 38 of the AAA establish that the Civil Section of Andorran Court (*Batllia*) is competent to adopt interim measures before, or during, the arbitration requested by the parties. Neither the request nor the granting of the interim measure will affect the validity of the arbitration agreement.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

There is still no case law experience on these matters, but the approach should be positive, due to the fact that the procedure is perfectly defined in the AAA.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Although there are no special provisions in the AAA, article 8 prevents courts acting when the dispute is referred to arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Article 33 of the AAA establishes that the arbitrators may require the claimant to furnish sufficient security.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

There is still no case law experience on these matters, but article 36 of the AAA establishes that interim measures adopted by the arbitrators will be subject to the general provisions regarding the annulment and the enforcement of the award.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The AAA does not provide for particular rules of evidence in arbitral proceedings.

Article 9 of the AAA establishes that the Civil Section of Andorran Court (*Batllia*) is competent to provide court assistance for taking evidence.

Moreover, article 47 of the AAA foresees that arbitrators, on their own initiative or at the request of a party, can appoint one or more

experts to report on specific issues and may call any of the parties to furnish the expert with all relevant information, display thereto all relevant documents or goods, or afford them access to such documents or goods for examination.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The AAA does not have any specific provisions for arbitrators on these matters.

Nevertheless, article 48 of the AAA establishes that the arbitrators, or a party with their approval, may request a competent court to furnish assistance with the collection of evidence pursuant to the applicable rules on the means of proof. Such assistance may consist of the collection of evidence by the competent court or the adoption thereby of any specific measures needed to enable the arbitrators to do so.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

According to article 48 of the AAA, a court is only able to intervene when the arbitrators, or a party with their approval, requests said court to furnish assistance in the collection of evidence.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

There are no provisions in this sense in the AAA. Article 40 establishes that the parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

According to article 13.2 of Act 48/2014, of 18 December, on the practice of lawyer profession and the Andorran Bar Association, communications between lawyers attract privilege. Privilege is deemed to have been waived when the other lawyer authorises it or the Bar Association waives it.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The requirements of the arbitral awards are contained in article 52 of the AAA. These requirements are the usual and can be summarised as follows:

- The award will state its date.
- Complete name or denomination of the parties and their address.
- Name of the lawyer or the person who represents the parties.
- Name of the arbitrators.
- The place of arbitration. The award will be deemed to have been made at the place specified.
- Short brief regarding the claims made by the parties and means of proof to be effected.
- The decision.
- The arbitration costs, if not decided in the arbitration agreement.
- The award will state the grounds upon which it is based, except for awards delivered on agreed terms pursuant to article 51 (settlement by agreement).
- All awards must be issued in writing and signed by the arbitrators.
- In arbitral proceedings with more than one arbitrator, the signatures of a majority of all arbitrators or of the president will suffice, provided that the reasons for the omissions are stated.
- Arbitrators may specify how they voted.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

According to article 54.3 of the AAA, the arbitrators may correct any error of the type referred to in sub-item 1.a) of the same article, on their own initiative within 10 days of the date of the award. The types of error are:

a) errors in computation, as well as clerical, typographical or similar errors;

b) an error regarding the interpretation of a specific point or part of the award;

c) an additional award on claims presented in the proceedings and omitted from the award; and

d) the rectification of a partial overextension of the proceedings in an award covering questions not submitted to the arbitrators or questions on a matter not subject to arbitration.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

According to the AAA, parties have two options:

- An action to set aside a final award (article 56 of the AAA). For this purpose, a party has to allege and prove:
  - (i) that one of the parties was incompetent at the moment of signing the arbitration agreement, or that the arbitration agreement did not exist or was not valid according to the law chosen by the parties, or, if there was not agreement about the applicable law, according to Andorran law;
  - (ii) 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; or
  - (iii) that the award contains decisions on questions not submitted to arbitration or questions that exceed the arbitration agreement; or
  - (iv) that the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with an imperative provision of this act, or, failing such agreement, was not in accordance with this act.

  The court hearing the case for the setting aside of the award on its own initiative or at the request of the Public Prosecutor, in connection with interests whose defence is legally attributed thereto, may determine that:

(i) the subject matter of the dispute is not apt for settlement by arbitration; or

(ii) the award is in conflict with Andorran public policy.

- An action for the review of the award, pursuant to the provisions of civil procedure rules in the Principality of Andorra (article 58 of the AAA).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

There is nothing provided in the AAA regarding this matter, but, *a priori*, it seems that parties shall not be able to exclude the possibility of setting aside a future award.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There is nothing provided in the AAA regarding this matter.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Article 57 of the AAA establishes the procedure to set aside an arbitral award, as follows:

a) The application must be submitted in conjunction with any supporting documents, the arbitration agreement and the claimant's proposal for the means of proof to be effected.

b) The court will notify the respondent of the claim. In his defence, which must be submitted within 20 days, the respondent must attach any substantiating documents and propose all the means of proof from which he will draw. The claimant will receive copies of the defence and the attached documents to be able to submit any additional documents or propose further means of proof.

c) After the defence is received or the respective time limit lapses, the court will set the date for the hearing, if so requested by the parties in their statements of claim and defence.

The court's sentence will not be appealable.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

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.

Relevant national legislation for recognition and enforcement of foreign awards is contained in:

- Articles 59 to 61 of Act 47/2014 on arbitration of the Principality of Andorra.
- Enforcement Civil Procedure Rules of the Principality of Andorra, and more specifically:
  - "*Decret, del 6 de maig de 1922, execució de sentències*".
  - "*Decret, del 4 de febrer de 1986, regulador de l'execució de les resolucions judicials en matèria civil*".
  - "*Llei 43/2014, de 18 de desembre, del saig*".
  - "*Llei 44/2014, de 18 de desembre, de l'embargament*".

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

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

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

There is still no case law regarding this matter.

Regarding the steps that parties are required to take, it should be noted that:

- Recognition of the award is regulated, according to article 61 of the AAA under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, drawn up in New York on 10 June 1958. The requisite procedural steps will be performed as set out in the civil procedure rules for judgments delivered by foreign courts.

The recognition of foreign civil judgments is regulated by articles 47 to 49 of the "*Llei transitòria de procediments judicials, de 21 de desembre de 1993*". According to these articles, steps for recognition are:

- Recognition of the award has to be issued, by one of the parties, before the *Tribunal Superior de Justícia d'Andorra*.
- The recognition proceeding consists of controlling and verifying:
  - The jurisdiction where it has been granted.
  - The regularity of the proceeding where it has been granted.
  - The application of competent law according to national conflict rules.
  - The consistency with national and international public domain.
  - The absence of contravention of national law.
- Execution of the award is regulated, according to article 59 of the AAA, in accordance with this chapter (where article 59 is contained) and the provisions of the Civil Procedure Rules.

The civil procedure rules regarding execution in Andorra refer to the "*Llei transitòria de procediments judicials, de 21 de desembre de 1993*", of which article 92 establishes:

- Execution will be regulated under the "*Llei del saig*", the "*Llei de l'embargament*", and the Annex III of the "*Decret del 4 de febrer de 1986*".
- The party has to apply for the enforcement before the *Secció Civil de la Batllia*, and also has to supply to the court the duly authenticated original award and the original arbitration agreement or a duly certified copy.
- If the award or agreement is not made in Catalan, Spanish or French, the party applying for enforcement of the award will have to produce a translation of these documents into Catalan. The translation has to be certified by a sworn translator.
- The court will proceed through the steps established by the ordinary enforcement regulation granting the enforcement or not. In cases where enforcements are granted, the "Saig" will continue with the potential research of assets, possible seizures and subsequent measures.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Article 55.1 of the AAA establishes that arbitral awards constitute *res judicata*. It means that the award cannot be modified unless through the correspondent action to set aside awards. It also means that what has been decided by the award cannot be re-heard before another arbitration or court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

There is still no case law regarding this matter.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Article 5.2.c of the AAA on arbitration of the Principality of Andorra establishes the principle of confidentiality unless otherwise provided.

On the one hand, article 67.2 of the AAA about international arbitrations provides that parties must expressly stipulate that the proceeding is confidential in the arbitration agreement.

On the other hand, article 39 of the AAA establishes the obligation of confidentiality from everybody who is involved in the arbitration with regards to all of the information involved in it.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

It depends on what the parties have agreed with regards to confidentiality.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are not any specific limits in the AAA related to the types of remedies.

13.2 What, if any, interest is available, and how is the rate of interest determined?

There are no articles in the AAA related to interest. The determination of interest and the rate of interest will depend on the applicable law according to each action issued, and also on the agreements reached by the parties.

The Andorran Government approves every year legal and late-payment interest rates. According to 2017 National Budget Law 3/2017, during 2017 the legal interest rate was 0.846%, and late-payment interest rate was 1.692%.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Pursuant to article 52.3.h) of the AAA, subject to agreement by the parties, the award will include the arbitrators' decision on arbitration costs.

Shifting fees and costs depend on the agreement of the parties.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award itself it is not subjected to any tax, but a difference is made with the content of the award. According to article 5 of the Personal Income Tax Act, compensation as a result of personal liability for damages legally or judicially recognised are tax-exempted.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are not any known restrictions on third parties, including lawyers, funding claims.

Yes, contingency fees are legal in Andorra. Article 37 of the Statutes of the Bar Association of Andorra establishes that contingency fees are permitted as long as a minimum wage is fixed for the lawyer's time and for all the expenses incurred in his action, such as taxes and attorney and experts' fees.

Although here in Andorra there are no visible signs of professional active funders, such funders are very active in Europe for international arbitration and judicial proceedings; therefore they may also act here due to the particular interaction between Andorran and international markets.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

No, the Principality of Andorra has not signed the ICSID.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The Principality of Andorra signed in 2015 a Bilateral Investment Treaty with the United Arab Emirates for the promotion and reciprocal protection of investments. The Treaty has not yet entered into force.

Furthermore, the Principality of Andorra has entered into a Good Neighbour Agreement with Spain and France, based on the principle of good-neighbourliness, which crystallises in: (i) the rejection by the contracting states of those performing any acts seeking to establish zones of influence or domination; and (ii) their commitment to maintain a peaceful coexistence.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

In the Bilateral Investment Treaty with the United Arab Emirates, expressions of noteworthy language as "principle of balance" should be highlighted as a reflection of the aforementioned aims of this agreement.

Regarding the Good Neighbour Agreement with Spain and France, the "most favoured nation principle" must be highlighted as an example of noteworthy language. In the context of this agreement, such principle means that each contracting state shall grant in its territory to the investments and income obtained by the investors, a treatment no less favourable than treatment granted to the investments and income of its own investors or to the investors of any third state, and must apply the treatment which results to be most favourable between these two alternatives.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Article 63 of the AAA provides that States and the entities under their aegis may not invoke the prerogatives of their own legal systems in connection with matters subject to arbitration.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Arbitration has been initiated in the Principality of Andorra since their law entered into force on 22 January 2015.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

There is a joint project between the Andorran Bar Association ("CAA") and the Andorran Chamber of Commerce ("CCISA") for launching the first and unique arbitral institution in the Principality of Andorra.

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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.

Before founding Cases & Lacambra, Miguel carried out the project to establish the Banking practice of Cuatrecasas in its Barcelona office. Before that he developed his career as legal counsel and responsible for derivatives in "la Caixa" and in the Spanish Confederation of Savings Banks, "CECA".

He has extensive experience as an arbitrator, being regularly appointed as a specialised arbitrator in financial instruments. He is a regular lecturer in international business schools in their specialty areas and, in particular, financial instruments which simulate or replicate cash flows. He has participated in the drafting of the Spanish standards for master netting agreements, in the regulation of netting and financial guarantees and in other regulations of the financial sector. He also has been a member of different working committees for the development of market standards in the International Swaps and Derivatives Association, "ISDA".

CASES & LACAMBRA

Cases & Lacambra is an independent law firm founded with the ambition of providing legal tailor-made services designed to fulfil the needs of both private clients and financial institutions. We are the forerunners of the high-end law firms that are based on true specialisation, the expertise of our teams, innovative and flexible organisation, efficient services, cutting-edge technology, confidence, and loyalty to clients. Whether acting on a single transaction basis, or providing continuous, highly-focused advice, the firm is committed to the highest standard of client care that can be expected. We provide advice to our clients understanding their commercial threats, opportunities and goals. Our aim is to maintain a long-lasting client relationship with a very careful client selection among their different business areas.

Arbitration is currently experiencing a very significant increase in popularity, showing itself as an alternative, agile, efficient, specialised and confidential system for dispute resolution. It is precisely for this reason that the team of Cases & Lacambra intervenes as counsel, defending our clients' interests in arbitral proceedings, both national and international, before internationally-recognised arbitral institutions or "*ad hoc*" tribunals. The common practice of the firm articulates these arbitration proceedings, whether solving complex commercial disputes between companies, advising in specialised banking litigation, or resolving any differences arising between governments and individuals from other States for breaching any bilateral or multilateral international treaties. Our arbitration team is regularly immersed in some of the most complex and relevant investment arbitration proceedings that are being carried out at an international level. The team is also closely collaborating with several Chambers of Commerce, advising on the creation and implantation of new Arbitration Tribunals. Likewise, as a result of its wide experience in the subject, the members of the arbitration team of Cases & Lacambra are regularly selected to act as sole arbitrators or to integrate arbitration Tribunals, both national and international, ruling in matters of their specialty. They are members of the International Bar Association Arbitration Committee, members of the Spanish Arbitration Club, regular collaborators in legal works and specialised publications, lecturers regarding arbitration, and regular attendees to congresses related to the subject.

Belgium

Joost Verlinden

Matthias Schelkens

Linklaters

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

There are no formal requirements for an arbitration agreement to be valid and enforceable under Belgian law. Arbitration agreements can, for instance, result from an exchange of letters, faxes or emails. They can also be included in general conditions, provided it is sufficiently clear from the circumstances that the general conditions were accepted by the other party. An oral arbitration agreement is perfectly valid, but if one of the parties denies the existence of such an agreement, the other party will have to prove the common intent of the parties to submit the dispute to arbitration, which will usually require at least some sort of written proof.

Moreover, the arbitration agreement will only be binding if the substantial conditions for the validity of an agreement are met, such as the capacity of the parties and their valid consent to the agreement.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Although not required by law, it is a good idea to include the institution (if any), the method of appointment of the arbitrators, the number of arbitrators, the language and seat of the arbitration, as well as a choice of law clause.

In the event that the parties did not incorporate these elements in their arbitration agreement, they can fall back on the Belgian Code of Civil Procedure (hereinafter, the "CCP"), which provides for default rules on the conduct of the arbitration procedure.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

As indicated under question 1.1, there are no formal requirements for an arbitration agreement to be valid.

The courts will, however, refuse the enforcement of an arbitration agreement on limited grounds, e.g. if the arbitration agreement is invalid or terminated, was entered into by parties which had no capacity to do so, relates to a type of dispute which is by law considered to fall outside the scope of arbitration ("non-arbitrability") or if the agreement is contrary to public policy.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The provisions governing arbitration are incorporated in the Belgian Code of Civil Procedure (Articles 1676–1722 CCP).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes, the same provisions govern both domestic and international arbitration proceedings.

However, in arbitrations in which all parties are non-Belgian, the parties can, before or after the dispute arises, waive their right to initiate proceedings to set aside an award (Article 1718 CCP).

Also, while the absence of reasoning in an award will be considered a ground for setting aside or refusing the enforcement of an award rendered in Belgium (Articles 1713.4, 1717.3 and 1721.1 CCP), this ground cannot be invoked to oppose enforcement of an award rendered in a foreign country where awards without reasoning are permitted (Article 1721.1 CCP).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The current Belgian arbitration law – which was adopted on 24 June 2013, entered into force on 1 September 2013 and incorporated in the CCP – is largely based on and consistent with the UNCITRAL Model Law. The Belgian law transposed some of the major improvements of the 2006 version of the UNCITRAL Model Law on interim and conservatory measures ordered by arbitral tribunals and the limited grounds for setting aside arbitral awards.

There are still some minor differences between the Belgian law and the UNCITRAL Model Law, the most important ones being the exclusion of *ex parte* interim/conservatory measures, the impossibility for the arbitral tribunal to amend, suspend or terminate such interim measures *ex officio*, the fact that parties in an arbitration sited in Belgium cannot agree that the award would not contain any reasoning, and the fact that both the absence of reasons and the existence of fraud are additional grounds for setting aside an award rendered in Belgium.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Although the Belgian arbitration law provides a flexible framework for conducting arbitration in Belgium, there are nevertheless some mandatory provisions which the parties to an arbitration procedure sited in Belgium have to abide by. These include the following:

- the arbitration agreement and the applicable procedural rules must meet the principles of equal treatment between parties and due process (Article 1699 CCP);
- arbitrators must be independent, impartial and uneven in number; and
- the arbitral award must be in writing, reasoned and signed by a majority of arbitrator(s), although only the absence of reasons constitutes a ground for setting aside the award.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

In principle, all claims of a pecuniary nature can be submitted to arbitration, as well as non-pecuniary claims for which parties are allowed to enter into a settlement agreement (Article 1676.1 CCP).

However, the following disputes cannot be referred to arbitration (despite the fact that they are of a pecuniary nature or can be the subject of a settlement agreement) or can only be referred to arbitration under certain conditions:

- Certain matters that fall within the jurisdiction of the labour courts, such as those relating to employment contracts, cannot be the subject of an arbitration agreement entered into prior to the dispute (Article 1676.5 CCP). The same holds true for disputes relating to certain insurance contracts. In both cases, the parties cannot agree to submit future disputes to arbitration. However, once a dispute has arisen, they may validly decide to refer it to arbitration.
- There is a long-standing controversy as to the arbitrability of disputes relating to the termination of exclusive distribution agreements of an indefinite duration that cover all or part of the Belgian territory. As a general rule, an arbitration clause in such agreement will only be valid and enforceable if the arbitrators are contractually bound to apply Belgian law.
- There are some limited exceptions to the general rule of arbitrability of certain intellectual property disputes.
- In the field of consumer disputes, the Court of Justice of the European Union has decided that an arbitration agreement may be considered abusive (see e.g. CJEU 26 October 2006, Case C-168/05, *Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*).

Public law entities may only enter into an arbitration agreement if the purpose thereof is to resolve disputes relating to an agreement that pertains to matters defined by law or royal decree (Article 1676.3 CCP).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, the arbitral tribunal can rule on the question of its own jurisdiction, which includes the competence to rule on the validity of the arbitration agreement (Article 1690.1 CCP). A plea that the arbitral tribunal does not have jurisdiction must be raised in the first written submission in the arbitration. A party is not precluded from raising such a plea by the mere fact that it has appointed an arbitrator (Article 1690.2 CCP). The arbitral tribunal will decide on the question of its own jurisdiction either in a preliminary award or in the final award on the merits (Article 1690.3 CCP).

Article 1690.1 CCP also stipulates that an arbitration agreement contained in a contract which is found null and void does not automatically become null itself (severability).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The national courts will decline to hear a case brought in breach of an arbitration agreement, provided that the other party invokes the existence of a valid arbitration agreement *in limine litis*, i.e. before asserting any other plea or defence (Article 1682.1 CCP).

Even if a party seizes a court to oppose the jurisdiction of an arbitral tribunal, the arbitration can commence or proceed and the arbitral tribunal can render an award (Article 1682.2 CCP).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The general rule is that the arbitral tribunal has the competence to decide on its own jurisdiction. Hence, if a party brings a dispute before the courts that is subject to a valid arbitration agreement, the courts will decline jurisdiction at the request of the party that invokes the arbitration agreement (see question 3.3).

Yet, if the arbitral tribunal decides that it has jurisdiction, this decision can be challenged before the national courts in proceedings to set aside the arbitral award. This challenge can only be made at the end of the arbitral proceedings. By contrast, if the arbitral tribunal decides that it does not have jurisdiction over the dispute, this decision can immediately be challenged before the national courts (Article 1690.4 CCP).

The national courts can also address the issue of jurisdiction of the arbitral tribunal in the framework of opposition proceedings against the recognition and enforcement of an arbitral award (Article 1721.1 CCP).

The national courts will exercise full jurisdiction when reviewing the issue of the tribunal's jurisdiction (*de novo* judicial review). Accordingly, the courts are not bound by the decision of the arbitral tribunal in this respect.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

In principle, an arbitral tribunal will not assume jurisdiction over individuals or entities that are not themselves party to the arbitration agreement (issues of representation, assignment, change of control, etc. aside), unless the parties to the arbitration agreement and the third parties all agree that the latter would join the proceedings.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

In Belgium, limitation periods are a matter of substantive law. An arbitral tribunal must apply the Belgian rules on limitation periods if Belgian law governs the merits of the dispute.

The limitation period generally depends on the type of claim. For contractual claims, it is generally 10 years, whereas for tort claims, it is generally five years (Article 2262*bis* of the Civil Code), although specific laws can provide shorter limitation periods.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

If a Belgian party to an ongoing arbitration becomes involved in insolvency proceedings, the arbitration proceedings can continue with the insolvency administrator representing the insolvent party, albeit after a period during which the proceedings are stayed in order to assess the situation. In that respect, however, there is some controversy regarding the binding effect of an arbitration agreement upon the administrator.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The law applicable to the substance of a dispute is determined by the parties. In the absence of an express choice, the arbitral tribunal will determine the applicable substantive law on the basis of the relevant rules of private international law (e.g. those laid down in the EU Regulation Rome I on the law applicable to contractual obligations).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

As indicated under question 2.4, the Belgian arbitration law provides some mandatory rules that are applicable to an arbitration having its seat in Belgium.

Apart from those rules, the Code of Civil Procedure does not expressly stipulate in which circumstances mandatory laws or the laws of public policy of Belgium or of another jurisdiction will prevail over the law chosen by the parties. However, since the arbitral tribunal has an implied duty to render an award that is enforceable, the tribunal will have to take due account of any mandatory laws applicable in the country where the arbitration is sited or in the country where enforcement will be sought, in order to avoid or reduce the risk that the award will be set aside or that enforcement of the award will be refused.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

As a principle, the rules of Belgian law described under questions 4.1 and 4.2 will apply to an arbitration sited in Belgium.

Belgian case law decided that if a court has to assess whether the dispute is arbitrable, it does not only have to apply the law chosen by the parties to govern their contract, but also the mandatory laws of the country where the arbitration is sited.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

In principle, the parties are free to select the arbitrators of their choice, as long as the general requirements of independence and impartiality are respected and the arbitral tribunal consists of an uneven number of arbitrators (Article 1684.1 CCP). However, an arbitration agreement that provides for an even number of arbitrators is not automatically invalid. In that case, an additional arbitrator will need to be appointed to make the number uneven (Article 1684.2 CCP). If the parties did not provide the number of arbitrators in the arbitration agreement, and if they cannot agree on the number at a later stage, the arbitral tribunal will consist of three arbitrators (Article 1683.3 CCP).

The parties can also designate a third party, for instance an arbitral institution, to appoint the arbitrators (1685.2 CCP).

Finally, unless otherwise agreed, arbitrators cannot be excluded or challenged by reason of their nationality (Article 1685.1 CCP). Nationality is a valid criterion to designate/challenge (an) arbitrator(s), but only if it was agreed to between the parties for objective reasons.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The law contains default procedures for the selection of arbitrators. Such procedures are applicable in the event that the method chosen by the parties fails, or in the event that the parties have not specified the method of appointment in their arbitration agreement.

In the event that the arbitration agreement does not specify the method of appointment and/or the parties cannot agree on the method, each party will appoint one arbitrator and the two appointed arbitrators will then appoint a third one (Article 1685.3 CCP).

The method chosen by the parties may fail, for instance, if the institution designated by the parties fails to appoint an arbitrator, if a party refuses to appoint an arbitrator, or if the arbitrators who have to appoint an additional arbitrator cannot reach an agreement. In each of these situations, any party can turn to the President of the competent Court of First Instance to request the appointment or replacement of an arbitrator (Articles 1685.3 and 1685.4 CCP). Such decision by the President of the Court of First Instance cannot be appealed, unless the President decided not to appoint an arbitrator (Article 1680.1).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

If the parties, the arbitrators or the arbitral institution cannot agree on the appointment of an arbitrator or if they fail to appoint an arbitrator, each party can turn to the President of the Court of First Instance and request the appointment of an arbitrator by the President of the Court (see question 5.2).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Arbitrators must be independent and impartial. Any circumstance that casts justifiable doubts on the arbitrator's impartiality or independence may, at the request of a party, result in the removal of the arbitrator (Article 1686.2 CCP).

Belgian law obliges arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their independence and/or impartiality, both at the time of the tribunal's constitution and during the proceedings (i.e. if new circumstances arise) (Article 1686.1 CCP). Consequently, a party may only request the removal of an arbitrator during the proceedings on grounds that were not known to that party before the appointment of the arbitrator (Article 1686.2 CCP).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

As a matter of principle, the parties are free to determine the rules governing the arbitral proceedings (Article 1700.1 CCP). They can, for instance, agree to apply the procedural rules of an arbitral institution (e.g. the rules of procedure of CEPANI, the Belgian arbitration institution).

The only safeguard provided by law is that the proceedings must meet the requirements of due process and equal treatment of the parties (Article 1699 CCP).

Failing any agreement by the parties, the arbitral tribunal may apply the procedural rules it deems appropriate (Article 1700.2 CCP), always subject, though, to the principles of due process and equal treatment.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Procedural steps (e.g. initiating the arbitral proceedings, filing the answer to the request for arbitration, terms of reference, exchange of submissions, etc.), will be decided upon by the parties or will be governed by the rules of the arbitral institution which the parties have chosen, always subject, however, to the principles of due process and equal treatment. Absent a choice by the parties, the rules of the CCP will apply.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Belgian lawyers are bound by their ethical bar rules when acting in arbitrations, be they sited in Belgium or elsewhere. They are allowed to examine and cross-examine witnesses and to prepare witnesses before arbitral hearings. Foreign lawyers in arbitrations sited in Belgium are not bound by the Belgian bar rules.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitrators' key duty is to hear the case brought before them and to render a reasoned award on the case, in accordance with their mission.

Arbitrators also have certain secondary duties that are considered inherent to their mission or are imposed by the rules of the institution governing the arbitration, such as the duty to remain impartial and independent from the parties, or to organise the arbitral proceedings in a manner consistent with the principle of due process.

Arbitrators are entrusted with certain powers in order to allow them to conduct arbitration proceedings in a successful manner. In particular, arbitrators can issue interim measures, require a party to provide appropriate security, hear witnesses and experts and order penalty payments ("*astreinte*"/"*dwangsom*"). These powers are similar to the powers bestowed upon the regular courts, but are often more limited. For example, arbitrators cannot order attachments, hear witnesses under oath or rule on an alleged forged authentic deed, which are typically decisions requiring the judicial courts' *imperium*.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Any restrictions existing under Belgian law on the appearance of lawyers from other jurisdictions before the Belgian courts do not apply to arbitration proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Belgian law does not provide for arbitrator immunity.

However, certain arbitral institutions, such as CEPANI and ICC, provide for the limitation of liability of arbitrators (Article 30 of the CEPANI Rules; Article 41 of the ICC Rules).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

As a general rule, procedural issues are dealt with by the arbitrators. However, the national courts do have jurisdiction over certain procedural issues, such as granting interim measures, forcing the appearance of witnesses, forcing the production of evidence, deciding on a challenge of an arbitrator if no institution has been chosen or if the institution is inactive.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless excluded in the arbitration agreement, an arbitral tribunal is allowed to award preliminary or interim relief at the request of a

party. Any type of interim or conservatory relief can be awarded, except for attachments or garnishments (Article 1691 CCP).

The party obtaining an interim measure shall be liable for any costs and damage caused to the other party as a consequence of the execution of said measure if the arbitral tribunal were subsequently to decide that the measure should not have been ordered (Article 1695 CCP).

The arbitral tribunal can suspend, amend or terminate an interim or conservatory measure at the request of a party, but not *ex officio* (Article 1692 CCP).

To ensure compliance with the interim award, the arbitral tribunal can impose penalty payments ("*astreinte*"/"*dwangsom*").

If necessary to ensure proper compliance, an award ordering interim or conservatory measures will be enforced by the competent Court of First Instance, except for limited grounds (Article 1697 CCP).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

In principle, an arbitration agreement will not prevent the parties from turning to the national courts to obtain preliminary or interim relief (Article 1683 CCP). The presidents of the courts have jurisdiction to grant provisional measures in urgent matters.

The three traditional prerequisites for obtaining such measures in summary proceedings are: (i) urgency; (ii) the president must refrain from issuing judgments that either contain a declaration of rights or cause a change in the legal position of the parties; and (iii) the president should determine whether there is a *fumus boni iuris*, i.e. whether a case on the merits has any chance of success, and then issue a judgment in accordance with the probable rights of the parties.

A party's request to a court for preliminary or interim relief cannot be interpreted as a renunciation of arbitration (Article 1683 CCP). In other words, the request to a court for interim relief has no effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Since the law explicitly provides that parties can request interim relief from the courts even if the dispute is subject to arbitration (Articles 1683 and 1691 CCP), courts are not particularly reluctant to grant interim relief prior to or during arbitration proceedings. However, interim relief can only be granted under the circumstances indicated above under question 7.2.

In practice, parties will more likely request interim relief from the national courts where the arbitral tribunal has not yet been constituted or where the measure cannot (or not easily) be obtained from the arbitral tribunal (e.g. attachment, measure involving a third party).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

It is not possible to obtain an anti-suit injunction from a Belgian court, as such type of relief falls outside the scope of the jurisdiction of the Belgian courts.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Both the Belgian courts and arbitral tribunals are allowed to order security for costs if this is justified under the circumstances of the case.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

An arbitral award ordering interim conservatory measures has a binding effect and will be declared enforceable by the Court of First Instance, irrespective of the country in which it was issued, subject, however, to the grounds of refusal of recognition or enforcement laid down in Article 1697 CCP (Article 1696 CCP).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The parties are free to determine the rules of evidence that will apply. The default rule is that the arbitrators are not bound by any rules of evidence. They freely determine the admissibility, relevance and probative value of the evidence submitted to them (Article 1700.3 CCP).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Unless the parties agree otherwise, the arbitral tribunal can order the disclosure of documents held by a party, if necessary subject to penalty payments ("*astreinte*"/"*dwangsom*") (Article 1700.4 CCP). The Belgian rules governing discovery in arbitral proceedings are the same as those applicable in regular court proceedings. These rules do not allow for broad discovery. Production of a document can only be ordered if there are "serious, precise and concurring indications" that the other party is in possession of a document containing proof of a relevant fact (Article 877 CCP). Yet, the parties may extend the conditions for obtaining such an order, e.g. by agreeing to apply the IBA Rules on the Taking of Evidence in International Arbitration.

Due to the contractual nature of arbitration, the arbitral tribunal cannot force the production of evidence from third parties; this requires court intervention.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Upon request of a party, the President of the Court of First Instance – acting as in summary proceedings – can order all measures that are necessary for parties to bring relevant evidence, including forcing the production of a document or ensuring that vital evidence is preserved.

Parties can also turn to the President of the Court of First Instance to ensure compliance with the decisions of the arbitral tribunal

concerning disclosure and production of evidence or the appearance of witnesses (Articles 1680.4 and 1708 CCP).

In practice, however, parties rarely ask for court intervention to obtain a document held by another party or to force the appearance of a witness. If the arbitral tribunal orders disclosure, the parties usually comply. If a party refuses to produce the document or to bring a witness, the arbitral tribunal can draw an adverse inference from this refusal.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The parties are free to determine how witness and expert testimony will be dealt with. The parties may file witness statements, although this rarely happens in practice. There is no obligation for witnesses to be sworn in before the tribunal (Article 1700.4 CCP). Cross-examination of witnesses and experts is allowed.

If no rules are agreed upon between the parties, the arbitral tribunal will decide. In practice, the examination of witnesses and experts is increasingly conducted in accordance with Anglo-Saxon legal principles, with direct examination, followed by cross-examination and redirect examination.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

There are no rules which specifically address this point in arbitration matters. However, it is common for the arbitral tribunal to examine this question under the law of the nationality of the parties concerned.

All communication between a party and his outside counsel is, in principle, privileged and cannot be produced in court or before an arbitral tribunal. In principle, communication between the party and in-house counsel in Belgium is also privileged.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The arbitral tribunal must render a reasoned award in writing after deliberation (Articles 1713.3 and 1713.4 CCP).

In addition, the award must contain the names and addresses of the arbitrators and parties, as well as the date on which it was rendered and the place of arbitration. The award must also contain a description of the subject-matter of the dispute (Article 1713.5 CCP).

If more than one arbitrator is appointed, the award shall be signed by at least the majority of the tribunal and the reasons for the absence of signature of the other arbitrator(s) must be mentioned (Article 1713.3 CCP). Not every page of the award needs to be signed by the arbitrators in order to be valid.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The arbitral tribunal has the power to correct errors in computation, clerical or typographical errors, or any errors of a similar nature, *ex officio* or upon request of a party (Articles 1715.1 and 1715.2 CCP). If so agreed by the parties, a party may also request the arbitral tribunal to give an interpretation of a specific point or part of the award (Article 1715.1 CCP). Finally, a party may also request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award, unless otherwise agreed by the parties (Article 1715.3 CCP).

With respect to interim and conservatory measures, the arbitral tribunal has the power to amend, suspend or revoke the measures awarded upon request of a party (Article 1692 CCP).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Unless the parties agree otherwise, arbitral awards are final and not open for appeal. The parties cannot request a court or arbitral tribunal to determine the merits of the case for a second time (Article 1716 CCP).

Usually, though, the parties do not provide for the option of an appeal, which means that the only way for the losing party to challenge the award will be to initiate proceedings to set aside the award before the regular courts.

Before looking at the grounds on which an award can be set aside, the Court of First Instance must first verify whether the award can no longer be contested before the arbitral tribunal (Article 1717.1 CCP).

The Court of First Instance can set aside the award only if:

a) there was no valid arbitration agreement, including if one of the parties did not have the legal capacity to enter into the arbitration agreement (Article 1717.3a.i CCP);

b) due process requirements were not complied with (Article 1717.3a.ii CCP);

c) the award deals with a dispute not falling within the terms of the arbitration agreement (Article 1717.3a.iii CCP);

d) the award does not contain the reasoning of the arbitrators (Article 1717.3a.iv CCP);

e) the arbitral tribunal was irregularly constituted (Article 1717.3a.v CCP);

f) the arbitral tribunal has exceeded its jurisdiction or powers (Article 1717.3a.vi CCP);

g) the underlying dispute is not arbitrable (Article 1717.3b.i CCP);

h) the award is contrary to public policy (Article 1717.3b.ii CCP); and

i) the award was obtained by fraud (Article 1717.3b.iii CCP).

The grounds mentioned under a), b), c) and e) above can no longer be invoked to request the setting aside of the award if the party was aware of them during the arbitration proceedings, but failed to raise them at that point (Article 1717.5 CCP).

The grounds mentioned under g), h), and i) are the only ones that can be raised *ex officio* by the court.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

If all parties are non-Belgian, they can waive their right to initiate proceedings to set aside the award, before or after the dispute arose (Article 1718 CCP). This waiver must expressly refer to setting-aside proceedings; a general waiver to invoke "any legal recourse" will not be sufficient in that respect. In case of a valid waiver, the arbitral award will not be subject to any supervision by the Courts of First Instance under Article 1717 CCP. It will then only be subject to supervision by the courts of the country where enforcement of the award is sought.

This option is not open to Belgian parties (Belgian nationals or companies with a registered seat, principal establishment or branch in Belgium).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties cannot validly expand the scope of the judicial review of the arbitral award beyond the grounds for annulment listed in Article 1717 CCP. However, the parties are free to provide for an appeal against the arbitral award and, accordingly, to submit the award to a full review by an appellate arbitral tribunal (Article 1716 CCP).

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The proceedings to set aside an arbitral award must be initiated within three months of the notification of the award to the parties (Article 1717.4 CCP).

The arbitral tribunal's decision that it has jurisdiction may only be contested in setting-aside proceedings against the final award (Article 1690.4 CCP).

If a request is made under Article 1715 CCP to correct errors in the award or to ask the arbitral tribunal for an interpretation of it, the deadline to enter into setting-aside proceedings starts to run as from the date of notification of the arbitral tribunal's decision on the requested corrections/interpretation.

Setting-aside proceedings must be brought before the Court of First Instance located at the seat of the Court of Appeal in whose jurisdiction the seat of arbitration is situated (Article 1680.6 CCP). A judgment on setting aside cannot be appealed before a court of appeal. It can only be subject to recourse before the Belgian Supreme Court of Cassation and is limited to points of law and compliance with fundamental procedural rules (Article 1680.5 CCP).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Belgium has signed and ratified the New York Convention. The Convention is directly applicable in the Belgian legal order. Hence, there is no legislation specifically implementing the Convention. It entered into force in Belgium on 16 November 1975.

Belgium entered a reservation of reciprocity which provides that it will only apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Belgium is a party to the European Convention on International Commercial Arbitration of 1961. Belgium has also concluded bilateral treaties on the enforcement of arbitral awards with France, the Netherlands, Germany, Italy, Switzerland and Austria. If one of these treaties is applicable, its regime applies rather than the provisions of the CCP.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The Belgian courts will generally enforce arbitral awards. The grounds for the refusal of enforcement are narrowly construed. This is particularly the case for the concept of "public policy" (see question 11.5 below). As a result, there are very few precedents in which courts have refused enforcement of an award on the grounds that it was contrary to public policy.

In order to enforce an arbitral award in Belgium, the enforcing party will first have to obtain a leave to enforce ("*exequatur*") from the Court of First Instance by means of an *ex parte* application (Articles 1719, 1720.1 and 1720.1/1 CCP). For awards rendered outside Belgium, the relevant Court of First Instance is the one located at the seat of the Court of Appeal in whose jurisdiction the party against whom enforcement is sought has its domicile, residence, registered office, place of business or branch. If the party against whom enforcement is sought does not have its domicile, residence, registered office, place of business or branch in Belgium, the application will have to be brought before the Court of First Instance located at the seat of the Court of Appeal in whose jurisdiction enforcement is sought (Article 1720.2 CCP).

The party seeking enforcement must provide the Court with an original or certified copy of the arbitral award (Article 1720.4 CCP). Only once the *exequatur* has been granted will the opposing party have the opportunity to challenge the decision before the Court in contradictory proceedings.

The Court ruling on an application for obtaining the *exequatur* will apply the rules laid down in Articles 1719 to 1721 CCP if the application relates to the enforcement of a Belgian arbitral award. If the application concerns the enforcement of a foreign award, the Court will apply the rules of the New York Convention or any other applicable treaty, and, if these treaties are not applicable, the default rules stipulated in Articles 1719 to 1721 CCP.

However, under Article VII of the New York Convention, a party seeking to enforce a foreign arbitral award can opt for the application of national laws (Articles 1719 to 1721 CCP) if they are more favourable to the recognition and enforcement of the award. Belgian case law considers that such choice must be made "*in globo*", which prevents the party from using a combination of the Belgian rules on enforcement and the New York Convention.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Article 1713.9 CCP stipulates that the arbitral award shall have the same effect as a court decision on the relationship between the parties. Therefore, the award has *res judicata* effect from the moment the parties are notified of the award and provided that it can no longer be challenged before the arbitrators.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The enforcement of an arbitral award may be refused if it is contrary to public policy (Article 1721.1.b.ii CCP). One generally accepts that this relates to the concept of Belgian "international public policy", which is narrower than mere public policy.

A foreign award will be considered to be contrary to international public policy if it is contrary to a principle that is essential to the moral, political or economic order of Belgium. The violation of international public policy can follow from the substantive assessment of the case by the arbitral tribunal or from the infringement of certain procedural rules (e.g. some due process requirements).

Given the narrow interpretation of the concept of "public policy", there are very few precedents in which the courts have refused the enforcement of an arbitral award on the ground that it was contrary to public policy. If the courts did so, it was often due to major procedural shortcomings.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Belgian arbitration law does not contain any explicit rules on the confidentiality of arbitral proceedings. However, arbitral proceedings will typically be conducted behind closed doors. The CEPANI rules of arbitration provide that the arbitrations conducted under its rules are confidential, except if otherwise agreed (Article 25 of the CEPANI Rules).

If the parties wish to guarantee that their arbitration remains confidential and if they did not choose institutional rules providing for it, it is advisable that they include a confidentiality clause in the arbitration agreement or in the terms of reference.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

There is no specific legal provision that prohibits parties from relying upon documents submitted in arbitral proceedings in the course of subsequent court proceedings.

The parties can, however, explicitly agree to keep information and documents exchanged in the arbitration confidential. Yet, in that case and to the extent it is necessary, the parties will nevertheless be entitled to refer to or rely on the information or documents disclosed in the arbitration if the follow-on court proceedings concern the arbitration or the arbitral award (e.g. in court proceedings for setting aside the award, enforcement proceedings, interim measures proceedings, etc.).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The arbitral tribunal must decide on the issues that are presented by the parties and may issue one or several awards in that respect (Article 1713.1 CCP).

With regard to damages, the arbitral tribunal will award damages according to the law applicable to the dispute. If Belgian law is applicable, compensatory damages and liquidated damages can be awarded. Punitive damages, however, cannot be awarded under Belgian law.

Arbitral tribunals are, furthermore, allowed to issue anti-suit orders. In contrast to anti-suit injunctions issued by the regular courts, the validity of such orders is not affected by the Brussels I (Recast) Regulation (see CJEU 13 May 2015, Case C-536/13, *Gazprom OAO*). The enforceability of anti-suit orders must be assessed by reference to the New York Convention or, as the case may be, Article 1697 or 1721 CCP.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The arbitral tribunal will award interest according to the law applicable to the dispute.

Under Belgian law, unless otherwise agreed by the parties, amounts that are due but remain unpaid will generate interest (the legal interest rate for the year 2018 is 2%). Interest starts accruing from the date the defaulting party is formally given notice. Compounded interest is allowed, but is subject to the specific rules stipulated in Article 1154 of the Civil Code. In the event of late payments in commercial transactions, interest will in principle be due automatically at a more favourable rate provided for by the Law of 2 August 2002 on late payment in commercial transactions (8% for the first half of 2018).

Moreover, once the award is rendered, judicial interests (at the legal interest rate) can be due as from the notification of the award.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The parties can agree on the allocation of the costs and fees in the arbitration agreement or in the terms of reference. The rules of the arbitral institution can also provide for guidelines on the allocation of fees and costs between the parties.

Absent any specific rules in this respect, the arbitrators can freely determine, in the award, how the parties will bear the arbitration costs, including the parties' legal fees and all other expenses arising from the arbitral proceedings (Article 1713.6 CCP).

In general, arbitrators are inclined to decide that the unsuccessful party has to pay the prevailing party's costs or part thereof, unless the behaviour of the prevailing party were to justify another solution.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award itself is not subject to any tax. However, it cannot be excluded that a tax (of 3% on the total amount at stake, provided the order for payment exceeds EUR 12,500) might be due in the event of certain court proceedings relating to the enforcement of the award.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no rules preventing third parties from funding claims. However, such third-party funders should be cautious of the application of Article 1699 of the Civil Code in case the funding entails the assignment of the claim to them. Article 1699 stipulates that the debtor can validly free himself from his obligation by simply paying to the funder the price (together with costs and interest) which he paid to the original creditor for the assignment of the claim (irrespective of the value of the claim), provided that the claim is pending in court.

Contingency fees are illegal in Belgium. However, it is permitted to agree a success fee for the lawyer.

There are a number of professional litigation and arbitration funders active on the Belgian market.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes. Belgium ratified the ICSID Convention on 27 August 1970. The Convention entered into force in Belgium on 26 September 1970.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Belgium has concluded approximately 90 BITs. These BITs provide for arbitration as a dispute-resolution mechanism for investors from outside Belgium, either within the framework of the ICSID, or through *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

Belgium is also a party to the Energy Charter Treaty.

Furthermore, with the European Union having acquired more competences in the field of concluding investment treaties, it can be expected that new multilateral investment treaties between the EU and third-party States will be entered into in the near future. However, recent political and legal developments may hamper this evolution. One thinks of, for example, the fierce discussions in relation to the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), where Belgium has requested an opinion from the Court of Justice of the EU on the compatibility of CETA's investment protection rules with EU law.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Most of the BITs entered into by Belgium feature a broad description of the term "investment" (usually all kinds of assets, including IP rights, etc.) and are concluded jointly with Luxembourg. The substantive provisions contained in such BITs usually do not deviate from the language stipulated in model BITs concluded by other EU countries.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

With respect to foreign States, Belgian courts will generally recognise immunity regarding jurisdiction and execution, which is based on an international custom. However, this immunity can be challenged, in particular if the State has waived its immunity or entered into purely commercial transactions.

In respect of execution against the Belgian State, Article 1412*bis* CCP provides for partial immunity.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

International arbitration is well developed in Belgium, be it institutional (in particular ICC, CEPANI and Federation of Belgian Diamond Bourses) or *ad hoc*. It is commonly used, especially for all kinds of commercial disputes.

In Belgium, arbitration occurs mainly in English, Dutch or French, i.e. languages that are generally spoken and understood in the Belgian legal community. Belgium is also home to many excellent arbitrators with a worldwide reputation, who intervene as arbitrators in arbitrations sited in Belgium or anywhere else.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

As indicated under question 2.3, the current arbitration law, adopted on 24 June 2013, increased the efficiency of arbitration proceedings in Belgium.

The law of 25 December 2016 brought about some minor modifications to the 2013 arbitration law. These modifications in no way affect the essence of the 2013 reforms. By providing some corrections and clarifications, the Belgian legislator sought to respond to recent developments in the world of arbitration and to further increase the attractiveness of Belgium as a place for international arbitration. The most important modifications, already discussed above, concern the provisions on the territorial jurisdiction of the courts dealing with applications for recognition and enforcement of foreign arbitral awards, and the abolition of the requirement to present the recognition and enforcement court with the original or certified copy of the arbitration agreement.

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

There are no formal requirements for an arbitration agreement to be valid. However, the Arbitration Act 1996 (the "1996 Act"), which governs arbitration proceedings in England and Wales, only applies to arbitration agreements that are in writing (section 5(1)). The 1996 Act contains a number of mandatory and non-mandatory provisions intended to facilitate the arbitral process, and so it is highly recommended that arbitration agreements are recorded in writing.

An agreement is deemed to be in writing for the purposes of the 1996 Act if it is: (i) made in writing, whether or not signed by the parties (section 5(2)(a)); (ii) made by exchange of communications in writing (section 5(2)(b)); or (iii) evidenced in writing (section 5(2)(c)). The parties will satisfy the writing requirement if they orally agree to arbitrate by referring to terms that are in writing (section 5(3)). Writing includes "*being recorded by any means*" (section 5(6)).

As to the content of an arbitration agreement, the 1996 Act simply requires that the parties agree "*to submit to arbitration present or future disputes (whether they are contractual or not)*" (section 6(1)). It is possible for a contract to incorporate an arbitration agreement contained in a separate document by reference to that separate document (section 6(2)).

1.2 What other elements ought to be incorporated in an arbitration agreement?

Parties should consider making provision in their arbitration agreement for the applicable arbitral rules, governing law, arbitral seat, language of the arbitration, and number of arbitrators.

Where the arbitration agreement does not include these elements, the default provisions of the 1996 Act provide detailed procedures, designed to enable parties to use and enforce arbitration agreements in circumstances where the agreements themselves provide little practical assistance.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The English courts have generally taken a pro-enforcement approach to arbitration agreements. This is reflected in the courts' approach to: (i) ambiguous arbitration agreements; (ii) the separability of arbitration agreements; and (iii) the scope of arbitration agreements.

English law construes arbitration clauses widely and generously. It will rarely hold that a clause of a commercial contract is void for uncertainty and will endeavour to make sense of the agreement. In *Exmek Pharmaceuticals SAC v Alkem Laboratories Ltd* [2015] EWHC 3158 (Comm), a contract inconsistently contained both an arbitration clause and an exclusive jurisdiction clause for "UK" courts. The English High Court held that the arbitration agreement was valid – with all disputes to be submitted to arbitration seated in England and Wales under the supervisory jurisdiction of the courts of England and Wales. There are, however, limits to the lengths the courts will go to save arbitration agreements. For instance, a clause might not be considered an arbitration agreement under the 1996 Act if it does not permit the arbitrator to make decisions that are binding on the parties (*Turville Heath Inc v Chartis Insurance UK Ltd* [2012] EWHC 3019 (TCC)).

Under English law, arbitration agreements are separable. This means that an arbitration agreement may be valid, even if the contract in which the arbitration agreement is contained is invalid (for example, because of misrepresentation) (*Fiona Trust Corp v Privalov & Ors* [2007] 4 All ER 951). The situation is different if the arbitration agreement itself is impugned, but this is rare and difficult to prove in practice.

In *Fiona Trust*, the House of Lords also held that parties to arbitration agreements generally intend all disputes arising out of their relationship to be determined by the same tribunal, unless language to the contrary is present. The issue is more complicated when a party asserts that an arbitration agreement in one contract extends to claims arising from a different contract between the same parties. In such cases, courts and arbitral tribunals are likely to scrutinise the contracts carefully in order to determine the scope of the arbitration agreement (as seen in *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The 1996 Act governs the enforcement of arbitration proceedings in England and Wales. There have been no significant changes to this legislation in the last year.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The provisions of the 1996 Act that are in force do not distinguish between domestic and international arbitration proceedings. Sections 85 to 87 of the 1996 Act (which apply to "domestic arbitration agreements" only) are not in force.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The 1996 Act is, in large part, based on the UNCITRAL Model Law (last amended in 2006). However, the 1996 Act differs from the Model Law in a number of important respects, including the following:

- the 1996 Act applies to all forms of arbitration, whereas the Model Law only applies to international commercial arbitration;
- under the 1996 Act, a party may appeal an arbitral award on a point of law (unless agreed otherwise);
- under the 1996 Act, an English court is only able to stay its own proceedings and cannot refer a matter to arbitration;
- the default provisions of the 1996 Act for the appointment of arbitrators provide for the appointment of a sole arbitrator as opposed to three arbitrators;
- under the 1996 Act, where each party is required to appoint an arbitrator, a party may treat its party-nominated arbitrator as the sole arbitrator in the event that the other party fails to make an appointment;
- there is no time limit for a party to oppose the appointment of an arbitrator under the 1996 Act; and
- the 1996 Act does not prescribe strict rules for the exchange of pleadings.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

For arbitrations seated in England and Wales, all provisions listed in schedule 1 of the 1996 Act are mandatory. The provisions listed in Schedule 1 include (by way of example): the basic duties of tribunals and parties (sections 33 and 40); challenges to an award (sections 67 and 68); and certain powers of the court, such as the powers to stay legal proceedings (sections 9 to 11), extend agreed time limits (section 12), remove arbitrators (section 24), secure witnesses' attendance (section 43), and enforce an award (section 66).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The 1996 Act does not define or describe those matters that are "arbitrable" (i.e., capable of settlement by arbitration); it simply preserves the common law position (section 81(1)(a)).

Under English common law, a multitude of non-contractual claims (including tort, competition, intellectual property, and certain statutory claims) are capable of settlement by arbitration. There are, however, certain claims which are not capable of settlement by arbitration, including criminal matters and claims under the Employment Rights Act 1996 (*Clyde & Co LLP v Bates Van Winkelhof* [2011] EWHC 668 (QB)).

Two recent decisions have addressed the arbitrability of statutory claims. The English Court of Appeal has held that (i) statutory claims relating to minority interests in a company (unfair prejudice) are arbitrable, but (ii) arbitrators have no power to order the winding up of a company (*see Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 and *Salford Estates (No.2) Ltd. v Altomart Ltd* [2014] EWCA Civ 1575).

There is also an open question as to whether disputes involving issues of mandatory EU law can be settled by arbitration. The long-held view is that such matters – for example, EU competition claims – are generally arbitrable (*ET Plus SA v Jean-Paul Welter* [2005] EWHC 2115 (Comm) *cf. Accentuate Ltd v ASIGRA Inc.* [2009] EWHC 2655)).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Unless agreed otherwise, the tribunal has the competence to rule on its own substantive jurisdiction as to:

- whether or not there is a valid arbitration agreement;
- whether or not the tribunal has been properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement (1996 Act, section 30(1)).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

A party against whom court proceedings are brought in England and Wales in apparent breach of an arbitration clause, may apply to the court for a stay of the court proceedings (1996 Act, section 9(1)). The court is required to grant the stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed (section 9(4)). This requirement applies even if the seat of the arbitration is outside of England and Wales (section 2(1)).

Once the applicant has established the existence of an arbitration clause and that the clause covers the matters in dispute, the burden of proof shifts to the party seeking to show that the arbitration agreement is null and void, inoperative, or incapable of being performed. In practice, this is a high threshold (*see Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky* [2013] EWCA Civ 784).

Pursuant to section 9(3) of the 1996 Act, the right to a stay of judicial proceedings may be lost if the applicant has taken steps in the court proceeding to answer the substantive claim. It has been held that participating in a case management conference and inviting the court to make related orders constituted steps to answer the substantive claim (*Nokia Corp v. HTC Corp* [2012] EWHC 3199 (Pat)).

An application under section 9 is not the only means by which a party can seek to restrain court proceedings allegedly brought in breach of an arbitration agreement. The court is also entitled to stay court proceedings under its inherent jurisdiction where the requirements of section 9 of the 1996 Act are not satisfied – for instance, where there is a dispute whether the parties have entered into a binding arbitration agreement or whether the dispute falls within the scope of the arbitration agreement (*see Golden Ocean Group v Humpuss Intermoda Transportasi* [2013] EWHC 1240 (Comm)).

The power of the courts in England and Wales to issue an anti-suit injunction is considered below in question 7.4.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

As explained above in question 3.2, unless otherwise agreed by the parties, the arbitral tribunal may determine its own substantive jurisdiction. The court, however, also has certain powers to decide the jurisdiction and competence of the tribunal during the arbitral proceedings (1996 Act, section 32); after an award has been rendered (section 67); and where the applicant has not taken any part in the arbitral proceedings (section 72).

Section 32 of the 1996 Act grants the court a limited power to address the jurisdiction and competence of an arbitral tribunal during proceedings. A party can only apply to the court for a ruling on jurisdiction during arbitral proceedings in two circumstances:

- First, an application can be made where all parties to the arbitral proceedings agree in writing.
- Second, an application can be made where the arbitral tribunal gives permission and the court is satisfied that: (i) the determination of the question is likely to produce substantial savings in costs; (ii) the application was made without delay; and (iii) there is good reason why the matter should be decided by the court (section 32(2)). It is only in exceptional cases that a court will find these criteria to have been met (*see Toyota Tsusho Sugar Trading Ltd v Prolat SARL* [2014] EWHC 3649 (Comm) for a recent case where the criteria were met).

The arbitral proceedings may continue, and an award may be granted, at the same time that an application to the court for the determination of a preliminary point of jurisdiction is pending (section 32(4)).

Section 67 of the 1996 Act permits a party to challenge an arbitral award on grounds of lack of substantive jurisdiction. A challenge must be brought within 28 days of the date of the arbitral award determining jurisdiction. The court will review the arbitral tribunal's jurisdiction by way of complete rehearing, without being bound by the arbitral tribunal's reasoning (*Dallah Real Estate & Tourism Holding Co v Government of Pakistan* [2010] UKSC 46).

Under section 72 of the 1996 Act, a party who takes no part in the arbitral proceedings can apply to the court for a declaration or injunction restraining arbitration proceedings by challenging: (i) the validity of an arbitration agreement; (ii) whether the arbitral tribunal has been properly constituted; or (iii) the matters that have been referred to arbitration. In addition, such a party may challenge an award under section 67, as discussed above.

For the sake of completeness, it should be noted that the court can also address the substantive jurisdiction of the arbitral tribunal in proceedings for the recognition and enforcement of foreign arbitral awards.

The right to object to the substantive jurisdiction of the arbitral tribunal may be lost if a party takes part or continues to take part in the arbitral proceedings without objection (section 73).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

English law does not empower tribunals to assume jurisdiction over individuals or entities, which are not party to the arbitration agreement. Arbitration is a consensual process. While a tribunal may invite a non-party to submit testimony or produce documents willingly, it cannot itself compel that individual or entity to do so (although the court has powers to make such orders in certain circumstances).

In various jurisdictions, a number of legal theories have been advanced to seek to bind non-signatories to arbitration agreements (such as piercing the corporate veil and the group of companies doctrine). English law, however, has not embraced these legal theories. Following a recent Supreme Court decision, it will be extremely rare that the corporate veil is pierced (*VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5). Moreover, in *Peterson Farms Inc. v C & M Farming Ltd* [2004] EWHC 121 (Comm), the High Court set aside an award in which the group of companies doctrine had been recognised, stating, *inter alia*, that the doctrine "*forms no part of English law*". However, third parties may be bound to arbitration agreements through the principles of agency law.

Under English law, in certain circumstances, third parties can acquire rights under a contract (pursuant to the Contracts (Rights of Third Parties) Act 1999). Where that contract contains an arbitration clause, the third party may be required to enforce those rights through arbitration (section 8(1) and *Nisshin Shipping v Cleaves & Co* [2003] EWHC 2602 (Comm)). The third party may also have the right to insist on being sued by any parties to the contract in arbitration rather than in court. However, a party to an arbitration agreement cannot commence an arbitration against a third party without that third party's consent (*Fortress Value Recovery Fund LLP v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Section 13 of the 1996 Act governs the imposition of limitation periods for arbitral proceedings in England and Wales. This provides that the "Limitation Acts" apply to arbitral proceedings in the same way that they apply to legal proceedings. The "Limitation Acts" are defined (in section 13(4)) as comprising the Limitation Act 1980 and the Foreign Limitation Periods Act 1984.

The former imposes a six-year limitation period for actions in both contract and tort, which constitute the majority of arbitration claims. The latter statute provides that, where a dispute is governed by foreign law, the laws of the foreign state relating to limitation shall apply. In imposing such a rule, the Foreign Limitation Periods Act makes clear that the rules regarding foreign limitation periods are substantive.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Where an arbitration is seated in England and Wales, there is a mandatory stay of proceedings where one party to the arbitration is subject to a winding-up order or goes into administration. Proceedings may be continued only with the consent of the administrator or permission of the court (Insolvency Act 1986, section 130(2) and schedule B1, para. 43(6); Cross Border Insolvency Regulations 2006, schedule 1, para. 20(1)). In deciding whether to lift a stay, the courts have a wide discretion to do what is fair and just in the circumstances (*United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd* [2013] EWHC 4335 (Ch)).

At least for cases involving parties from EU Member States, the effect of insolvency proceedings on pending arbitration proceedings will be determined in accordance with the law of the seat of the arbitration (Recast Regulation on Insolvency Proceedings 2015/848), article 18). Thus, in *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ 677, the Court of Appeal rejected the argument of a Polish party in administration that an arbitral tribunal in England and Wales no longer had jurisdiction over a dispute because the arbitration agreement had been annulled by Polish bankruptcy law.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Section 46 of the 1996 Act provides that the dispute shall be decided in accordance with the parties' choice of law, or, if the parties agree, in accordance with "*other considerations*". A choice of the laws of a particular state is understood to refer to the substantive laws of the foreign state, and not the foreign state's conflict of laws rules.

Where no choice or agreement is made, the tribunal is given considerable latitude, and is required to apply the law "*determined by the conflict of laws rules which it considers applicable*" (1996 Act, section 46(3)). This grants the tribunal broad power to apply a system of conflict of laws rules that it concludes is most appropriate to the case.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The 1996 Act is silent as to when mandatory laws will apply. In practice, arbitral tribunals in England and Wales may take guidance from the Rome Convention and Rome I, which stipulate when mandatory laws may prevail over an express choice of law in English court proceedings.

The Rome Convention applies to contracts entered into before 17 December 2009, and was partially adopted by England and Wales in the Contracts Applicable Laws Act 1990. Under the Contracts Applicable Laws Act 1990, effect may be given to mandatory laws of England and Wales, but not to those of some other jurisdiction.

Rome I applies to contracts entered into after 17 December 2009, and was adopted in England and Wales in full. It provides that effect may be given to both (i) the mandatory laws of the forum, and (ii) the mandatory laws of the state where the obligations arising out of the contract have to be performed, insofar as those mandatory laws render performance of the contract unlawful (Rome I, article 9). Furthermore, where the application of a law is manifestly incompatible with the public policy of the forum, it will not be applied (Rome I, article 21).

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The Rome Convention and Rome I Regulation expressly exclude from their scope arbitration agreements (Rome Convention, article 1(2)(d); Rome I, article 1(2)(e)). Accordingly, in England and Wales, the question of which law is applicable to the formation, validity, and legality of the arbitration agreement is determined by the application of common law choice-of-law principles.

The court will look first for an express choice of law and, failing that, an implied choice of law from the other provisions of the contract. If this does not yield an answer, the court will seek to determine which law has the "*closest and most real*" connection with the arbitration agreement (*Sulamerica Cia Nacional de Seguros SA v Ensesa Engenharia S.A.* [2012] EWCA Civ 638).

In practice, there are two options: (i) the law that governs the underlying contract that contains the arbitration agreement (*Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER 1); or (ii) the law of the country of the chosen seat (*Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm)). Which will apply depends on the particular facts of the case.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

English law gives parties wide autonomy in their selection of arbitrators. The 1996 Act imposes only two mandatory rules in this area: first, the death of an arbitrator brings his or her authority to an end, and second, the court has the ability to remove arbitrators who are not performing their functions properly (section 24).

Parties are free to agree on the number of arbitrators, whether there is to be a chairman or an umpire, the arbitrators' qualifications, and the method of appointment (section 15). The arbitrators must consent to their appointment for such appointment to be valid. Unless otherwise agreed, an agreement that the number of arbitrators shall be two (or any other even number) shall be understood to be an agreement that an additional arbitrator is to be appointed to act as chairman of the tribunal (section 15(2)).

As indicated above, the court has the power to remove an arbitrator on several grounds, including: (i) justifiable doubts as to his impartiality; (ii) the fact an arbitrator does not possess the qualifications required by the parties' arbitration agreement; (iii) physical or mental incapability; or (iv) failures in conducting the proceedings (section 24(1)(a) to (d)). For a recent example of such an application, see *Allianz Insurance v Tonicstar Ltd* [2018] EWCA Civ 434.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties fail to agree on an appointment procedure, the 1996 Act sets out default provisions for the appointment of arbitrators. Depending on the number of arbitrators agreed by the parties, the 1996 Act has default provisions for the appointment of:

- a sole arbitrator (joint appointment by the parties within 28 days of a written request by one party: section 16(3));
- a tribunal comprised of two arbitrators (each party to appoint one arbitrator within 14 days of a written request by one party to do so: section 16(4));
- a tribunal comprised of three arbitrators (as with two, but the two party-appointed arbitrators shall forthwith appoint a chairman: section 16(5)); and
- a tribunal comprised of two arbitrators and an umpire (as with three, subject to differences as to the timing of the umpire's appointment: section 16(6)).

Where the parties have failed to even agree on the number of arbitrators, the tribunal shall consist of a sole arbitrator by default (section 15(3)).

The 1996 Act contains provisions in the event that an appointment procedure fails. If the procedure fails because one party fails to comply with the procedure, the other party may give notice that it intends to appoint its arbitrator to act as sole arbitrator, and then make such an appointment (section 17(1)). For other failures in the appointment procedure, either party may apply to the court to exercise certain powers (unless the parties have agreed to the contrary). These powers include: (i) giving directions as to the making of appointments (section 18(3)(a)); (ii) directing that the tribunal be constituted by such appointments as have been made (section 18(3)(b)); (iii) revoking any previous appointments (section 18(3)(c)); or (iv) making the necessary appointments itself (section 18(3)(d)). The court may also delegate its power to make the necessary appointment to an arbitral institution if it thinks fit (*Chalbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC)).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A court may intervene in the selection of arbitrators in certain circumstances, but only on the application of one of the parties to the arbitration agreement. If one party fails to appoint an arbitrator and so a sole arbitrator is appointed under section 17 of the 1996 Act, the party in default may apply to the court to set aside that appointment (section 17(3)). In all other cases where the appointment procedure has failed, unless the parties have agreed otherwise, a party can apply to the court to exercise certain powers (as described in more detail in question 5.2). Furthermore, as discussed in question 5.1, the court has the ability to remove arbitrators in certain circumstances if an application is made under section 24.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The impartiality of arbitrators is central to the arbitration process. The 1996 Act states that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal*" (section 1(a)). Section 24(1)(a) of the 1996 Act permits a party to apply to the court for the removal of an arbitrator on the basis that circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality. Furthermore, section 33(1)(a) of the 1996 Act requires the tribunal to act fairly and impartially as between the parties, and a failure by a tribunal to comply with this duty is a ground for challenging the validity of an award (section 68(2)(a)).

The question whether circumstances exist which give rise to justifiable doubts as to an arbitrator's impartiality is to be determined by applying the common law test for apparent bias (*A v B* [2011] 2 Lloyd's Rep 591). The test for apparent bias is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that an arbitrator was biased (*H v L* [2017] EWHC 137 (Comm)).

The 1996 Act does not require the disclosure of potential conflicts (it does not contain provisions equivalent to articles 12 and 13 of the Model Law). The Departmental Advisory Committee – on whose report the 1996 Act was based – preferred instead to retain the rule that the only issue is whether the arbitrator has acted impartially, and not whether they are "*independent in the full sense of that word*". Nevertheless, arbitrators would be well advised to disclose any matters which could reasonably be deemed to have a bearing on their impartiality.

Institutional rules commonly adopted by the parties in arbitration proceedings in England and Wales do contain disclosure requirements:

- Under the LCIA Rules, prospective arbitrators are required to sign a declaration before being appointed by the LCIA, stating whether "*there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence*" and specifying any such circumstances in full (LCIA Rules, article 5.4).
- A similar obligation is imposed by the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009), which provides that "*Members shall disclose any interest or relationship which is likely to affect, or may reasonably be thought likely to affect, their conduct*" (Part 1, Rule 2).
- The IBA Guidelines on Conflicts of Interest in International Arbitration (October 2014) contain detailed guidance on independence, impartiality and disclosure that is frequently referred to. It should be noted that the IBA Guidelines are just guidelines. In a recent case (*W Ltd v M SDN BHD* [2016] EWHC 422 (Comm)), the English High Court refused to annul an award on the ground of serious irregularity, even though the arbitrator had a non-waivable conflict of interest within the meaning of the IBA Guidelines.

The failure by an arbitrator to disclose repeat appointments by a party to an arbitration may result in the courts removing that arbitrator. In *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm), an arbitrator was removed after failing to disclose that 18% of his appointments and 25% of his income were in some way related to one of the parties to the arbitration.

It is possible, in theory, to make an application to the court to obtain disclosure of documents that may be relevant to whether an arbitrator is impartial. However, an order for disclosure against an arbitrator will only be made in "*wholly exceptional*" circumstances (*P v Q* [2017] EWHC 148 (Comm)).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The parties are free to decide on the procedure of arbitrations seated in England and Wales, and generally do so by reference to a set of institutional rules. If the parties do not agree a procedure, Part I of the 1996 Act contains default provisions governing arbitration proceedings in England and Wales. The default provisions give the tribunal the power to decide all procedural and evidential matters (section 34(1)).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no particular procedural steps that are required by law. Instead, the parties are free to agree how their disputes are to be resolved.

The 1996 Act does, however, impose, an overarching "general duty" on the arbitral tribunal (section 33). This general duty has two elements. First, section 33(1)(a) requires the tribunal to act fairly and impartially as between the parties, giving each a reasonable opportunity to put its case and deal with that of its

opponent. Second, the tribunal is obliged by section 33(1)(b) to adopt procedures suitable to the circumstances of a particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined. The tribunal is obliged to comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence, and in the exercise of all other powers conferred upon it.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no separate rules that govern the conduct of counsel from England and Wales in arbitral proceedings sited in England and Wales. English solicitors participating in arbitrations sited in England and Wales are bound by the Solicitors Regulation Authority Code of Conduct 2011 ("SRA Code of Conduct"). English barristers are governed by the BSB Handbook 2018.

Where arbitration proceedings are sited outside of England and Wales, the following rules apply:

- Solicitors who are established and practise in England and Wales will be regulated by the SRA Code of Conduct. A solicitor who temporarily practises abroad will be subject to some but not all provisions of the SRA Code of Conduct (chapter 13A). A solicitor who practises overseas on a non-temporary basis will be subject to the SRA Overseas Rules, which are a modified version of the SRA Code of Conduct taking into account the circumstances of overseas practice.
- Barristers must comply with the rules of the local bar unless this conflicts with one of the core duties under the BSB Handbook, in which case the core duties prevail (BSB Handbook, rule C13).

There are no separate rules that govern the conduct of counsel from states and jurisdictions other than England and Wales in arbitral proceedings sited within England and Wales. The SRA and BSB Handbook are limited to solicitors and barristers of England and Wales. Furthermore, there are no separate rules that impose mandatory codes of conduct on counsel irrespective of jurisdiction. The expectation is that lawyers from other jurisdictions are regulated by the applicable rules of professional conduct from their home jurisdictions.

It is this difference in regulation – with practitioners in the same arbitration being required to comply with different rules of professional conduct – that has led to moves to harmonise the rules of professional conduct to which international arbitration practitioners are subject. In 2013, the International Bar Association published its Guidelines on Party Representation in International Arbitration, to which arbitral tribunals may make reference. More recently, the LCIA revised its arbitral rules in 2014 to grant arbitral tribunals the power to sanction legal representatives in the event that their conduct falls below the required standard.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

As mentioned in question 6.2 above, the arbitral tribunal has a general duty to act fairly and impartially, and to adopt suitable procedures (section 33). Furthermore, the tribunal has the power to withhold the award if it has not been paid (section 56(1)). With those exceptions, under the 1996 Act, the parties are free to agree on the powers exercisable by the arbitral tribunal in relation to the proceedings (section 38).

Unless otherwise agreed, the arbitral tribunal also has certain powers to sanction the parties in the event of default, including the power to: dismiss any claim where there has been inordinate and inexcusable delay (section 41(3)); continue the proceedings in the absence of a party if that party fails without sufficient cause to participate (section 41(4)); and make a peremptory order prescribing a time for compliance, if a party fails to comply with the tribunal's orders or directions (section 41(5)).

Where a party fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may dismiss the claim (section 41(6)). Where a party fails to comply with any other kind of peremptory order, the tribunal may: (i) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; (ii) draw such adverse inferences from the act of non-compliance as the circumstances justify; (iii) proceed to an award on the basis of such materials as have been properly provided to it; or (iv) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance (section 41(7)).

There are also default provisions relating to the tribunal's power to award preliminary and interim relief, as set out below in question 7.1.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

In England and Wales, only solicitors of the Senior Courts of England and Wales and barristers called to the Bar in England and Wales can have rights of audience in English courts or rights to "conduct litigation" in proceedings issued in those courts. These restrictions are subject to certain limited exceptions.

An arbitration sited in England is not subject to these restrictions; accordingly, foreign lawyers are free to appear before an arbitral tribunal in England without restriction. Indeed, a representative need not necessarily be legally qualified in any jurisdiction; the 1996 Act provides that, unless the parties otherwise agree, each party may be represented in the proceedings "*by a lawyer or other person chosen by him*" (section 36).

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators acting in arbitrations sited in England and Wales have immunity for any act or omission made in the discharge of the arbitrators' functions, unless the act or omission is shown to have been in bad faith (section 29, which is mandatory). When appointing an arbitrator, the parties may agree with the arbitrator the potential consequences of the arbitrator's resignation, including agreeing that the arbitrator should incur liability (section 25(1)). An arbitrator can apply to the court for relief from liability in those circumstances (section 25(3)).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Intervention by national courts in the arbitral process should be minimal, and the court should not intervene except as expressly provided by the 1996 Act (section 1(c)).

The Act does provide that the national courts may exercise powers with regard to some procedural issues. Specifically, the courts may deal with procedural issues relating to:

- the enforcement of peremptory orders of the tribunal (section 42);
- securing the attendance of witnesses (section 43);
- the taking and preservation of evidence, the inspection of property, the sale of goods that are subject to proceedings, interim injunctions, and the appointment of a receiver (section 44); and
- the determination of a preliminary point of law (section 45).

Only one of these provisions is mandatory (the power to secure the attendance of witnesses in section 43). The parties can therefore agree to exclude these other powers of the courts should they so wish.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless the parties have agreed otherwise, the tribunal may: order a claimant to provide security for costs in the arbitration (section 38(3)); give directions relating to property which is the subject matter of the proceedings or as to which any question arises in the proceedings (section 38(4)); direct a party or witness to be examined (section 38(5)); or give directions for the preservation of evidence (section 38(6)).

In addition, the parties may agree that the tribunal shall be entitled to make an order for provisional relief (section 39) (e.g., the disposition of property or provisional payment). In the absence of agreement between the parties, the tribunal shall not have such power. The tribunal is authorised to grant provisional relief without having to seek the assistance of the court to do so.

In the event that a party fails without sufficient cause to comply with an order – or a procedural direction – given by the tribunal, the tribunal may make a peremptory order, which specifies a time for compliance (section 41(5)).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Unless otherwise agreed, the courts have the same powers in arbitral proceedings as they do in court proceedings in relation to:

- the taking of evidence (section 44(2)(a));
- the preservation of evidence (section 44(2)(b));
- the inspection of property (section 44(2)(c));
- the sale of any goods that are the subject of the proceedings (section 44(2)(d)); and
- the granting of an interim injunction or the appointment of a receiver (section 44(2)(e)).

It was formerly the case that the court itself could intervene to order security for costs during an arbitration but this power was removed by the Arbitration Act 1996 (repealing section 12(6)(a)) of the Arbitration Act 1950). A court can only order security in the context of challenges to an award under sections 67, 68, or 69 (see question 7.5).

It is a condition precedent to the court having the power to act that neither the arbitral tribunal nor any arbitral or other institution has the power to act or is able for the time being to act effectively (section 44(5)). This threshold may be met where the tribunal has yet to be formed or where the applicant requires an order which will bind third parties (*Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep 371). In *Gerald Metals v Timis* [2016] EWHC 2327 (Ch), the court held that where the parties had the opportunity to use emergency procedures as laid down in the LCIA Rules, the court would not exercise its powers under section 44. Only in those cases which were so urgent that relief could not be given by these emergency procedures would the court intervene.

There are further conditions precedent to the court acting, which vary according to the urgency of the situation. If the situation is urgent, the court is only entitled to make whatever orders it thinks necessary for the purpose of preserving evidence or assets (section 44(3)). If the situation is not urgent, the court is only entitled to act (i) on the application of a party made with the permission of the arbitral tribunal, or (ii) with the agreement in writing of all of the other parties (section 44(4)).

The English courts have given guidance on the meaning of "*preserving evidence and assets*", which is generally interpreted broadly. For instance, in *Doosan Babcock Ltd v Commerializadora de Equipos y Materiales Mabe Lda* [2013] EWHC 3010 (TCC), the court granted interim relief to restrain the beneficiary of a performance guarantee bond from making a demand under that bond.

English courts are not limited to granting interim relief with respect to arbitrations seated in the jurisdiction, but interim relief will more rarely be granted in support of arbitrations seated outside of England and Wales and where there is no connection with this jurisdiction (*see Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm)).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In general, the courts do not intervene in arbitral proceedings in England and Wales, except within the relatively narrow confines of the 1996 Act, where it is both necessary and appropriate for them to do so. As explained above in question 7.2, the court will not grant interim relief unless the tribunal or arbitral institution has no power to act or is unable for the time being to act effectively (section 44(5)).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The courts' approach to anti-suit injunctions differs depending on whether or not the actual or prospective court proceedings that the applicant wishes to restrain have been or will be brought in an EU Member State.

In *Allianz SpA v West Tankers Inc*, Case C-185/07 [2009] 1 AC 1138, the European Court of Justice held that Regulation 44/2001 (known as the Brussels I Regulation) did not permit the issuance of anti-suit injunctions by courts of a Member State to restrain proceedings commenced in another EU Member State in contravention of an arbitration agreement.

However, in *Gazprom OAO* Case C-536/13 [2015] 1 Lloyd's Rep 610, the European Court of Justice held that when an arbitral tribunal issues an anti-suit injunction, this can subsequently be enforced by

the court of a Member State. This is the case even if enforcing the anti-suit injunction will have the effect of restraining proceedings before the courts of another EU Member State. This development may have the effect of making arbitration even more attractive to European parties.

The law is well-settled where EU law does not apply. English courts have continued to grant anti-suit injunctions in respect of proceedings brought outside the EU, in violation of valid and binding arbitration agreements (*see Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66). The English courts will also grant injunctive relief to restrain breaches of an arbitration agreement even where the applicant has no intention of commencing arbitration (*AES-UST Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35). The courts may also award relief at the post-award stage to restrain proceedings that "*challenge, impugn or have as their object or effect the prevention or delay in enforcement*" of an award (*Shashoua v Sharma* [2009] EWHC 957 (Comm)).

In order to obtain an anti-suit injunction, the application must be made "*promptly and before the foreign proceedings are too far advanced*" (*The Angelic Grace* [1995] 1 Lloyd's Rep. 87). The case of *ADM Asia-Pacific Trading v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm) is a recent example of refusal of an anti-suit injunction application that was not made swiftly. The applicant must also satisfy the court that there is a "*high degree of probability*" that there is a valid agreement and that bringing and continuing the court proceeding is contrary to such an agreement (*see Rochester Resources Ltd v Lebedev* [2014] EWHC 2926 (Comm)). In general, where England and Wales is not the seat of the arbitration, then the court will hesitate to grant any injunction, because this is normally a matter for the supervisory court abroad (*see Amtrust Europe Limited v Trust Risk Group SpA* [2015] EWHC 1927 (Comm), which concerned an anti-arbitration injunction).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Both the courts and the arbitral tribunal are empowered to order security for costs in certain circumstances.

Section 38(3) of the 1996 Act grants the tribunal a restricted power to order security for costs (unless agreed otherwise). The tribunal can only order security for costs against the claimant or counterclaimant. Furthermore, the tribunal is not permitted to exercise this power merely because the claimant is an individual that is ordinarily resident overseas, or because it is a corporation incorporated or formed in a country outside the UK or whose central management is located outside the UK.

As discussed above at question 7.2, the court cannot order security for costs during an arbitration. The court can, however, enforce an arbitral tribunal's order for security for costs and make its own order where a party makes an application to challenge an arbitral award under sections 67, 68, or 69. However, the restrictions imposed on the arbitral tribunal with regard to individuals or corporations based outside the United Kingdom also apply to the exercise of this power by the court (section 70(6)).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Enforcement of preliminary relief and interim measures ordered by an arbitral tribunal in England and Wales is a two-step process. If a party fails to comply with an order of the arbitral tribunal, the tribunal must first issue a peremptory order specifying a time for compliance. (The tribunal's power to make peremptory orders is set out above in question 6.4.) Unless agreed otherwise, the court can then enforce the peremptory order on application by the tribunal, on application by a party with the permission of the tribunal, or where the parties have agreed that the enforcement powers of the court should be available (1996 Act, section 42(1) and (2)). The court will not act unless the applicant has exhausted any available arbitral process, which addresses the failure to comply with the tribunal's order (section 42(3)).

The above procedure does not apply to arbitrations seated outside of England and Wales (section 2(1)). It therefore appears that the court would not enforce preliminary relief or interim measures ordered by a tribunal seated outside of England and Wales.

Some arbitral rules allow arbitral tribunals to issue interim measures in the form of an award (for example, the ICC Rules and the SIAC Rules allow arbitral tribunals to issue interim measures in the form of an award; the LCIA Rules allow emergency arbitrators to issue decisions in the form of an award). It is possible that such decisions are capable of enforcement as awards under section 66 (as discussed in question 11.3), but there is no clear authority.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Section 34(1) of the 1996 Act provides that it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. Section 34(2)(f) lists the procedural and evidential matters that the tribunal may decide, including: (i) whether to apply "strict" rules of evidence as to the admissibility, relevance or weight of any material sought to be tendered on matters of fact or opinion; and (ii) the time, manner, and form in which such material should be exchanged or presented.

English law contains extensive rules of evidence, which are applicable in England courts. Frequently, rather than adopting strict English rules of evidence, arbitral tribunals will be guided by the IBA Rules on the Taking of Evidence in International Arbitration.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Unless otherwise agreed, the tribunal has the power to order a party to produce documents (1996 Act, section 34(2)(d)) and the tribunal may determine whether or not these documents are relevant and/or privileged (section 34(2)(f)). The tribunal also has the power to order that any evidence be given orally at the hearing (section 34(2)(e) and (h)).

The tribunal has no power to order the production of documents by a third party or to secure the attendance of witnesses. However, as described in more detail below in question 8.3, a court can provide assistance in such matters.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

A party to arbitral proceedings can also apply to the court under section 43 of the 1996 Act to secure the attendance of a witness

(including a third-party witness) in order to produce documents or provide oral testimony.

The court cannot, however, order pre-action disclosure in circumstances where the dispute is to be decided by arbitration (*Travelers Insurance Company Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC)).

In addition to the above, the court can make an order under section 42 requiring a party to comply with a peremptory order made by the tribunal. This could include an order requiring a party to produce documents.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Parties are free to agree whether there should be oral or written evidence in arbitral proceedings (1996 Act, section 34(1)). Otherwise, the arbitral tribunal may decide whether or not a witness or party will be required to provide oral evidence and, if so, the manner in which that should be done and the questions that should be put to, and answered by, the respective parties (section 34(2)(e)). Unless otherwise agreed, the tribunal also has power to direct that a particular witness or party may be examined on oath or affirmation, and may administer the necessary oath or affirmation (section 38(5)). There is no strict requirement that oral evidence be provided on oath or affirmation; it is a matter for the tribunal's discretion.

The 1996 Act contains further provisions with regard to expert testimony. Section 37(1) provides that, unless the parties agree otherwise, the arbitral tribunal is empowered to appoint (i) experts or legal advisors to report to it and the parties, or (ii) assessors to assist it on technical matters. The parties must, however, be given a reasonable opportunity to comment on any information, opinion or advice offered by such a person (section 37(1)(b)).

The conduct of lawyers with regard to the preparation of witness testimony is often regulated by the rules of professional conduct of the jurisdiction in which that lawyer is admitted to practise.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

When making an order for the production of documents, the tribunal may determine that a document (or class of documents) is protected from disclosure on the grounds of privilege.

English law recognises a number of privileges. The most common is legal professional privilege, which can be subdivided into legal advice privilege (communications between a lawyer and a client for the purpose of seeking legal advice) and litigation privilege (which applies to communications between parties, their lawyers and third parties for the dominant purpose of upcoming legal proceedings that were "reasonably in prospect"). English law interprets "legal advice" relatively broadly: it applies not only to a lawyer's advice on the law, but also to what could be "prudently and sensibly done in the relevant legal context" (*Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48). However, English law defines the "client" more restrictively: within a corporate organisation, the "client" is deemed to be only those individuals directly charged with communicating with the lawyers, rather than all employees of the corporation (*Three Rivers DC v Governor and Company of the Bank of England (No. 5*) [2003] EWCA Civ 474). Privilege also applies to communications with in-house counsel, so long as the communications are for the purpose of giving legal advice (*Alfred Crompton Amusement Machines Ltd v Customs & Excise Comms (No. 2)* [1972] 2 QB 102).

Privilege can be waived, both advertently and inadvertently. Importantly, a party may be taken to have waived privilege if it refers to a privileged document in its pleadings or witness statements.

English law recognises other privileges, including joint privilege, common interest privilege and without prejudice privilege. The first two are applications of the principles of legal professional privilege to multi-party situations, while the last is a rule that protects from production to the tribunal correspondence made in a genuine attempt to settle a dispute.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The parties are free to agree on the form any award should take (1996 Act, section 52(1)). In the absence of agreement, the award shall be in writing and signed by all of the arbitrators or all those assenting to the award (section 52(3)); it shall contain the reasons for the award, unless it is an agreed award or the parties have agreed to dispense with reasons (section 52(4)); and it shall state the seat of the arbitration and the date when the award was made (section 52(5)). An award must also make a final determination of a particular issue (*Brake v Patley Wood Farm* [2014] EWHC 4192 (Ch)).

The New York Convention requires awards to be "duly authenticated" in order for contracting states to be obliged to enforce them. Therefore, an unsigned award may not be enforceable in another contracting state. (Note, however, the Court of Appeal's recent statements regarding the enforcement of awards under section 102 (1) of the 1996 Act in *Lombard-Knight v Rainstorm Pictures Inc* [2014] EWCA Civ 356, a case discussed in detail in question 11.3 below.)

A tribunal is entitled to make a single, final award or an award relating only to part of the claims submitted to it for determination (section 47). The parties may also agree that the tribunal should have a separate power to make provisional awards, in which case it can order any relief on a provisional basis that it would have power to grant in a final award (section 39(1)).

The 1996 Act does not require the award to be rendered within a particular time, although the tribunal must avoid unnecessary delay. The parties can, however, specify in their arbitration agreement a time within which the award must be rendered.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The parties are free to agree on the powers of the tribunal to correct an award (1996 Act, section 57(1)). Parties should, however, make sure that any agreed process for correction or amendment takes place within a prescribed timeframe, otherwise there could be a dispute about whether an award is final and enforceable.

In the absence of agreement, the tribunal can:

- correct an award to remove any clerical mistake or error arising from an accidental slip or omission, or clarify or remove any ambiguity in the award (section 57(3)(a)); or

- make an additional award in respect of any claim that was presented to the tribunal but not dealt with by the tribunal (section 57(3)(b)).

A party must apply for a correction or an additional award within 28 days of the original award (section 57(4)). The tribunal can also correct an award on its own initiative within 28 days of the original award or issue an additional award within 56 days of the original award (sections 57(5) and (6)). Unless otherwise agreed by the parties, these time limits can be extended by the court under section 79(3) where the parties have exhausted all options before the tribunal and a substantial injustice would otherwise occur (*see Xstrata Coal Queensland v Benxi Iron & Steel* [2016] EWHC 2022 (Comm) for a recent example where an extension to correct mistakes was granted).

There are a number of cases addressing how far arbitrators may go in correcting clerical mistakes or errors arising from accidental slips and omissions, from which it is hard to derive clear rules. These provisions are not, however, intended to permit an arbitrator to change his or her mind (*see*, e.g., *Mutual Shipping Corp v Bayshore Shipping Co Ltd* [1985] 1 WLR 625).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

There are three bases upon which a party may apply to the court to challenge or appeal an arbitral award made in England and Wales.

First, a party may argue that the tribunal lacked substantive jurisdiction to make the award (1996 Act, section 67). A party challenging the substantive jurisdiction of the tribunal under section 67 is entitled to a complete rehearing, rather than a review of the decision reached by the tribunal (*Dallah Real Estate & Tourism Holding Co v Government of Pakistan* [2010] UKSC 46). After hearing a challenge under section 67, the court may either confirm the award, vary the award, or set aside the award in whole or in part.

Second, a party may challenge an award on the basis of a serious irregularity affecting the tribunal, the proceedings, or the award, which has the effect of causing substantial injustice to the applicant (section 68). There are two limbs to a challenge under section 68: the applicant must show both "*serious irregularity*" and that "*substantial injustice*" was caused thereby. There is a high threshold for challenges under section 68 (*Gujarat NRE Coke Ltd and Shri Anrun Kumar Jagatramaka v Coeclerici Asia Pte Ltd* [2013] EWHC 1987 (Comm)). Recently, the High Court emphasised that relief under section 68 is a "remedy of last resort" (*Ameropa SA v Lithuanian Shipping* [2015] EWHC 3847 (Comm)).

Serious irregularity can arise in nine different circumstances, namely where:

- the tribunal has failed to comply with its general duty under the 1996 Act (including its duty to act fairly and impartially) (section 68(2)(a));
- the tribunal has exceeded its powers (section 68(2)(b));
- the tribunal has failed to conduct the proceedings in accordance with the parties' agreed procedure (section 68(2)(c));
- the tribunal has failed to deal with all of the issues put to it (section 68(2)(d));
- an arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award has exceeded its powers (section 68(2)(e));
- there is uncertainty or ambiguity as to the effect of the award (section 68(2)(f));
- the award was obtained by fraud or is otherwise contrary to public policy (section 68(2)(g));
- the award does not comply with requirements as to form (section 68(2)(h)); or
- there was irregularity in the conduct of the proceedings or the award which is admitted by the arbitral tribunal or other institution or person vested by the parties with powers in relation to the proceedings or the award (section 68(2)(i)).

An "error of law" will not, without more, be sufficient to challenge an award under section 68 (*Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221).

Having shown that a serious irregularity has occurred, a party must then show that substantial injustice was caused thereby. The question of substantial injustice is approached independently of the question of serious irregularity. For example, in *CNH Global NV v PGN Logistics Limited* [2009] EWHC 977 (Comm), an arbitral tribunal committed a serious irregularity, when it purported to correct its award in order to award the claimant interest, although it had no power to do so. The court nevertheless refused to set aside the award on the basis that, since interest was due to the claimant, the party ordered to pay interest had suffered no "substantial injustice". Similarly, in *Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383, the High Court dismissed a challenge to an award, despite making a finding that there had been fraud in the arbitration, because the claimant was unable to establish that the tribunal probably would have come to a different decision if there had been no fraud.

On a successful challenge under section 68, the court can remit the award to the tribunal for reconsideration, set aside the award, or declare the award to be of no effect either in whole or in part.

A party's right to bring a challenge under sections 67 and 68 may be lost if that party does not object to the tribunal's jurisdiction and/or procedural irregularities forthwith and continues to take part in the proceedings (section 73).

Third, an award can be appealed if the tribunal erred on a point of law (section 69). Unlike a challenge under either section 67 or 68, this appeal goes to the merits of the tribunal's reasoning.

Unless all parties agree to the appeal being brought, an appeal under section 69 can only be brought if leave is granted by the court (section 69(2)). The court will only grant leave if it finds four conditions to be satisfied: (a) the determination of the question will substantially affect the rights of one or more of the parties; (b) the question is one which the tribunal was asked to determine; (c) the decision of the tribunal was obviously wrong, or the question is one of general public importance and at least open to serious doubt; and (d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all of the circumstances for the court to determine the question.

When an applicant seeks leave to appeal, the standard of review adopted by the court is deferential. When determining if the tribunal has reached a decision that is "obviously wrong", an error must be apparent on the face of the award itself, such that it constitutes a "*major intellectual aberration*" (see *HMV UK Ltd v. Propinvest Friar Ltd Partnership* [2012] 1 Lloyd's Rep 416). Likewise, where the question is one of general public importance, the mere fact that the court might have reached a different conclusion is unlikely to render an award "open to serious doubt".

Assuming leave to appeal is granted, the court will then proceed to hear the appeal itself. It has been held that an appeal will not be allowed simply because the appeal court may have come to a different conclusion, so long as a tribunal that correctly understood the law could have reached the same conclusion as the conclusion reached by the tribunal (see *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 Lloyd's Rep 503).

After hearing an appeal under section 69, the court may confirm the award; vary the award; remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination; or set aside the award in whole or in part.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Sections 67 and 68 of the 1996 Act are mandatory. However, the parties may agree to exclude the right to appeal to the court on a question of law (section 69(1)).

An agreement that the tribunal does not need to give reasons for its award will be deemed an agreement between the parties to exclude this basis of appeal (section 69(1)). Moreover, many of the major institutional arbitral rules (including the LCIA and ICC rules) have the effect of excluding the application of section 69. However, a statement that the award shall be "final, conclusive and binding" will not suffice to exclude section 69 (*Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm)).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties can agree additional appeal procedures before a second arbitral tribunal or before an arbitral institution, but cannot expand the court's power to review an arbitral award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An appeal against or challenge to an arbitral award under the 1996 Act must be commenced by the issue of an arbitration claim form (in accordance with Part 62 of the English Civil Procedure Rules).

A challenge or appeal under any of sections 67 to 69 must be brought within 28 days of the date of the award (or 28 days of the notification of the decision of any applicable process of arbitral appeal or review) (section 70). As mentioned in question 9.2, unless the parties otherwise agree, these time limits can be extended by the court under section 79(3) in certain circumstances.

If the arbitral tribunal corrects its award under section 57 of the 1996 Act, the 28-day time limit will run from the date of the corrected award. However, the 28-day time limit will only be postponed in this way, if the part of the award the applicant wishes to challenge is the part of the award that was subject to the correction (*K v S* [2015] EWHC 1945 (Comm)).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The United Kingdom (of which England and Wales forms a part) is a party to the New York Convention, which it signed and ratified in 1975, subject to the reservation that it applies only to awards made in the territory of another contracting party.

Part III of the 1996 Act provides for the recognition and enforcement of New York Convention awards (i.e., awards made, in pursuance of an arbitration agreement, in the territory of another state which is also a party to the New York Convention). The Supreme Court has recently held that when it comes to recognition and enforcement, the 1996 Act provisions and the New York Convention should be read consistently as the Convention establishes "a common international approach" (*IPCO (Nigeria) v Nigerian National Petroleum Corp* [2017] UKSC 16).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The United Kingdom is also a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. An arbitral award made in the territory of a contracting party to this treaty is enforceable pursuant to section 99 of the 1996 Act. Enforcement of awards under the Geneva Convention 1927 has, in practice, been all but superseded by enforcement under the subsequent New York Convention. However, there remain a limited number of countries which have not yet acceded to the New York Convention that are party to the Geneva Convention 1927.

England and Wales has not signed any other regional conventions regarding the recognition and enforcement of arbitral awards. However, the Foreign Judgments (Reciprocal Enforcement) Act 1933 provides for the reciprocal recognition and enforcement of arbitral awards (and court judgments) in former Commonwealth countries.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Generally speaking, the English courts adopt a strongly pro-enforcement approach.

The enforcement procedure prescribed by the 1996 Act distinguishes between awards made in England and Wales and foreign awards.

An arbitral award made in England may, by leave of the court, be enforced in the same manner as a judgment or order of the court (section 66). Leave will not be given where the tribunal is shown to have lacked substantive jurisdiction to make the award. Where leave is given, judgment may be entered in terms of the award.

The enforcement of foreign awards under the New York Convention is addressed by sections 100 to 104 of the 1996 Act. A New York Convention award (defined in section 100 as an arbitral award made in the territory of a foreign state that is a party to the New York Convention) may – with the leave of the court – be recognised and enforced in the courts of England and Wales in the same way as judgment or order of the court (section 101). As is the case with awards made in England and Wales, judgment may be entered in the terms of the award.

A party seeking recognition and enforcement of a New York Convention award must produce: (i) the duly authenticated original award or a duly certified copy thereof; and (ii) the original arbitration agreement or a duly certified copy thereof (section 102(1)). If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent (section 102(2)). The Court of Appeal has held that the requirements of section 102(1) should not be construed too strictly, so as to give rise to "*hollow formalism*" (*Lombard-Knight v Rainstorm Pictures Ltd* [2014] EWCA Civ 356). In that case, the Court of Appeal held that photocopies of two arbitration agreements, when accompanied by a statement of truth, could amount to "certified copies" of the original arbitration agreements, as required by section 102(1)(b).

Recognition and enforcement of New York Convention awards may only be challenged on limited grounds, namely: (i) incapacity of a party; (ii) invalidity of the arbitration agreement; (iii) lack of proper notice; (iv) lack of jurisdiction; (v) procedural irregularity in the composition of the tribunal; (vi) the fact that the award has been set aside or not become binding in the country where it was made; (vii) the non-arbitrability of the subject matter of the arbitration; and (viii) the fact that it would be contrary to public policy to enforce the award (section 103).

Under the New York Convention, the court "may" refuse recognition and enforcement on one of the above grounds. The English courts therefore retain a discretion to enforce an award even where one of these grounds exists, but this discretion is very narrowly construed (*Dallah Real Estate & Tourism Holding Co v. Ministry of Religious Affairs (Pakistan)* [2009] EWCA Civ 755).

It is not necessary for the court to recognise and enforce an arbitral award in its entirety. The Court of Appeal has held that the word "award" in sections 101 to 103 of the 1996 Act should be construed to mean the "award or part of it", and accordingly, that the court is permitted to enforce part of an award (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2008] EWCA Civ 1157).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

In general, the English common law principles of *res judicata* and issue estoppel apply to arbitrations sited in England and Wales. A final and binding award, therefore, precludes the successful party from bringing the same claim(s) again, either in a fresh arbitration or before the national courts, and precludes both parties from contradicting the decision of the arbitral tribunal on a question of law or fact decided by the award (*Sun Life Insurance Company of Canada and others v The Lincoln National Life Insurance Company* [2006] 1 All ER (Comm) 675; *Injazat Technology Capital Ltd v Najafi* [2012] EWHC 4171 (Comm)).

The Privy Council has affirmed that a prior award may be used by one of the parties to raise a defence of issue estoppel in a new arbitration between the same parties (*Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co. of Zurich* [2003] 1 WLR 1041).

The doctrine of issue estoppel does not apply in the same way to subsequent proceedings between a party to an earlier arbitration and a non-party. However, seeking to bring claims or advance defences that were rejected in an earlier arbitration can amount to abuse of process (it has been said though that it will be a "*a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process*" (*Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ 3).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Section 103(3) of the 1996 Act gives effect to Article V(2)(b) of the New York Convention, meaning that an English court may refuse to recognise or enforce an award on the ground that it is contrary to public policy. As noted above in question 11.3, the approach of the English courts is pro-enforcement: the Court of Appeal has held that arguments based on public policy should be approached with "*extreme caution*", as the provision "*was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards*". (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] EWHC 726 (Comm)).

Notwithstanding the above, recognition and enforcement has been refused on grounds of public policy for the following reasons: the award was obtained by fraud (*see Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65); the award was tainted by illegality (*Soleimany v Soleimany* [1998] 3 WLR 811); the underlying agreement was contrary to principles of EU law, in particular competition law as set out in Articles 101 and 102 of the TFEU (*Eco Swiss China Time Ltd v Benetton International NV* Case C-126/97 [1999] ECR I-3055); and the award was unclear as to the obligations imposed on the parties (*Tongyuan (USA) International Trading Group v Uni-Clan Ltd*) (2001, unreported, 26 Yearbook of Commercial Arbitration 886). In a recent case (*National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 1900 (Comm)), the English High Court clarified that the enforcement of a contract procured by bribery would not be contrary to public policy, but the enforcement of a contract to pay a bribe would be.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Although it is not addressed by the 1996 Act, the English courts have held that arbitral proceedings in England and Wales are confidential. The most accepted explanation is that there is an implied duty of confidentiality in all arbitration agreements, which is said to arise from the essentially private nature of arbitration (*Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184).

Both the parties and the tribunal are required to maintain the confidentiality of the hearing, the pleadings, the documents generated during the hearing, and the award. There is no clear authority on whether the existence of an arbitration and the identity of the parties to the arbitration are confidential.

There are also certain exceptions to the obligation of confidentiality described above, including: where the parties have agreed that the proceedings will not be confidential; where disclosure is reasonably necessary to establish or protect a party's legal rights; where disclosure is in the interests of justice; and where disclosure of documents is required by law (*Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184). These exceptions to the obligation of confidentiality are most often relevant with regard to the arbitral award: for example, a party may have to disclose the award to the court when bringing recognition and enforcement proceedings.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

A party to whom documents (or other information) were disclosed in arbitral proceedings is precluded by the implied duty of confidentiality from referring to or relying on that information in subsequent proceedings. However, as noted in question 12.1, there are exceptions to the duty of confidentiality.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The parties are free to agree the scope of the tribunal's power to grant remedies (1996 Act, section 48(1)). Sections 48(3) to (5) set out the powers of the tribunal in the absence of any agreement to the contrary:

- First, the tribunal may make a declaration as to any matter to be determined in the proceedings (section 48(3)).
- Second, the tribunal is permitted to order the payment of a sum of money, in any currency (section 48(4)). The tribunal does not have an unfettered discretion to decide the currency of an award. Where the proper currency cannot be discerned from the parties' contract, the damages should be calculated in the currency in which the loss was felt by the claimant or which most truly expresses his or her loss (*Milan Nigeria Ltd v Angeliki B Maritime Company* [2011] EWHC 892 (Comm)).
- Third, under section 48(5), the tribunal has the same powers as the court to order: (i) a party to do or refrain from doing anything; (ii) specific performance of a contract (other than a contract relating to land); and (iii) the rectification, setting aside or cancellation of a deed or document. For these purposes, the arbitral tribunal only has those powers that are exercisable by both the county court and the High Court. *See* 1996 Act, section 105(1). However, it is an open question whether a tribunal could make orders such as freezing orders (discussed but not decided in *Kastner v Jason* [2004] EWCA Civ 1599).

English law does not allow punitive damages (called "exemplary damages" under English law) to be awarded for breach of contract, but does rarely permit the award of exemplary damages for some tortious claims. Therefore, if the parties' agreement is governed by English law, exemplary damages can only be awarded in limited circumstances.

Some foreign laws permit punitive damages to be awarded in a wider range of circumstances – in particular, US law permits the award of triple damages for breach of anti-trust and certain other laws. It is possible that awards of multiple damages are contrary to English public policy and that an arbitral tribunal seated in England and Wales would refuse to award them on that basis. (In *Jones v Jones* [1889] LR 22 QBD, an English court refused to award multiple damages, and the Protection of Trading Interests Act 1980 prevents an English court from enforcing a judgment for multiple damages. (*Cf. Pencil Hill Ltd. v US Citta di Palermo Spa* [2016] EWHC 71 (QB), which held that the English rule against enforcing penalty clauses in a contract was not a sufficient reason to refuse enforcement of an award under the New York Convention.)

13.2 What, if any, interest is available, and how is the rate of interest determined?

The 1996 Act provides that parties are free to agree on the powers of the tribunal to award interest (section 49(1)). In the absence of agreement by the parties, the powers set out in sections 49(3) and 49(4) apply.

Section 49(3) empowers the tribunal to award pre-award interest. Pre-award interest can be awarded on a simple or compound basis, from such dates, at such rates, and with such rests as the tribunal considers meet the justice of the case. Interest can be awarded on the whole or part of any amount awarded by the tribunal. The tribunal has a similar power with regard to amounts outstanding at the outset of the arbitral proceedings but paid before the award was made.

Section 49(4) empowers the tribunal to award post-award interest on any unpaid amount. Once again, the tribunal has full discretion to decide the rates and rests of such an award as it considers to meet the justice of the case.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The 1996 Act provides that the tribunal may make an award allocating the costs of the arbitration between the parties (section 61). These costs include: the arbitrators' fees and expenses (section 59(1)(a)); the fees and expenses of any arbitral institution (section 59(1)(b)); and the legal or other costs of the parties (section 59(1)(c)).

With one exception, the parties are entitled to reach an agreement with regard to the costs of any arbitral proceeding (section 61(1)). The exception is that the parties may not agree that one party will pay the costs of the arbitration regardless of the outcome, unless this agreement was entered into after the dispute in question has arisen (section 60). In the event that no agreement has been reached, the arbitral tribunal shall make an award of costs on the basis that costs should "follow the event" (i.e., the successful party will be entitled to its costs), unless it considers such an award inappropriate in the circumstances of the case (section 61(2)).

In practice, a tribunal may treat interim steps or applications separately when awarding costs, potentially resulting in an unsuccessful party recovering its costs in relation to an unnecessarily expensive and onerous interim step in the proceedings taken by the successful party.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Payment of tax is a personal matter for the party to whom damages are paid. If an arbitral award relates to income, it will be subject to income tax or corporation tax along normal principles. If it relates to capital, the position is more complex. Where damages are derived from an underlying asset, they will be taxed as if the underlying asset has been sold. Where damages do not relate to an underlying asset, the first £500,000 will be tax-exempt, after which any further exemptions must be sought from HMRC (Extra Statutory Concession, D33).

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are a number of means by which third parties – including lawyers – can fund claims under the law of England and Wales. These include conditional fee arrangements, damages-based agreements (another term for contingency fee arrangements) and third-party funding.

A conditional fee arrangement ("CFA") allows a lawyer to charge on a "no win, no fee" basis. The lawyer agrees to charge the client nothing if he is unsuccessful, while obtaining an uplift on his or her usual fee (a success fee) if he or she is successful. As a consequence of recent rule changes (the so-called "Jackson reforms"), it is no longer possible for a costs award made in "proceedings" to include

the payment of a success fee under a conditional fee arrangement. This restriction on the recoverability of costs appears to apply to arbitrations (see section 58(A)(4) and (6) of the Courts and Legal Services Act 1990, as amended).

Following the Jackson reforms, parties can also enter into contingency fee agreements (known in England as "damages-based agreements" or "DBAs"). A DBA allows the lawyer to recover a percentage of the client's damages if the client is successful in the case.

The use of third-party funding is permitted in England and Wales (*Arkin v Borchard Line* [2005] 1 WLR 3055), and there are a number of third-party funders active in the market. In a recent case (*Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm)), the High Court upheld an arbitrator's decision to award a party its third-party funding costs as part of an award on costs.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The United Kingdom (which incorporates England and Wales) signed and ratified the Washington Convention on 26 May 1965 and 19 December 1966, respectively. The Washington Convention ultimately entered into force in the United Kingdom on 18 January 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The United Kingdom has entered into more than 100 BITs, of which 94 are currently in force. The United Kingdom has also been a signatory to the Energy Charter Treaty since 16 December 1997.

Since the entry into force of the Treaty of Lisbon on 1 December 2009, the European Commission has been responsible for negotiating and concluding BITs with states outside the European Union on behalf of all EU Member States. All EU Member State BITs with non-EU states signed prior to 1 December 2009 will remain in force until replaced by new treaties between the EU and the relevant state(s) (*see* EU Council Regulation 1219/2012). As discussed below in question 15.1, the United Kingdom has now begun the process of leaving the EU, after which time it may regain competence to conclude BITs.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The most recent version of the United Kingdom's model BIT was published in 2008. Key elements of United Kingdom BITs include provisions for the fair, equitable and non-discriminatory treatment of investments, compensation for expropriation, transfer of capital and returns, and access to arbitration to resolve disputes.

The main objective of the United Kingdom's model BIT is to provide legal protection for British foreign property in a rapidly developing international context. It is similar to the model BITs of other European countries. Its language emphasises investment protection rather than the liberalisation of the investment policies of developing countries.

Of particular note in the UK model BIT is Article 3 which is the "most favoured nation" article. Article 3.3 stipulates which articles of the BIT the most-favoured-nation provision applies to, and includes the dispute-settlement provision of the BIT.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Under the State Immunity Act 1978, a state is entitled to immunity of two different kinds. First, immunity from adjudication protects a state from being subject to the jurisdiction of the English courts. Second, immunity from enforcement protects a state from having a writ of enforcement executed against it by an English court. The Act recognises a number of exceptions to immunity from adjudication, but only two exceptions to immunity from enforcement.

In the context of arbitration, the most important exception to immunity from adjudication is provided by section 9. Where a state has agreed in writing to submit disputes to arbitration, it is not entitled to immunity from adjudication with respect to proceedings in the English courts which relate to the arbitration (see *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] EWCA Civ 1529.) A state would therefore not be immune from the adjudicative jurisdiction of the English courts with respect to court proceedings that related to an arbitration under a bilateral investment treaty to which the state was a party.

The only exceptions to immunity from enforcement are where: (i) the state has waived its immunity from enforcement in writing (section 13(3)); and (ii) the property of the state is in use for commercial purposes (section 13(4)). A state will only waive immunity from injunctions or orders of specific performance by giving its written consent.

A mere agreement by the state to submit to the jurisdiction of a national court is not sufficient to waive immunity from execution: the language used by the state must make it clear that it has waived immunity from execution (section 13(3)). (This and other issues relating to state immunity were recently explored in *Pearl Petroleum Company Ltd. v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm).) Historically, English and international courts have been reluctant to deem state assets to be used exclusively for commercial purposes (*Alcom Ltd v. Republic of Colombia and others* [1984] AC 580). *L R Avionics Technologies Ltd v Federal Republic of Nigeria* [2016] EWHC 1761 (Comm) is a recent example where such an application was unsuccessful.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

London continues to be one of the leading centres for international arbitration. A 2015 survey carried out by Queen Mary University of London found that London was the most used and most favoured arbitral seat in the world (based on a survey of 763 respondents and 105 personal interviews). The caseload of the LCIA continues to be robust (with 303 arbitrations started in 2016), and London is frequently chosen as the seat for arbitrations under other institutional rules and for *ad hoc* arbitration.

On 29 March 2017, the United Kingdom triggered Article 50 of the Treaty on European Union, commencing a process whereby the United Kingdom will leave the EU by 29 March 2019 ("Brexit"). After Brexit, there is unlikely to be any change to English arbitration law or the attractiveness of London as a seat for arbitration for five reasons. First, the United Kingdom will remain a signatory to the New York Convention and the pro-enforcement attitude of the courts will continue. Second, the legislation governing arbitration will remain unchanged as this is domestic rather than European. Third, Brexit will not materially change the substantive content and application of English contract law and commercial law as these are largely unaffected by EU law. There is therefore no reason why English law as a governing law should not remain a popular choice for parties in their international contracts. Fourth, Brexit may make arbitration more attractive for commercial parties as court judgments will no longer be enforceable under the Brussels I Regulation (recast), Regulation 1215/2012 after Brexit is completed. Fifth, Brexit may mean that English courts can issue anti-suit injunctions to restrain parties from bringing proceedings before courts of a European Member State (as is currently prohibited by *Allianz SpA v West Tankers Inc.*, Case C-185/07 [2009] 1 AC 1138, discussed in question 7.4).

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Law Commission of England and Wales continues to consider and consult upon potential changes to the 1996 Act in order to retain London's competitive edge as a seat for arbitration. For example, the Law Commission considered whether the 1996 Act should be amended expressly to permit tribunals to determine preliminary issues of fact or law akin to the summary judgment procedures applicable in English court proceedings and to allow for the arbitration of trust disputes. However, there are no immediate proposals for change in the near future, as arbitration law was left out of the most recent programme for reform.

The LCIA's current rules apply to arbitrations commenced after 1 October 2014. These rules have introduced the following changes (among others):

- the arbitral tribunal has the right to deny a party's request to change its counsel in the event that the intended change is likely to compromise the composition of the tribunal or the finality of the award;
- there are new guidelines for the conduct of legal representatives and the tribunal has a wide discretion to impose sanctions for violations;
- the new rules contain emergency arbitrator provisions;
- as well as declaring that they are independent and impartial, prospective arbitrators are required to declare that they are ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration;
- the LCIA Court has the power to revoke an arbitrator's appointment if he or she fails to conduct the arbitration with reasonable efficiency, diligence and industry;
- the tribunal is required to render its final award as soon as reasonably practical after the final submissions by the parties, and to do so in accordance with a timetable that must be notified to the parties and the registrar; and
- the LCIA Court and tribunals have enhanced powers to consolidate arbitrations.

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Finland

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Under the Finnish Arbitration Act (967/1992, as amended, the "Act"), an arbitration agreement must be in writing.

An arbitration agreement is deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters or documents produced in another such manner and providing for a record.

Further, the requirement of written form is fulfilled with a reference to general conditions which contain an arbitration clause.

1.2 What other elements ought to be incorporated in an arbitration agreement?

It is advisable that the parties agree on the number of arbitrators and the manner in which they are to be appointed, as well as the seat of arbitration and the language to be used in the proceedings. Additionally, it is recommended that an arbitration agreement contains a reference to applicable institutional rules, if any, and to the IBA Rules on the Taking of Evidence in International Arbitration if the parties are from civil and common law jurisdictions.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Finnish courts' approach is non-interventionist and arbitration-friendly and the courts recognise and enforce valid arbitration agreements.

According to the Act, a valid arbitration agreement excludes the jurisdiction of the courts, as a court may not hear an action that is brought in a matter that is subject to arbitration if a party, before responding to the main claim, invokes that the matter is subject to arbitration.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Arbitration proceedings are governed by the Act which came into force on 1 December 1992.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Act is applied without distinction to both domestic and international arbitration, and is divided into two parts. Sections 1 to 50 apply to arbitration proceedings seated in Finland and Sections 51 to 55 to arbitration agreements providing for arbitration abroad and the recognition and enforcement of foreign arbitral awards in Finland.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Although the Act applies without distinction to both domestic and international arbitration, it is based on the same basic principles as the UNCITRAL Model Law and can be largely considered as compatible with the Model Law. However, the Act does not contain any provision relating to interim measures.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Party autonomy is a governing principle under the Act, and the Act contains only few mandatory provisions, such as that the parties shall be given sufficient opportunity to present their case, as well as regulations concerning nullity and setting aside arbitral awards.

This flexibility guarantees that arbitration proceedings can be settled under the Act according to an international approach without focusing purely on civil law or common law characteristics or other cultural anomalies that might be strange to international arbitration proceedings.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Any dispute in a civil or commercial matter, which can be settled by an agreement between the parties and without involvement of a court or other public authority, is arbitrable. Consequently, for example, criminal law and family law-related matters are non-arbitrable.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

An arbitral tribunal is permitted to rule on its own jurisdiction. However, a party has the right to request a court to rule on the issue (see question 3.4).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

A court cannot decline jurisdiction *ex officio* because of an existing arbitration agreement.

In order for the court to take the arbitration agreement into account, a party must invoke the arbitration agreement before responding to the main claim.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

A party has the right to request a court to rule on the issue of the jurisdiction of the arbitral tribunal either when arbitration proceedings are requested by the other party or during the arbitration proceedings.

Nonetheless, the arbitral tribunal may commence or continue the proceedings and decide the matter even though the issue concerning the arbitral tribunal's jurisdiction is pending at the court. If a court's decision denying the jurisdiction of the arbitrators has become final, the arbitrators should issue an order for the termination of the proceedings.

Additionally, a court is not bound by the arbitrators' decision concerning their lack of jurisdiction. If a court would later find that the arbitrators had jurisdiction, the arbitral proceedings would need to be initiated again.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Generally, an arbitral tribunal has no jurisdiction over third parties and non-signatories to an arbitration agreement. However, there are grounds on which third parties may be bound to an arbitration agreement such as universal succession and assignment. Additionally, according to the Finnish Supreme Court's decision KKO 2013:84, the arbitral tribunal has jurisdiction over an individual's claims based on an agreement which provides rights to the individual but to which the individual is not a party.

There are no provisions in the Act nor case law concerning the applicability of the 'group of companies' doctrine in Finland.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Act does not contain any provisions on limitation periods. Limitation periods are considered as part of substantive law. Accordingly, if the seat of arbitration is in Finland, the arbitral tribunal shall most likely apply the limitation periods as provided in the law applicable to the merits of the dispute.

If the applicable substantive law is Finnish law, the general limitation period is three years from the due date of the invoice or, in a case of contractual breach, the date when the aggrieved party knew or should have known of the breach.

Further, a debt becomes statute-barred after 10 years from the breach of contract or the event causing the damage, unless the limitation period is interrupted.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Generally, if the debtor has entered into an arbitration agreement before the insolvency proceedings, the arbitration agreement is binding upon both the bankrupt's estate and the other party. However, if a claim of a creditor is contested by another creditor, who is not bound by the arbitration agreement, the prevailing opinion is that the claim shall be referred to a court.

Further, if the bankrupt's estate finds that the debtor has made a transaction which violates the creditors' rights and wants to have such transaction declared null and void or rescinded, the bankrupt's estate will not be bound by an arbitration agreement which the debtor has entered into before the insolvency proceedings.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The parties may freely decide the applicable substantive law.

In the absence of such agreement, the arbitral tribunal decides the law applicable to the substance of a dispute. However, the Act does not contain provisions on how such a decision is to be made. Generally, the arbitral tribunal should base its decision on the applicable choice of law rules.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The Act is silent on the issue. The prevailing opinion is that the arbitral tribunal is not required to apply mandatory law in the same way as national courts. However, under the Act, an award shall be null and void to the extent that the recognition of the award is to be deemed contrary to the public policy of Finland. Consequently, the public policy of Finland prevails over the law chosen by the parties.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The Act is silent on the issue. In the absence of the parties' agreement, the law applicable to the arbitration agreement is in the discretion of the arbitral tribunal. In most cases, the arbitral tribunal shall presumably apply the law applicable to the underlying contract or the law of the seat of arbitration.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Unless otherwise agreed by the parties, according to the Act, any person of age who is not bankrupt and whose competence has not been restricted may act as an arbitrator. There are no restrictions for foreign nationals to act as arbitrators in arbitrations seated in Finland.

Under the Arbitration Rules of the Finland Chamber of Commerce (the "FAI Rules"), the confirmation of a party-nominated arbitrator may be declined if the prospective arbitrator is considered to be unsuitable to serve as an arbitrator. In practice, the aforementioned section of the FAI Rules is rarely applied and mainly relates to situations in which the prospective arbitrator, for example, does not know the relevant language in the case.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties have not chosen a method for selecting arbitrators or the method chosen by the parties fails, the default number of arbitrators under the Act is three. Each party shall appoint one arbitrator and the arbitrators appointed shall appoint the chairman. If the parties have agreed on a sole arbitrator, the parties must agree on the appointment of the arbitrator.

A court shall, upon a request of a party, appoint the arbitrator if a party has not within 30 days of receiving the notice of arbitration fulfilled its obligation to appoint an arbitrator, or if the arbitrators appointed by the parties have not within 30 days of their appointment agreed on the chairman, or if the parties have not agreed on the sole arbitrator within 30 days of the date when a party received the notice of arbitration from the other party.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A court is not allowed to intervene in the selection of arbitrators *ex officio*. A court may only intervene in the selection of arbitrators if a party has requested the court to appoint an arbitrator (see question 5.2).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Under the Act and the FAI Rules, an arbitrator must be and remain directly and indirectly independent and impartial in relation to all parties, and not only to the nominating party.

The notion of independence is not defined in the Act, nor in the FAI Rules. Consequently, the issue is analysed on a case-by-case basis taking into account the specific circumstances of each case, the applicable law as well as the nationality of the parties and the arbitrators. The requirement of impartiality is closely connected with the requirement of independence although the terms are not identical. The concept of impartiality is more of a subjective nature which makes it more difficult to detect in the arbitration proceedings. Additionally, when assessing the independence and impartiality of the arbitrators, guidance is often searched from the IBA Guidelines on Conflicts of Interest in International Arbitration.

Under the Act, if an arbitrator accepts their appointment, he or she is obliged to, throughout the proceedings, immediately disclose any circumstances likely to endanger or give rise to justifiable doubts as to his or her independence and impartiality as an arbitrator.

According to the Act, on the challenge of a party, an arbitrator shall be disqualified if he or she would have been disqualified from hearing a case as a judge, or if other circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality as an arbitrator. The Code of Judicial Procedure (4/1734) sets forth provisions concerning the disqualification of judges.

Under the FAI Rules, each arbitrator must, before the confirmation or appointment, sign and submit to the Arbitration Institute of the Finland Chamber of Commerce (the "FAI") a statement of acceptance, availability, impartiality and independence. In this statement, the arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality.

Further, according to the FAI Rules, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The procedure of arbitration is governed by Sections 21 to 30 of the Act which generally apply to all arbitral proceedings seated in Finland. However, if the parties have agreed on institutional arbitration, the arbitration procedure is governed by the rules of the chosen institute.

In practice, the procedure is conducted under the principle of party autonomy. The parties are mainly free to agree on the procedure and if such procedure fails, the procedure is conducted as the arbitral tribunal considers appropriate, taking into account the requirements of impartiality and expediency.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

No, there are not.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

No, there are no particular rules governing the conduct of a Finnish or a foreign counsel in arbitration proceedings sited in Finland or elsewhere. However, if a counsel is a member of the Finnish Bar Association, he or she is required to obey the rules of conduct of the said association.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitrators are required to give the parties sufficient opportunity

to present their case and to conduct the proceedings in accordance with the agreement of the parties.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

In order to represent a client in a Finnish court, a person is required to be a member of the Finnish Bar Association, a licensed counsel admitted to appear before courts in Finland or a public legal aide.

It is clear that the restrictions do not apply to arbitration proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no laws or rules providing for arbitrator immunity in Finland.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

A court only has jurisdiction to rule on the following issues explicitly determined in the Act: appointment and removal of arbitrators; challenges to the jurisdiction of the arbitral tribunal; interim measures; examining a witness, an expert or a party in the court; and deciding matters relating to document production requests.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The Act is silent on the issue.

Under the FAI Rules, the arbitral tribunal may, at the request of a party, grant any interim measures of protection it deems appropriate.

However, interim measures granted by the arbitral tribunal are not enforceable. In order to obtain a binding and enforceable interim relief, the request must be submitted to a court.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

In Finland, national courts have an exclusive jurisdiction to order binding and enforceable interim measures at the request of a party. A party's request for interim measures to a court does not have any effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Finnish national courts approach requests for interim relief in matters subject to arbitration in the same manner as requests in other matters.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

National courts in Finland do not have explicit authority to issue anti-suit injunctions in aid of an arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The arbitrators have the right to demand an advance on the compensation or a security therefor. National courts are not allowed to order security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Interim measures granted by an arbitral tribunal, seated either in Finland or elsewhere, are not enforceable in Finland. In order to obtain a binding and enforceable interim relief, the request must be submitted to a court.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The parties may agree on the applicable rules of evidence as well as the type of evidence admissible. In the absence of such agreement, the arbitral tribunal shall decide on the conduct of the proceedings, taking into account the mandatory requirements of impartiality and expediency.

In international arbitration proceedings, the IBA Rules on Taking of Evidence in International Arbitration are often applied.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The arbitral tribunal may, at the request of a party or on its own motion, request that a party, a witness or any other person appear to be heard on the matter, as well as request a party or any other person in possession of a document or other object which may have relevance as evidence to produce the document or object.

The arbitral tribunal may not impose the threat of a fine nor issue orders regarding other coercive measures. It may also not administer an affirmation. However, the arbitral tribunal's requests to appear to be heard in the matter or produce evidence are usually respected.

The Finnish legal system is unfamiliar with the common law type of discovery.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

In Finland, a party to an arbitration may, by approval of the arbitral tribunal, file an application concerning hearing a party, a witness

or an expert witness in court or production of a document to the District Court.

The arbitral tribunal should approve the application concerning the court's assistance if hearing a party, a witness or an expert witness or the requested document is relevant and necessary for the case and does not cause exorbitant costs.

Court orders concerning coercive measures are enforceable and a court may also impose sanctions.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The Act does not contain any provisions regarding written and/or oral witness testimony. The parties are free to agree on submitting written witness testimonies and the arbitral tribunal is also allowed to order said testimonies to be submitted. However, such witnesses are usually heard in the hearing as well.

The arbitral tribunal may not administer any affirmations. Cross-examination is always allowed.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The Act is silent on the issue. The prevailing opinion is that the privilege rules as applied in national courts may also be invoked in arbitration.

In Finland, as in other civil law jurisdictions, legal privilege does not generally cover in-house legal counsels who are regarded as regular employees of the company. However, it is clear that the documents created or exchanged in the attorney-client relationship between a retained independent legal counsel and a client are protected by the principles of legal privilege, as stated in the *Akzo Nobel* judgment of the Court of First Instance of the EU (T-125/03, T-253/03).

If an attorney is a member of the Finnish Bar Association, the privilege may only be broken if the attorney is obliged to testify under the Code of Judicial Procedure.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An award must be in writing and signed by the arbitrators (the last page). The award shall be void if the aforementioned criteria is not met.

However, the award shall not be deemed null and void in the absence of the signature of one or more arbitrators if it has been signed by a majority of the arbitrators provided that they, on the award, have stated the reason why an arbitrator who has participated in the arbitration has not signed the award.

The award must also indicate its date and the place of arbitration as agreed or determined.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

A party may request the arbitrators to correct any errors in computation and any clerical errors as well as any other corresponding errors in the award. Generally, a party shall request the correction within 30 days of receipt of a copy of the award. The arbitrators may also correct the errors on their own initiative.

If the arbitrators consider the request for correction to be justified, they shall make the correction without delay and, if possible, within 30 days of receipt of the request.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The Act separates provisions concerning null and void awards and awards that may be set aside.

An award shall be null and void:

1) to the extent that the arbitrators have decided that an issue is non-arbitrable under Finnish law;
2) to the extent that the recognition of the award would be contrary to the public policy of Finland;
3) if the award is so obscure or incomplete that it is unclear how the dispute has been decided; or
4) if the award is not in writing or signed by the arbitrators. However, the absence of a signature does not always make an award null and void (see question 9.1).

There is no time limit to challenge an award as null and void.

An award may be set aside, by the request of a party, if:

1) the arbitrators have exceeded their authority;
2) an arbitrator has not been properly appointed;
3) an arbitrator could have been disqualified to act as an arbitrator, but a challenge duly made by a party has not been accepted before the award was made, or if a party has become aware of the ground for disqualification so late that it could not have been able to challenge the arbitrator before the award was made; or
4) the arbitrators have not given a party sufficient opportunity to present its case.

An action for setting aside an award must be brought before the District Court in whose circuit the award was made within three months from receiving a copy of the award. The challenge procedure might take between six months and four years according to the Finnish legal praxis.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties cannot agree to exclude any basis of challenge provided in the Act before the award has been rendered.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There are no provisions in the Act nor case law concerning the issue. However, according to the principle of party autonomy, it may be

possible for the parties to expand the scope of appeal of an arbitral award beyond the grounds available in the Act.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

There is no appeal procedure concerning arbitral awards.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Finland has signed and ratified the New York Convention which has been in force without any reservations since 19 April 1962. The relevant national legislation is the Act.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Finnish courts are supportive of both domestic and international arbitration and the threshold for refusal of the recognition and enforcement is high.

An application for the enforcement of an award shall be submitted to the District Court accompanied by the original arbitration agreement, or the document containing the arbitration clause and the original award or certified copies thereof, as well as translations into Finnish or Swedish if necessary.

Before an application is granted, the party against whom enforcement is sought may be given an opportunity to be heard if necessary.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

A final award constitutes *res judicata* immediately when it has been rendered. The prevailing opinion is that *res judicata* effect should be considered as a non-mandatory procedural requirement and, therefore, a court should only observe it if a respondent invokes the award as a bar to proceedings before responding to the main claim.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

A court may dismiss the application for enforcement *ex officio* only if the enforcement would be against the public policy of Finland. It should be noted that if only a part of an award is deemed to be contrary to the public policy, the refusal of the recognition and enforcement shall be limited to the part of the award that concerns such issues.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitration proceedings are private, but there are no provisions in the Act nor case law concerning confidentiality. Therefore, in the absence of a confidentiality agreement or a reference to institutional rules containing provisions on confidentiality, the proceedings are not, in principle, confidential. In practice, however, the arbitrators uphold the confidentiality of the proceedings and the award.

The FAI Rules contain an explicit provision on confidentiality, which is binding upon the arbitral tribunal, the FAI and the parties.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes, such information can be referred to in subsequent proceedings taking into account possible confidentiality obligations.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no provisions in the Act, nor any case law, concerning the issue. The prevailing opinion is that punitive damages could be considered to be against the public policy of Finland.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The parties may agree on the interest or it can be determined according to the applicable substantive law.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The parties are entitled to recover fees and costs of arbitration. Generally, the losing party is ordered to bear the costs of the proceedings and cover the legal fees of both parties. However, if both parties have won, in part, the costs can be divided between the parties in proportion to the success of their respective claims or the parties can be ordered to bear their own costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Generally, an award is not subject to tax. However, under some circumstances, a compensation paid under the award can be subjected to income taxation.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Third-party funding and contingency fees are not restricted under Finnish law. However, if an attorney is a member of the Finnish Bar Association, a contract concerning contingency fees requires special reasons and it must be in writing.

There are no active professional funders in Finland.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Finland has signed and ratified the ICSID Convention, which has been in force since 8 February 1969.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Finland is a party to 67 BITs.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Generally, the BITs provide national treatment, 'most favoured nation' requirement, prohibition of expropriation and/or nationalisation, fair and equitable treatment, full protection and security and free transfer of investment and its profits.

The language is common.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

States can be parties to arbitration agreements under the Act. State immunity defence may only be invoked if a dispute concerns acts of state, but not in matters with commercial law or private law connection.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

There are no pending legislative changes. Recently, the FAI submitted a motion to the Ministry of Justice of Finland in order to update and bring the Act fully consistent with the UNCITRAL Model Law.

In 2017, according to the FAI's statistics, the three main categories relating to the subject matter concerned in arbitration proceedings were company acquisitions / sales of business (23%), shareholders' agreements (15%) and delivery / supply agreements (13%). The main lines of business concerned in arbitration proceedings were manufacturing (20%) and information and communication (19%). The FAI cases have become more complex, and the number of multi-party and multi-contract proceedings is on the rise.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The FAI published new rules which entered into force on 1 June 2013. The current FAI Rules include FAI Arbitration Rules and FAI Expedited Arbitration Rules and contain new provisions concerning, for example, the following:

- multi-party arbitration (e.g., joinder and consolidation);
- emergency arbitrators;
- confidentiality; and
- a nine-month time limit from the commencement of the arbitration proceedings for the final award.

Additionally, the FAI Rules contain a new practically useful provision that makes it possible to learn the case law of the FAI arbitration proceedings as the FAI may publish on its website, unless otherwise agreed by the parties, excerpts or summaries of selected awards, orders and other decisions by both the FAI board and arbitral tribunals in FAI cases, provided that all references to parties' names and other identifying details are deleted and remain strictly confidential.

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Attorneys at law Ratiolex Ltd is one of the leading dispute resolution law firms in Finland. Ratiolex offers a full range of dispute resolution services for all businesses and industries covering, *inter alia*, all aspects of domestic litigation as well as domestic and international arbitration, both *ad hoc* and institutional. Ratiolex focuses on high-end domestic and international dispute resolution services. Ratiolex has represented its corporate clients successfully in dispute resolution assignments before courts and arbitral tribunals and different domestic and international contractual and corporate arrangements. Ratiolex's clientele has consisted mainly of domestic SMEs, growing and internationalising companies, and international corporations. Ratiolex has served a number of high-profile clients such as Finland's leading building services consulting company, one of the leading international freight forwarding and logistics companies and one of the leading international chemical industry companies, as well as, recently, several foreign clients in matters relating to Finland.

France

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

An arbitration agreement can be either (i) an arbitration clause inserted in a contract (*clause compromissoire*), or (ii) a separate agreement entered into once the dispute has arisen (*compromis*).

To be valid, a domestic arbitration agreement must be in writing. Pursuant to Article 1443 of the French Code of Civil Procedure ("CCP"), it can result from "*an exchange of written communications or be contained in a document to which reference is made in the main agreement*".

International arbitration agreements are not subject to any formal requirements and need not to be in writing (Article 1507 CCP). So long as the parties express their intention to arbitrate their disputes, the clause will be valid.

1.2 What other elements ought to be incorporated in an arbitration agreement?

There is no other formal requirement as to the content of the arbitration clause. Nevertheless, in order to avoid uncertainty in the enforcement of the clause and the risk of delaying the proceedings, it is recommended to provide for the seat of arbitration, the language of the proceedings, the number and method of appointment of the arbitrators, and whether the arbitration is institutional (with the exact name of the institution) or *ad hoc* (in which case the clause should provide for all necessary procedural details or refer to a set of rules such as the UNCITRAL Rules).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Where a dispute arising under an arbitration agreement is brought before a state court and a party raises a jurisdictional challenge, the court declines jurisdiction unless both of the following conditions are fulfilled: (i) "*an arbitral tribunal has not yet been seized*"; and (ii) "*the arbitration agreement is manifestly void or manifestly not applicable*" (Article 1448 CCP).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

France modernised its arbitration law with Decree No. 2011-48 of 13 January 2011, which forms part of the CCP.

Thus, most legislative provisions and legal principles governing arbitration are in the CCP. A number of provisions relating to arbitration can also be found in other statutes. For example, principles relating to arbitrability can be found in the French Civil Code ("CC") (see question 3.1 below).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The CCP draws a distinction between domestic (Articles 1442 *et seq.*) and international arbitration (Articles 1504 *et seq.*). Some of the provisions applicable to domestic arbitration also apply to international arbitration (Article 1506 CCP). International arbitration benefits from the application of more liberal principles (for example, see question 1.1 above on the requirements of arbitration agreements).

The definition of international arbitration is extremely broad and inclusive – pursuant to Article 1504 of the CCP, "*an arbitration is international when international commercial interests are at stake*". The French *Cour de cassation* held that an arbitration is international if it deals with "*a transaction that does not economically occur in only one country, regardless of the nationality of the parties, the law applicable to the merits of the dispute, or the seat of the arbitral tribunal*" (see, for example, Cass. Civ. 1, 26 January 2011, No. 09-10198 or, more recently, Cass. Civ. 1, 30 June 2016, No. 15-13904).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

France's arbitration law is not based on the UNCITRAL Model Law. One significant difference between French law and the UNCITRAL Model Law concerns the enforcement of interim measures issued by an arbitral tribunal. Under French law, such measures are generally not enforceable (see question 7.6 below).

The latest version of the UNCITRAL Model Law, on the other hand, provides that such measures "*shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued*" (Article 17H of the UNCITRAL Model Law on International Commercial Arbitration). Other differences include the fact that France uses a much broader definition of "international arbitration" (see question 2.2 above).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Only a few French mandatory legislative provisions are applicable to international arbitration, which is very favourable to party autonomy.

These rules include the separability of the arbitration agreement from the main contract (Articles 1447 and 1506 CCP) and the equal treatment of the parties in international arbitration (Article 1510 CCP provides 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*"). The tribunal has jurisdiction to decide on its own competence (Articles 1448, 1465 and 1506 CCP). Both the parties and arbitrators must act diligently and in good faith in the conduct of the proceedings (Articles 1464 and 1506 CCP). The parties may not appeal international awards or waive their right to appeal the decision granting *exequatur* thereof (Article 1522 CCP). More generally, an arbitral award must not violate French international public policy (Article 1514 CCP) (see section 10 below).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Under Article 2059 of the CC, certain rights cannot be referred to arbitration. The classic example is a dispute in relation to a divorce which cannot be submitted to arbitration. This applies both to domestic and international arbitration.

In addition to divorce and judicial separation of spouses, Article 2060 CC further provides that disputes related to the following subject matters cannot be settled through arbitration: status and capacity of individuals; disputes concerning certain public entities and authorities; and public policy related matters. French courts have, however, progressively reduced the scope of these prohibitions in domestic arbitration. French courts held that the fact that the subject matter of a dispute is subject to public policy rules no longer prevents the dispute from being referred to arbitration, thereby depriving part of Article 2060 of the CC of any effect (Cass. Com, 9 April 2002, No. 98-16829).

Regarding international arbitration, the French *Cour de cassation* has held the prohibitions under Article 2060 to be inapplicable (Cass. Civ. 1, *Trésor Public v. Galakis*, 2 May 1966).

Further, Article 2061 of the CC, as recently amended in November 2016, provides that "*where one of the parties has not contracted in the course of its professional activity, the arbitration clause may not be invoked against it*". It is yet to be seen whether French courts will hold that the new version of this article, which would, for example, prevent arbitration of consumer disputes, does not apply to international arbitration.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

In France, the principle of competence-competence is widely recognised and applied. This means that the arbitral tribunal has exclusive jurisdiction to rule on its own jurisdiction in the first instance (Article 1465 CCP).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

If court proceedings are initiated despite the existence of an arbitration agreement and the respondent raises a jurisdictional challenge, courts will routinely decline jurisdiction unless (i) arbitration proceedings have not commenced, and (ii) the arbitration agreement is manifestly null and void or manifestly inapplicable (Article 1448 CCP).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

When a dispute subject to an arbitration clause is submitted to a state court, that court must generally decline jurisdiction (see question 3.3 above).

French courts can review the issue of the tribunal's jurisdiction at the setting-aside stage or at the recognition/enforcement stage. In such a case, the court will review this specific issue *de novo* and its review will not be bound by the factual and legal findings of the tribunal (Cass. Civ. 1, 6 October 2010, No. 08-20563).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Arbitration agreements are binding only upon the parties to the arbitration agreement. There are, however, exceptions to this principle.

First, an arbitral tribunal has jurisdiction over a non-party to an arbitration agreement, in the case of transmission of an arbitration clause. Transmission involves third parties taking over the rights and obligations of the signatory (Cass. Civ. 1, 8 February 2000, No. 95-14330) or third-party assignees benefiting from the arbitration agreement (Cass. Civ. 1, 5 January 1999, No. 96-20202).

Second, in instances in which third parties participate in the negotiation, performance or termination of an agreement containing an arbitration clause, French courts can interpret their behaviour as implicit consent to be bound by the arbitration agreement (Cass. Civ. 1, 7 November 2012, No. 11-25891).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

French law provides for limitation periods for the commencement of

civil actions. The general limitation period for personal actions is five years after circumstances giving rise to the dispute were or should have been known to the party initiating the dispute (Article 2224 CC). There are, however, some specific durations and starting points of limitation periods, depending on the circumstances of the case.

Under French law, limitations are a matter of substantive law (Article 2221 CC).

As a result, these limitations periods will generally apply to arbitrations in France only if French law is the substantive law governing the parties' contract.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

In domestic arbitrations, proceedings must be stayed pending the insolvency of a party to the arbitration (Article 369 CCP, applicable by reference to Article 1471 CCP).

No such provision exists in the CCP for international arbitration. However, the *Cour de cassation* has held that the suspension of arbitral proceedings, once insolvency proceedings have been initiated, is "*both a matter of domestic and international public policy*" (Cass. Civ. 1, 5 February 1991, No. 89-14382).

In cases where the respondent is the insolvent party, the proceedings will be stayed until such time that the claimant has filed a declaration of its claim as part of the insolvency proceedings. Once proceedings have resumed, arbitrators can assess the amount of the debt but cannot order the insolvent party to pay it (Cass. Civ. 1, 6 May 2009, No. 08-10281).

If the claimant is the insolvent party, the principle of divestment of the debtor requires the appointment of a liquidator or a creditor's representative, as the case may be, and the proceedings to be resumed upon the latter's request.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

In both domestic and international arbitration, parties may freely choose the substantive law and may also invite arbitrators to act as *amiables compositeurs* (Articles 1478 and 1512 CCP). Absent such choice, arbitrators in international cases need not use any conflict of law rules. They may choose any "*appropriate*" law, taking into account trade usages (Article 1511 CCP).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The principle of party autonomy is recognised under French law, and arbitral tribunals should abide by the provisions agreed upon by the parties. In international arbitrations, the parties may (subject to certain limitations when they have selected French substantive law) contract around all mandatory French laws other than those that arise due to French international public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

When French judges assess the formation, validity and legality of arbitration agreements, they apply a specific standard developed in French arbitration law. Pursuant to an established case law, "*by virtue of a material rule of international arbitration law,* [the] *existence and effectiveness* [of an arbitration clause] *are determined (...) according to the common intention of the parties without reference to a national law*" (Cass. Civ. 1, 30 March 2004, No. 01-11951).

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

In both domestic and international arbitration, the parties are free to determine the number of arbitrators, directly or by reference to arbitration rules (Articles 1444 and 1508 CCP).

However, in domestic arbitration, the number of arbitrators cannot be an even number (Article 1451 CCP). In addition, the CCP provides that only natural persons having full capacity can act as arbitrators in domestic arbitration proceedings. Legal persons, if designated in the arbitration agreement, can only administer the arbitration (Article 1450 CCP). There are no corresponding rules for international arbitration. As a result, it is possible that parties could submit their disputes to an even number of arbitrators, and that legal persons could sit as an arbitrator.

The CCP does not provide for a default number of arbitrators in the absence of an agreement. French law does not impose requirements as to the arbitrators' nationality, professional qualifications or their need for a licence to practise in France as an arbitrator.

The CCP lays down a requirement of independence and impartiality, applicable in both domestic and international arbitration (Articles 1456 and 1506 CCP).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

French law does contain default provisions relating to the appointment of arbitrators (Article 1452 *et seq.* CCP).

Where there is a sole arbitrator and the parties do not agree on that sole arbitrator, the latter is designated by the person in charge of administrating the arbitration or, failing that, the judge acting in support (*juge d'appui*) (Article 1452 CCP).

Where there are three arbitrators, each party nominates an arbitrator (Article 1452 CCP). Both arbitrators nominated by the parties designate the third arbitrator. The person in charge of administrating the arbitration or, failing that, the *juge d'appui* must designate the missing arbitrator when a party does not designate an arbitrator within the required one-month period, and, also, when the two arbitrators designated by the parties cannot agree on the third arbitrator.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Parties can request the French *juge d'appui* to appoint one or several arbitrators where the mechanism set by the parties to appoint arbitrators is not functioning.

In domestic arbitration, the *juge d'appui* is the President of the *Tribunal de Grande Instance* ("TGI") (or of the Commercial Court, if the arbitration agreement so provides) of the seat of arbitration (Article 1459 CCP).

In international arbitration (unless the arbitration agreement provides otherwise), the *juge d'appui* is the President of the Paris TGI, so long as:

- the arbitration takes place in France;
- the parties have agreed that French procedural law will apply to the arbitration;
- the parties have expressly granted jurisdiction to the French courts over disputes relating to the arbitral procedure; or
- if one of the parties is at risk of a denial of justice (Article 1505 CCP).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

An arbitrator must disclose any circumstance likely to affect his or her independence or impartiality (Articles 1456 and 1506 CCP).

When an arbitrator fails to disclose any circumstances likely to affect his or her independence or impartiality, the arbitral award can be set aside and/or enforcement in France can be denied. If a party's reasonable doubt regarding the independence and impartiality of an arbitrator arises during the arbitration proceedings, that party can challenge the arbitrator in compliance with the procedure and time limits set out in the applicable arbitration or procedural rules.

A party must challenge the arbitral tribunal's independence and/or impartiality in the required time period. Failing this, a party is considered to have waived its right to challenge (Articles 1466 and 1506 CCP) (see question 10.1 below).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Parties to arbitration proceedings are free to determine the procedural rules applicable to the arbitral tribunal. The determination of the procedural rules can be direct or indirect (that is, by referring to sets of arbitration rules or national rules of civil procedure) (Articles 1464 and 1509 CCP).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no specific procedural steps required by law.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

French arbitration law does not impose any ethical rules specifically applicable to counsel in international arbitration. However, lawyers admitted to a French Bar are bound by the Bar's Code of Ethics, even if they intervene as counsel in arbitrations seated outside France. French lawyers must also comply with the *Règlement Intérieur National de la profession d'avocat* of the National Bar Council and the Code of Conduct for European lawyers.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

French law provides for arbitrator's evidentiary and disclosure powers (see question 8.2 below), and for the arbitral tribunal to decide on its own jurisdiction (see question 3.2 above).

Regarding their duties, arbitrators are under the obligation to promptly disclose to the parties any circumstances that may affect their independence or impartiality (Articles 1456 and 1506 CCP).

French law also imposes on them a duty to act diligently, promptly and fairly in the conduct of the proceedings (Articles 1464 and 1506 CCP). Arbitrators are under the obligation to respect the scope of their mandate and to carry out the latter until it is completed (Articles 1457 and 1506 CCP). They also have to ensure that the parties are treated equally, and to uphold the principles of due process (Article 1510 CCP).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are no rules restricting the appearance of lawyers from other jurisdictions in arbitral proceedings. There is indeed no obligation to be admitted to any Bar to act as counsel in such proceedings. Such restrictions apply only to national court proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Nothing under French law provides that arbitrators are immune from liability. Nonetheless, they are not liable for objective legal or factual errors (Paris Court of Appeal, *Bompard v. Consorts C. et autres*, 22 May 1991). Exceptions to this rule relate to denial of justice, gross negligence and fraud (Cass. Civ. 1, 15 January 2014, No. 11-17196). Arbitrators are also liable for breaches of their obligations arising out of the arbitrator appointment contract (e.g., breach of confidentiality…) or involvement in criminal matters such as corruption of persons exercising judicial functions (Articles 434-9 and 435-7 of the Penal Code).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

French courts may intervene to assist arbitration proceedings seated in France. When necessary, the *juge d'appui* will assist parties in the constitution of the arbitral tribunal (Articles 1451 to 1453 CCP). National courts might also summon a third party to obtain written evidence it holds, with the leave of the arbitral tribunal (Articles 1469 and 1506 CCP).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The arbitral tribunal may, on the conditions it determines and, if necessary, under financial compulsion (*astreinte*), "*order upon the parties any conservatory or provisional measures that it deems appropriate*". However, only national courts can order conservatory seizures and judicial securities (Articles 1468 and 1506 CCP).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Under certain circumstances (see question 7.3 below), French courts have the power to order any measures relating to the taking of evidence as well as other provisional or conservatory measures (Articles 1449 and 1506 CCP). These orders do not affect the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Prior to the initiation of arbitration proceedings, French courts are entitled to order measures relating to taking evidence, i.e. before the filing of a request for arbitration, so long as "*there is a legitimate reason to preserve or establish evidence upon which the resolution of a dispute may depend*" (Article 145 CCP). Under certain circumstances, *ex parte* applications are possible.

With respect to other provisional and conservatory measures, French courts will rule on the requested relief if the tribunal is not yet constituted and the matter is urgent.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Under French law, there is no prohibition against anti-suit injunctions. The French *Cour de cassation* held that anti-suit injunctions "*are not contrary to international public policy*" (Cass. Civ. 1, 14 October 2009, No. 08-16.369, 08-16.549). However, no available decisions demonstrate that French courts have been willing to order anti-suit injunctions. In any event, French courts do not recognise the validity of an anti-suit injunction that would restrain an individual from commencing proceedings before the courts of another European Union Member State – as this would be contrary to European Law (European Court of Justice, *Allianz SpA v. West Tankers*, 19 February 2009).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

No French law provision addresses security for costs. However, an arbitral tribunal is entitled to order any measures it deems appropriate pursuant to Article 1468 of the CCP.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

All decisions from arbitral tribunals that qualify as "awards" under French law may be recognised and enforced by French courts (M. Ostrove, C. Emery, *L'exécution des mesures conservatoires prononcées par les tribunaux arbitraux*, R.G.D.I.P. 2017-3, p. 817 *et seq.*); "awards" are those decisions that "*resolve in a definitive manner all or part of the dispute that is submitted to them on the merits, jurisdiction or a procedural matter which leads them to put an end to the proceedings*", irrespective of their formal qualification as an award or a procedural order by the arbitral award (Paris Court of Appeal, *Sardisud v. Technip*, 25 March 1994; Cass. Civ. 1, 12 October 2011, No. 09-72.439). Whether interim decisions rendered by arbitral tribunals can be enforced is more controversial. French courts have held that if the arbitral tribunal's decision finally resolved the parties' dispute regarding the issuance of provisional measures, the decision is properly an award, which may be immediately set aside (Paris Court of Appeal, *S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings*, 7 October 2004) and/or enforced.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

No default rules of evidence apply to arbitrations in France. Parties can agree on the procedural rules applicable to the arbitration proceedings and the powers conferred on the arbitrators. These rules can also be determined by the applicable institutional rules or decided by the arbitrators, who have very broad powers (see question 8.2 below).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Under Article 1467 of the CCP, arbitrators can order necessary inquiry measures, compel any person to appear for questioning, whether he/she is a party to the arbitration agreement. They can also compel a party to disclose any document and any piece of evidence.

The arbitral tribunal may subject compliance with its orders to fines for failure to comply.

When a third party to the arbitration holds written evidence, and with the arbitral tribunal's permission, national courts can issue orders to obtain that evidence (Articles 1469 and 1506 CCP).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Prior to the initiation of arbitral proceedings, parties may apply to courts for measures relating to the taking of evidence that may later be used in the arbitration. In particular, an application may be made to the President of the TGI or of the Commercial Court to obtain measures preserving or establishing evidence upon which the resolution of the dispute may depend (Articles 1449, 1506 and 145 CCP).

Once the arbitral tribunal is constituted, a party to the arbitration may apply to the President of the TGI to obtain the production of evidence held by a third party or the copy of an official (*acte authentique*) or private deed (*acte sous seing privé*) to which it was not a party (Articles 1469 and 1506 CCP).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Articles 1467 and 1506 of the CCP provide that the arbitral tribunal may call upon any person to provide testimony and that witnesses shall not be sworn in.

Cross-examination is allowed. A resolution of 26 February 2008 of the Paris Bar Council confirmed that, in the context of international arbitration, "*preparation of witnesses by lawyers before their examination does not breach the core principles of the profession of lawyer*".

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

As there is no "document discovery" in French courts, no rules of "privilege" have developed as exists in the Anglo-American systems. On the other hand, rules of confidentiality and professional secrecy do exist.

All correspondence exchanged between members of a French Bar is confidential, unless it is clear that such a communication is "official" and can be shared with others. In-house counsel, however, do not benefit from this rule.

Any communication between a member of a French Bar and his or her client is protected by professional secrecy, and third parties cannot have access to such communications. Save under very specific circumstances, a lawyer cannot waive the application of professional secrecy. A client cannot authorise a lawyer to divulge material covered by professional secrecy to a third party. On the other hand, once a lawyer provides advice or any work product to a client, the latter is free to share that information with third parties without the lawyer's consent.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Articles 1481 and 1506 of the CCP specify that domestic and international awards must be in writing because they must be produced for the purposes of their enforcement (Articles 1487 and 1515 CCP). An award must state: (i) the full names of the parties as well as their domicile or corporate headquarters; (ii) the names of the parties' counsel, if applicable; (iii) the names of the arbitrator(s) who made the award; (iv) the date on which the award was made; and (v) the place where the award was made. The award shall also "*succinctly set forth the respective claims and arguments of the parties*" and state the reasons upon which it is based (Articles 1481, 1482 and 1506 CCP).

A domestic award that fails to comply with these requirements will be void (Article 1483 CCP). Further, under Article 1492 of the CCP, a domestic award will be subject to annulment if it "*does not state the reasons upon which it is based, or its date or the identity of the arbitrators*". International awards that do not meet these requirements will not be subject to annulment (Article 1520 CCP).

International awards must be signed by all arbitrators. However, (i) if a minority of arbitrators refuse to sign, the other arbitrators shall state this in the award, and (ii) if the president rules alone and if the other arbitrators refuse to sign, the president alone shall sign (Article 1513 CCP).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Parties may request arbitral tribunals to interpret an award, correct clerical errors or make an additional award where the tribunal failed to decide on a claim. The request shall be presented within three months of the award's service (Articles 1485, 1486 and 1506 CCP).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

In domestic arbitration, the award cannot be appealed unless the parties have agreed otherwise. However, an arbitral award not subject to an appeal can always be set aside (Articles 1489 and 1491 CCP).

In international arbitration, when an arbitral award has been rendered in France, it can be set aside but not appealed (Article 1518 CCP).

An arbitral award can be set aside on strictly limited grounds (Article 1492 CCP for domestic arbitration and Article 1520 CCP for international arbitration): (i) the arbitral tribunal wrongly declared itself competent or incompetent; (ii) the arbitral tribunal was irregularly constituted; (iii) the arbitral tribunal ruled on the matter contrary to its mandate; (iv) the adversarial principle was not respected; (v) the arbitral award is contrary to public policy; or (vi) the arbitral award is not grounded or does not state the date on which it was rendered or the name of the arbitrator(s), does not include the required signature(s) or was not rendered by a majority vote (the latter ground applies to domestic awards only).

French courts also ensure that the principle of procedural estoppel is complied with. Article 1466 of the CCP states that "*a party that knowingly and without a legitimate reason fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity*". It follows that an action based on any of the grounds set forth in Article 1520 of the CCP will be admissible only if the applicant raised the relevant objections on a timely basis during the arbitration proceedings. With respect to the alleged violation of rules of public policy concerned with the regulation of the economic and social affairs of society ("*ordre public de direction*"), some legal scholars consider that French courts should declare that challenges are admissible on this ground, even if this objection was not raised during the arbitral proceedings (C. Seraglini & J. Ortscheidt, *Droit de l'arbitrage interne et international* (2013), § 979). In contrast, a party is precluded from invoking a violation of public policy intended to protect certain parties to contracts ("*ordre public de protection*") at the annulment stage if it had not raised the issue before the arbitral tribunal (Paris Court of Appeal, *Janville Distribution*, 25 February 2014).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Parties may, at any time, waive their right to challenge international awards issued in France by means of a petition to set aside (Article 1522 CCP). In this case, parties may still appeal an order declaring the award enforceable in France. Such an appeal would be limited to the same, narrow grounds as those governing a petition to set aside an award (Articles 1520 and 1522 CCP).

Parties may not exclude one of the five existing grounds to challenge an award (or, in case they waived their right to challenge the award, they cannot exclude one of these grounds to challenge the order declaring the award enforceable in France).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Absent any specific agreement regarding the scope of appeal of an arbitral award, a challenge can be raised only on the basis of the strictly limited grounds specified under Articles 1492 and 1520 CCP. Absent available decisions on this issue, it is debatable whether parties can expand the scope pursuant to which an arbitral award can be set aside.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

In international arbitration, setting-aside proceedings must be initiated before the relevant court within one month of the award's service (Article 1519 CCP) (extended by two months when the challenging party is located outside of France). Contrary to domestic arbitration, an application to set aside or an appeal of an enforcement order has no suspensive effect (Article 1526 CCP).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

France has signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "NY Convention") on 25 November 1958. It ratified the NY Convention on 26 June 1959, and the convention entered into force in France on 24 September 1959. France has not made any reservations, other than reciprocity.

Articles 1487 *et seq.* of the CCP apply to the enforcement of domestic arbitral awards, whereas Articles 1514 *et seq.* apply to the enforcement of international arbitral awards, comprising awards rendered in France in international matters and awards rendered abroad. The provisions of the CCP that are more favourable than those of the NY Convention prevail over the latter, by virtue of Article VII of the NY Convention.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

France ratified the Geneva (European) Convention on International Arbitration on 24 April 1961.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

French courts are generally considered as pro-arbitration, and decisions denying enforcement of awards are rare.

The French courts' review of international awards is strictly limited to the five grounds set out in Article 1520 of the CCP. French courts cannot review the merits of the case, and enforcement cannot be denied because of errors of fact or law.

The setting aside of an award made outside of France is not a ground for denying enforcement of that award in France (Cass, Civ. 1, 29 June 2007, No. 05-18053).

The party seeking recognition and enforcement of an award in France must establish the existence of the arbitral award, provide the courts with the originals or copies of the arbitral award and arbitration agreement, and translate them when necessary (Articles 1487 and 1515 CCP).

The TGI has jurisdiction to order the enforcement of an award (Article 1516 CCP). When the arbitral award has been rendered outside France, the competent TGI is that of Paris. Otherwise, the competent TGI is that of the seat of the arbitration.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Arbitral awards have *res judicata* effect upon issuance, with respect to the matters decided in the award (Article 1484 CCP). This means that a court or another arbitral tribunal cannot revisit the same issues between the same parties.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Until 2014, only "*flagrant, effective and concrete*" violations of international public policy could result in awards being set aside. In 2014, the Paris Court of Appeal initiated a new trend and held that judges should consider all the facts of a case when determining whether an award violated international public policy in an "*effective and concrete*" manner – disregarding the prior "flagrancy" requirement (Paris Court Appeal, *Gulf Leaders v. Crédit Foncier de France*, 4 March 2014).

More recently, this Court of Appeal set out the requirement of a "*manifest, effective and concrete*" violation of international public policy and it conducted a broader examination of the facts of the case, in order to determine whether a violation had taken place. This amounted to a stricter control over international awards (Paris Court of Appeal, *Kirghizstan v. Belokon*, 21 February 2017; see also *MK Group v. Onix*, 16 January 2018).

There is currently some debate as to the exact approach that the *Cour de Cassation* will take. In any case, however, French courts remain very pro-arbitration and restrictive in their review of arbitral awards.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

In domestic arbitration, unless the parties agree otherwise, the arbitral proceedings are subject to confidentiality (Article 1464 CCP).

In contrast, there is no confidentiality provision in international arbitration under French law. When parties agree to a French seat for their arbitral proceedings and want to ensure confidentiality, they can enter into a confidentiality agreement. Parties can also submit the arbitration proceedings to institutional rules providing for an express confidentiality obligation.

In any case, the arbitral tribunal's deliberations must remain confidential (Articles 1479 and 1506 CCP).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings can be used in subsequent proceedings. However, some rules may apply to safeguard the confidentiality of the proceedings, should it apply. For instance, under Article 435 of the CCP, the judge may decide that the hearings will not be public.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The CCP does not contain any statutory provision regarding the remedies that an arbitral tribunal can award. The arbitrators benefit from a wide discretion as to the content of the award they render and the remedies they grant.

Generally, French courts do not award punitive damages. However, such damages are not contrary to French international public policy and, accordingly, can be awarded and enforced in France as long as they are not "*disproportionate in light of the loss sustained and the contractual breach*" (Cass. Civ. 1, 1 December 2010, No. 09-13303).

13.2 What, if any, interest is available, and how is the rate of interest determined?

Nothing prevents the arbitral tribunal from ordering interest. The applicable law to determine the rate is decided by the arbitral tribunal. Should French law be applicable, the interest rate is fixed by statute.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

French law does not contain any provision regulating cost allocation between parties to an arbitration. Absent an agreement between the parties, the arbitral tribunal is often granted discretion to decide on this issue, and the applicable institutional rules may also provide guidance on the subject.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The arbitration award itself is not subject to tax. The awarded amount may, however, be regarded as taxable income if the winning party is subject to French tax, in accordance with general French tax laws.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no provisions specifically restricting or regulating third-party funding. Hence, it is allowed. This was confirmed by the Paris Bar on 21 February 2017. The Paris Bar adopted rules to ensure that lawyers comply with French ethics when using third-party funders. The parties' lawyers cannot enter into contact directly with third-party funders and must not disclose information about the case. Also, parties are encouraged to disclose to arbitrators the existence of third-party funding to avoid conflicts of interest.

Success fees can be agreed only if they are paid in addition to an hourly or fixed fee, and if they are not manifestly excessive. Fee arrangements that are wholly contingent on a case's outcome are illegal.

There are a number of professional funders active on the French market, e.g. La Française, AM International Claims Collection and Vannin Capital.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

France signed the ICSID Convention on 22 December 1965 and ratified it on 21 August 1967. The Convention entered into force on 20 September 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

France has signed 115 bilateral investment treaties ("BITs"), with 96 in force. France is also a party to the Energy Charter Treaty and several other multilateral treaties relating to investments.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

BITs are one of the cornerstones of French efforts to promote international investments.

This stance is notably reflected in the definition of investment contained in all French investment treaties, which is very broad,

generally referring to "assets" or "all assets", and providing a non-exclusive list of examples.

The French 2006 Model BIT contains a "Fair and equitable treatment" clause (Article 3) and a "Most favoured nation treatment" clause (Article 4). Five French investment treaties (Egypt, Guatemala, Morocco, Mauritius and Turkey) specify that fair and equitable treatment granted to foreign investors must be at least the same as the treatment granted by the host-state to its national investors. In some BITs (e.g. Paraguay, Sudan, Syria, Turkey), the fair and equitable treatment afforded to investors must be at least as favourable as that granted by the host-state to investors from the most favoured nation.

Further, most French investment treaties explicitly protect investments against both direct and indirect expropriation.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

French courts consider that a state's consent to arbitration is a waiver of its jurisdictional immunity (Paris Court of Appeal, *UNESCO v. Boulois*, 19 June 1998).

With respect to the immunity from execution, France adopted a new law on transparency, anti-corruption and modernisation (the "Sapin II Law") on 9 December 2016 and introduced new provisions governing measures of execution against other states' assets in France. In particular, the Sapin II Law provides that execution measures cannot be taken against property or assets used or intended to be used in the exercise of diplomatic missions, "*unless there is an express and specific waiver of immunity by the states concerned*".

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

France is one of the most arbitration-friendly jurisdictions. France has developed a legal system that supports arbitration, particularly international arbitration. Over the years, and through successive reforms and developing case law, France has created a solid tradition of judicial non-interference of French courts in the arbitral process. An award can be set aside in France on limited grounds, construed narrowly. By way of example, foreign awards may be enforced in France even if they are annulled in the jurisdiction of the seat (see question 11.3 above).

The last major reform was implemented through Decree No. 2011-48 which came into force on 1 May 2011. More recently, Law No. 2016-1547 (18 November 2016) modified Article 2061 of the CC to allow non-professionals to refer domestic disputes to arbitration.

All types of commercial disputes are commonly referred to arbitration.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The most prominent arbitral institution based in France is the International Chamber of Commerce ("ICC"). According to the results of the 2018 Queen Mary University of London survey, the "*ICC stands out as the most preferred institution*". The ICC Arbitration Rules were last amended in 2017. This version incorporates new features, including an expedited procedure that applies automatically to smaller claims, i.e. where the amount in dispute does not exceed US$ 2 million, unless the parties decide to opt out. The ICC has also issued a guide on techniques for controlling time and costs in arbitration and has taken steps to sanction arbitrators financially if they issue awards too slowly.

Acknowledgment

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The agreement between the parties to refer present or future disputes to an arbitral tribunal may be concluded in the form of an independent agreement or may form part of an agreement (Sec. 1029 (2) German Code of Civil Procedure, ZPO). The formal requirements for such arbitration agreement are laid down in Sec. 1031 ZPO.

In business-to-business relationships the arbitration agreement must not necessarily be contained in a document signed by the parties. It is sufficient if it is set out in letters, telefax copies, telegrams, or other messages exchanged by the parties, and that ensure proof of the agreement by supporting documents. Sec. 1031 (2) and (3) ZPO even facilitate the formal requirements in Sec. 1031 (1) ZPO by stipulating that they shall be deemed to have been met also in those cases in which the arbitration agreement is contained in a document transmitted by one party to another party or by a third party to both parties and – if no objection was raised in good time – the content of such document is regarded to be part of the contract in accordance with customary standards (Sec. 1031 (2)). The reference in a contract that is in compliance with the requirements to form set out in Sec. 1031 (1) or (2) for a document containing an arbitration clause may also constitute a valid arbitration agreement (Sec. 1031 (2)). Hence, arbitration clauses in general terms and conditions can be validly included.

If a consumer is party to an arbitration agreement, stricter requirements apply. According to Sec. 1031 (5) ZPO, the arbitration agreement must then be contained in a document signed by the parties, including by way of qualified electronic signature (Sec. 126 a German Civil Code (BGB)). In any case, such document may not contain agreements other than those making reference to the arbitration proceedings. Exceptions apply in case of an agreement recorded in notarial form.

Any invalidity of an arbitration agreement due to non-compliance with the form requirements will be cured if a party fails to raise objections as to the form but enters into arguments on the merits of the case in the hearing.

1.2 What other elements ought to be incorporated in an arbitration agreement?

In order to be valid, the arbitration agreement must only state that all or specific disputes between the parties in relation to a specific legal relationship shall be subject to arbitration (Sec. 1029, 1031 ZPO). However, it is recommendable to agree at least on the numbers and maybe also the qualification of arbitrators, the place and language of arbitration as well as the applicable substantive law. Lacking any such further specifications, the ZPO provides for a number of default provisions on how arbitration proceedings shall be conducted and how the arbitral tribunal will be constituted.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

German courts are known to be arbitration-friendly. If the defendant challenges the jurisdiction of the court seized due to the existence of an arbitration agreement that fulfils the requirements laid down in Sec. 1031 ZPO, the court will dismiss the claim according to Sec. 1032 (1) ZPO as inadmissible for the lack of jurisdiction and refer the parties to arbitration.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The enforcement of arbitration proceedings is governed by the 10th book of the ZPO that deal with arbitration proceedings. For example, courts have to decline jurisdiction in favour of a valid arbitration agreement, Sec. 1032 (1) ZPO; they will nominate an arbitrator on request of one party lacking an agreement between the parties, Sec. 1035 (3) sent. 1 ZPO; or will assist in taking evidence or performance of other judicial acts which the arbitral tribunal is not empowered to carry out on request of the arbitral tribunal (Sec. 1050 (1) ZPO).

Furthermore, the courts may, at the request of a party, grant leave of enforcement of an interim measure by the arbitral tribunal (Sec. 1041 (2) ZPO) and enforce an arbitral award according to Sec. 1060 and 1061 ZPO.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The law governing arbitration proceedings is contained in the 10th book of the ZPO. Its Sec. 1025 to 1066 deal with arbitration proceedings having their seat in Germany without distinguishing between domestic and international arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the 10th book of the ZPO, effective as of 1 January 1998, is based on the UNCITRAL Model Law. However, the German arbitration law even exceeds the aim of the Model Law by applying without distinguishing between domestic and international arbitration proceedings having their seat in Germany and irrespective of whether or not the matter underlying the dispute is a commercial matter for one of the parties.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

As there is no distinction between domestic and international arbitration, the few mandatory rules contained in the German arbitration law apply to both domestic and international arbitration. Generally, the parties' will to determine the conduct of the proceedings has priority, Sec. 1042 (3) ZPO. Nonetheless, there are some provisions the parties cannot deviate from. The most relevant provisions include the equal treatment of the parties and their right to present their case in full (Sec. 1042 (1) ZPO) as well as the prohibition to exclude counsel from acting as authorised representatives (Sec. 1042 (2) ZPO). A further absolute rule is that any default of a party justified by that party to the arbitral tribunal's satisfaction will be mandatorily disregarded (Sec. 1048 (4) sent. 1 ZPO).

Moreover, several provisions relating to recourse to state courts cannot be excluded, e.g. with regard to the constitution of the arbitral tribunal (Sec. 1034 (2) ZPO), the challenge of an arbitrator (Sec. 1037 (3) ZPO), interim relief (Sec. 1041 ZPO) or the challenge of the award (Sec. 1059 (1) ZPO).

A party agreement which contradicts mandatory law will generally not lead to the invalidity of the whole arbitration agreement, but the invalid part will be replaced by the mandatory statutory provision and the arbitrator's discretion.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The focus of German arbitration law is on commercial disputes. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties have the legal capacity to conclude a settlement on the issue in dispute (Sec. 1030 (1) ZPO). Examples for disputes that are not arbitrable include most family law matters, insolvency proceedings and matters of public law. Employment matters can be subject to arbitration, provided that the narrow requirements laid down in Sec. 101 *et seq.* Labour Court Act are met.

The arbitrability of shareholder disputes relating to corporate resolutions used to be disputed. The Federal Supreme Court (*Bundesgerichtshof*) had held, in 1996, that such disputes are *per se* not arbitrable (Arbitrability I). In 2009, the court reversed its position and defined the standards that arbitration procedures must meet for shareholder disputes in limited liability companies (GmbH) to be arbitrable (Arbitrability II). In 2017, these standards were applicable to partnerships (KG) (decision of 06.04.2017, I ZB 23/16; Arbitrability III). According to those decisions, the arbitration agreement must be agreed upon by all shareholders, all shareholders must have a minimum standard of participation rights, all shareholders must be able to participate in the appointment of the arbitrator and parallel proceedings about the validity of the same corporate resolution must be excluded or dealt with in front of the same arbitral tribunal. The DIS has devised supplementary rules for corporate disputes that implement the court's requirements. In the light of Sec. 23 para. 5 Stock Corporation Act (AktG), disputes in a stock corporation are viewed as not arbitrable, but a decision of the Federal Supreme Court is outstanding.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. According to Sec. 1040 (1) ZPO, the arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. If it considers that it has jurisdiction, it shall do so by means of an interim ruling. The arbitral tribunal does not, however, have complete *Kompetenz-Kompetenz* – the arbitral agreement may not exclude the right to have the interim award on the jurisdiction to be challenged in the state courts.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

German courts shall decline jurisdiction according to Sec. 1032 (1) ZPO in favour of an arbitration agreement that fulfils the requirements laid down in Sec. 1031 ZPO if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

According to German arbitration law, a court cannot rule on the jurisdiction of the arbitral tribunal on its own. Rather, it will decide on its own lack of jurisdiction if the defendant raises such objection and a valid arbitration agreement is in existence.

The interim ruling of the arbitral tribunal assuming its jurisdiction can be challenged according to Sec. 1040 (3) ZPO before the higher regional court by both parties within a month after having received the interim ruling. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. The decision of the state court is binding in later setting-aside or enforcement proceedings.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

An arbitral tribunal may not, under German law, assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no limitation periods for commencing arbitration proceedings. The statute of limitation is a matter of substantive law. Therefore, the question of whether or not a claim brought before the arbitral tribunal is time-barred depends on the substantive law and can vary depending on the type of claim or on a party agreement on the statute of limitation; procedural provisions dealing with the statute of limitation do not exist under German law.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

The interplay of insolvency proceedings and arbitration is complex, especially on an international scale. According to Sec. 240 ZPO, state proceedings shall be interrupted in the event of insolvency proceedings being opened against a party until they can be resumed in accordance with the rules applying to the insolvency proceedings or until the insolvency proceedings are terminated. The German Federal Court ruled in 1966 that this provision is not applicable to arbitration proceedings *but* in order to ensure enforcement the proceedings need to be factually interrupted and a formal change of the insolvent party by the insolvency administrator is required.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Ideally, the arbitration agreement contains a choice of law clause. The arbitral tribunal pursuant to Sec. 1051 ZPO is bound to such choice when deciding the dispute. In the absence of such choice by the parties, the arbitral tribunal shall apply the law of the state with which the subject-matter of the proceedings is most closely connected (Sec. 1051 (2) ZPO). It is at the arbitral tribunal's sole discretion to interpret the legal concept of "closest connection". In doing so, it may and usually does rely on Article 4 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). However, there is no obligation to do so.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Only taking into account the wording of Sec. 1051 ZPO, there would not be any restrictions on the law chosen by the parties, as long as the arbitrator takes account of any commercial practices that may exist. However, it is commonly accepted that mandatory rules protecting a structurally weaker party prevail over the law chosen by the parties. This includes consumers, employees and policyholders. The *ordre public* objection is generally seen as a question of enforceability.

Apart from that, it is unclear if or to which extent the choice of law itself is restricted; especially the application of the *lex rei sitae* principle of Article 14 (1) lit. a Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) and the requirement of a factual international connection.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

If Germany is chosen as the venue of arbitration, the formation of the arbitration agreement is mandatorily governed by German law (Sec. 1025 (1) ZPO). If Germany is not chosen as venue of arbitration and in absence of a choice of law, it is not yet resolved whether the *lex loci abitri* or the law governing the underlying contract is to be applied. If, in addition to the lack of a choice of law, no venue of arbitration is agreed upon, the law of the underlying contract will prevail.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and there are hardly any limitations as to the person of the arbitrator unless circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties (Sec. 1036 (2) ZPO).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, Sec. 1035 (2) ZPO provides for a default procedure in case the parties' chosen method for selecting arbitrators fails or in the absence of any agreement on the appointment of the arbitrators. Lacking an agreement on the number of arbitrators, the arbitral tribunal shall consist of three arbitrators (Sec. 1034 (1) ZPO), whereby each party shall appoint one arbitrator, and the two arbitrators shall appoint the third arbitrator who shall preside over the arbitral tribunal.

If a party fails to appoint its arbitrator or if the two arbitrators fail to agree on the third arbitrator within one month, the arbitrator shall be appointed, upon request of a party, by the court. The same applies in case the parties opted for a tribunal of a sole arbitrator but are unable to agree on the appointment of the sole arbitrator.

It is notable that Sec. 1035 (5) ZPO states that in case of appointment of a sole or third arbitrator by the court, it shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties. Without explicitly referring to international arbitration proceedings, this rule is only expedient if the parties have different nationalities.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Besides the capacity of the court to appoint arbitrators upon request of a party in the cases laid down in question 5.2, the courts may also take the necessary measure if a party fails to act as required under the agreed appointment procedure or if a third party fails to perform any function entrusted to it under such procedure (Sec.1035 (4) ZPO). The right of the court to act requires the request of one party and is subsidiary to any other mechanisms for securing the appointment agreed upon by the parties.

Moreover, the courts decide upon request of a party on the challenge of an arbitrator unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, and provided that

any procedure agreed upon by the parties or the arbitral tribunal's obligation to decide on the challenge is not successful (Sec. 1037 (2) ZPO).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Sec. 1036 ZPO obliges the arbitrator to disclose without delay any circumstances likely to give rise to doubts as to his impartiality or independence. This duty applies during the whole arbitral process, from his appointment until the rendering of the award.

The DIS Rules provide for a similar obligation as detailed in question 9.1. Also, according to this provision, every arbitrator shall be impartial and independent of the parties throughout the entire arbitration with the difference that the prospective arbitrators shall sign a respective declaration.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The procedural (default) provisions in Sec. 1042 to 1050 ZPO are widely disposable (Sec. 1042 (3) ZPO), even in favour of self-established rules or a non-statutory set of rules. This applies to all arbitral proceedings sited in Germany.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Arbitral agreements commence – despite a deviating agreement between the parties – on the date in which the notice of arbitration sent by the claimant is received by the respondent (Sec. 1044 ZPO). This notice must only contain the names of the parties, the subject matter of the dispute and the reference to the arbitration agreement. During the proceedings each party is to be given an effective and fair legal hearing (Sec. 1042 (1) sent. 2 ZPO). The plaintiff is to present his claim and the defendant is to state his defence (Sec. 1046 (1) sent. 1 ZPO). A hearing is not compelling (Sec. 147 (1) ZPO). In any case, the parties are to be informed of any hearing or assembly arranged for taking evidence (Sec. 1047 (2) ZPO). Moreover, the respective other party is to be made aware of any written documents submitted to the arbitral tribunal (Sec. 1047 (3) ZPO). The proceedings end with the issuance of the award.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no particular rules in German law governing the conduct of arbitral counsel in proceedings sited in Germany.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

There is a limited number of mandatory duties for arbitrators, including: disclosure of circumstances giving rise to doubts in the arbitrator's impartiality (Sec. 1036 (1) ZPO); circumstances upon which to terminate the proceedings and deliver an award (Sec. 1053 (1), 1048 (1) ZPO) or upon which to continue the proceedings (Sec. 1048 (2) ZPO). The arbitral tribunal is to decide in accordance with the parties' choice of law; if the parties did not make a choice of law, the arbitral tribunal is to apply the laws of the state with the closest connection to the subject matter (Sec. 1051 (1) and (2) ZPO). It must only base its decision on fairness and equity if the parties have expressly authorised it to do so (Sec. 1051 (3) sent. 1 ZPO).

The same applies to the powers explicitly granted to arbitrators by the ZPO. Relevant powers include: correcting an award without a petition being filed (Sec. 1058 (4) ZPO); making a discretionary decision on the bearing of costs, if the parties did not agree otherwise (Sec. 1057 ZPO); and directing provisional measures, unless the parties agreed otherwise (Sec. 1041 (1) ZPO). The arbitral tribunal may decide on its own jurisdiction (Sec. 1040 (1) sent. 1 ZPO). There are no specific rules on ordering sanctions; such could be included in the cost decision. However, there is no rule prohibiting specific sanctions, either.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The provision of most legal services is reserved to qualified lawyers by an EU-based national law (RDG). Representation in German courts is reserved to lawyers accredited in Germany with few exceptions where no lawyer is required at all. Representation in arbitration proceedings, on the other hand, is not restricted to lawyers. No additional professional rules apply to counsel in arbitration. Furthermore, any person fit to enter into a contract may be appointed as an arbitrator.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Immunity as such is not granted to arbitrators by German law. Arbitrators also do not enjoy the same protection as formal judges. A breach of contractual duties or any other unlawful act will give rise to liability under the general German law provisions. These liability provisions cannot be excluded for intentional breaches and wrongdoings. However, it is common practice to restrict the arbitrator's liability regarding (even gross) negligence via individual contracts between the arbitrator and the parties or via application of institutional rules (e.g. Sec. 45.1 DIS-Rules, Article 41 ICC, Article 45.1 Swiss Rules).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

After the arbitrational tribunal has been formed, a court generally may not take action regarding the arbitration proceedings (*cf.* Sec. 1032 (1) and (2) ZPO).

However, under Sec. 1062 ZPO, courts can be competent for certain decisions on petitions and applications regarding: the appointment,

recusal or termination of office of an arbitral judge; the determination of (in)admissibility of arbitration proceedings or regarding the decision of an arbitral tribunal to affirm its own competence; the enforcement, reversal or modification of arbitral orders providing for provisional measures or securities; and the reversal or (reversal of) declaration of enforceability of the arbitration award. The courts also may support the arbitral tribunal in the taking of evidence under certain circumstances (Sec. 1050 ZPO).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless the parties have agreed otherwise, the arbitral tribunal may, at a party's request, grant interim relief. Such interim relief may also include an obligation to post security (Sec. 1041 (1) ZPO). Whilst no court assistance is needed to determine the measure itself, a petition to permit its enforcement has to be filed with a court (Sec. 1041 (2) ZPO).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Even after arbitration proceedings have commenced, a court may, upon a party's request, order preliminary measures regarding the subject matter of the arbitration proceedings (Sec. 1033 ZPO). The conditions and scope of any such measures are governed by general civil procedures (*cf.* Sec. 916 *et seq.* ZPO). Since any interim relief ordered by the arbitration tribunal will only be declared enforceable if no corresponding measure has already been made to a court (Sec. 1041 (2) sent. 1 ZPO), contradictory measures are not to be expected.

It is not yet definitely determined whether the court's authority in this regard can be modified by the parties.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Whilst there is no court practice specific to arbitration proceedings (see question 7.2), it is to be noted that the requesting party still has to substantiate aspects already brought forward in arbitration.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions are not part of German procedural law. On the contrary, even the enforcement of foreign anti-suit injunctions is deemed to be in violation of German public policy. This certainly applies to any jurisdictions subject to the European treaties (*cf.* ECJ C-159/02 Turnen/Grovit a.o.).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Sec. 1041 (1) ZPO allows arbitral tribunals to order security for costs as it deems fit with regard to the arbitration's subject matter. Courts may also make such orders, pursuant to the general civil procedure rules in Sec. 916 *et seq.* ZPO (*cf.* Sec. 921 ZPO).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Sec. 1041 (2) to (4) ZPO provide the courts with the power to grant the enforceability of preliminary measures upon a party's request, unless a corresponding measure has already been made to a court; the courts may even alter the wording or otherwise reverse and modify an order, if so required for the measure's enforceability.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The ZPO does not contain any specific provisions that apply to taking of evidence by an arbitral tribunal. In the absence of specific agreements between the parties, the arbitral tribunal is free to set the rules of evidence. The arbitral tribunals are also free in their assessment of the evidence taken in arbitral proceedings (Sec. 1042 (4) ZPO). This is reflected in Article 28 DIS Rules: it expressly provides that the arbitral tribunal shall not be limited to admitting evidence only offered by the parties.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The arbitral tribunal has the powers to order the disclosure or discovery of documents and to require the attendance of witnesses. However, as the concept of disclosure of documents is alien to German civil litigation, in domestic arbitrations, these powers are rarely exercised.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Sec. 1050 ZPO provides that state courts shall assist an arbitral tribunal in the taking of evidence. However, the state courts can do so only within the parameters of the rules of evidence in the ZPO. As these do not comprise the concepts of disclosure or discovery, outside the narrow bounds of Sec. 142 ZPO, Sec. 1050 ZPO cannot be employed to assist Anglo-Saxon style document production in Germany.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

An arbitral tribunal does not have authority to administer an oath. Should it insist on a witness swearing an oath, it must seek the assistance of the state courts. An oath is rarely required, however, both in domestic litigation and in arbitration. Domestic arbitrations typically operate without cross-examinations, whereas they are currently being used in international arbitrations. Written witness

statements are another import into German arbitration practice, and are increasingly being used.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Rules on privilege typically correspond to rules on discovery and disclosure. In the absence of those, German procedural law has only rudimentary rules on legal privilege. The client enjoys legal privilege for all communication with counsel; the scope of privilege afforded to communication with in-house counsel used to be unclear. Sec. 53 Code of Criminal Procedure (*Strafprozessordnung*, StPO) now states that, as a general rule, communication with an in-house counsel, even if admitted to the bar, is not subject to legal privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Sec. 1054 ZPO defines the formal requirements: the award must be in writing, in the language of the proceedings, and it should be signed – but not on every page – by all arbitrators; however, the signatures of the majority may suffice. Unless the requirement is waived, the award must give reasons. It shall state the place of arbitration and shall be dated.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Pursuant to Sec. 1058 ZPO, an award may be corrected, either upon an application of a party, or in the tribunal's own initiative, with respect to computation errors, spelling mistakes and other mistakes of such nature. Sec. 1058 ZPO also applies to all other changes to an award, such as corrections, amendments addressing claims that were raised in the proceedings, but not disposed of in the award. Any such changes must observe the form requirements of Sec. 1054 ZPO (see question 9.1).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The grounds for challenge set out in the ZPO are those that international readers will be familiar with from Article 34 of the Model Law and Article 5 of the New York Convention. Sec. 1059 ZPO allows a challenge to be based on (i) the lack of a valid arbitration agreement, (ii) the lack of proper notification of the appointment of an arbitrator, or of the arbitration proceedings, or a violation of the right to be heard, (iii) the arbitral tribunal exceeding the boundaries of the arbitration agreement, (iv) a violation of an agreement between the parties as to the constitution of the arbitral tribunal, and finally (v) a violation of German public policy or the fact that the matter in dispute was not arbitrable under German law.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

As a matter of principle, the right to challenge an award cannot be waived in its entirety. The right to challenge on the grounds that public policy was violated or that the matter is not arbitrable under German law can specifically not be waived. All other reasons on which a challenge can be based may be waived once the award has been rendered and the facts on which a challenge could be based are known.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties are not at liberty to extend the statutory grounds for setting aside an award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The challenge of an award is heard by the Court of Appeal (*Oberlandesgericht*) for the district in which the place of arbitration is located. The challenge must be filed within three months from the receipt of the award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Germany is a party to the New York Convention; it is incorporated into the ZPO through Sec. 1061. Germany has not made any reservations. The original reciprocity requirement was given up in 1999.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Germany is a party to the 1923 Geneva Protocol on Arbitration Clauses, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the 1961 European Convention on International Commercial Arbitration, the 1965 Convention On the Settlement of Investment Disputes between States and Nationals of Other States and, finally, the 1994 Energy Charter Treaty.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The general opinion amongst observers appears to be that German courts take an arbitration-friendly approach, and this includes the recognition and enforcement of foreign arbitral awards. Generally, the grounds for setting aside or denying the recognition and enforcement of an award are construed narrowly. The Court

of Appeals (*Oberlandesgerichte*) which is competent to hear applications for the recognition and enforcement of foreign arbitral awards has constituted dedicated senates dealing with arbitration matters. A party seeking the recognition and enforcement of an award must file a respective application with the competent Court of Appeals. The decision of the Court of Appeal on the recognition and enforcement can be challenged, as a matter of right, before the Federal Supreme Court.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Yes, as an arbitral award is deemed to have the same effect *inter partes* as a final and binding judgment of a state court, pursuant to Sec. 1055 ZPO, it has *res judicata* effect.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

German courts typically take a narrow view of the concept of public policy (*ordre public*), and understand it to comprise only the fundamental principles of the German legal order. A mere violation of German mandatory legal provision in itself does not constitute, *per se*, a violation of public policy, nor does the wrong interpretation of such provisions by the arbitral tribunal.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitration proceedings in Germany are not automatically confidential, for lack of a statutory provision to that effect. Parties must always agree explicitly on confidentiality, be it in the arbitration agreement, or be it by incorporating arbitration rules that provide for, as the DIS Rules do, confidentiality of the proceedings.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The law is unclear on this issue. Some commentators argue that arbitral proceedings are to be treated as confidential even in the absence of an express agreement. However, there is no case law to that effect, and parties are advised to explicitly agree on confidentiality, if they want to avoid information disclosed in arbitral proceedings to be used outside these proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

From a German law perspective, the types of remedies are not a matter of the applicable arbitration law, but a matter for the applicable substantive law to determine. If the underlying governing law permits punitive damages, an arbitral tribunal would be free, in principle, to grant punitive damages in an arbitral award. However, there are certain limits: an award for punitive damages may not be capable of recognition and enforcement in Germany, as this type of remedy is deemed to be in violation of public policy (*ordre public*).

13.2 What, if any, interest is available, and how is the rate of interest determined?

Under German law, interest is a matter for the substantive law to determine. If German substantive law applies, the BGB stipulates a default rate of interest. In commercial transactions, the rate would be nine percentage points above the base rate of the European Central Bank, and in other transactions, five percentage points above the base rate (Sec. 288 BGB). This provision applies to default interest. Sec. 291 BGB, which provides for interest during the period a claim is pending, does not apply in arbitral proceedings, but only in state court proceedings.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Sec. 1057 (1) ZPO grants arbitral tribunals the power to issue a decision on costs. The tribunal has wide discretion to allocate costs taking into account the circumstances of the case at hand, including, but not limited to, the degree to which a party succeeded in the proceedings. Tribunals typically follow the loser pays principle. Legal fees can be recovered in a time-spent basis. The recovery is not limited, unlike in state court proceedings, to fees calculated in accordance with the statutory legal fees under the Lawyers Remuneration Act (*Rechtsanwaltsvergütungsgesetz*, RVG).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award does not *per se* trigger any taxes under German law. Whether payments made to a party under an arbitral award are taxable is exclusively a matter for the applicable tax law to decide.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no restrictions on third-party funding under German law. Parties have access to a wide range of professional funders, both in litigation and arbitration. Lawyers may not be able to fund actions they are bringing themselves, as they would violate the prohibition against contingency fees and *quota litis*. Contingency fees are allowed only in very narrow circumstances and, essentially, a party would need to show that without a contingency fee arrangement it would not have access to justice. Since there is an active third-party funding market, this will be very hard to demonstrate.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Germany signed the Convention in 1966 and ratified it in 1969.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Germany pioneered BITs; the 1959 treaty between Germany and Pakistan was the first of its kind. Until today, Germany has concluded 155 BITs, of which 132 are still in force. These include, however, BITs with other EU Member States, the validity of which is in doubt, following the ECJ's *Achmea* decision of 6 March 2018. In addition, Germany is a party to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Germany's BITs are based on a model BIT, and the majority of BITs in force contain provisions that are largely identical to the model BIT. Germany's BITs do not contain unusual language that would deviate from international standards used in investment treaties.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The jurisprudence of the German courts distinguishes between acts of state (*acta iure imperii*) on the one hand, for which a state enjoys immunity and commercial acts of state on the other hand (*acta iure gestionis*), for which there is no protection. If a state has entered into an arbitration agreement, such state is deemed to have also submitted to the jurisdiction of the competent courts for court proceedings arising out of such arbitration. However, this is not construed as such a state also waiving its immunity when it comes to the actual enforcement of the award. When it comes to execution, the same test is supplied as for the immunity of jurisdiction; if assets serve sovereign purposes of this state, they are immune from execution. All other assets may be the object of enforcement.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The Federal Ministry of Justice in 2017 has established a working group that looks at the need to reform the 10th book of the ZPO; in particular, in light of the modernisation of the UNCITRAL Model Law. This work is ongoing.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

As of March 2018, new rules of the German Institution for Arbitration (DIS), Germany's leading arbitral institution, came into force, replacing the 1998 Rules. The new rules constitute a major modernisation which can be allocated to three main objectives: firstly, the procedures should be faster; secondly, more efficient and cost-effective; and thirdly, more transparent. To this end, the arbitral tribunal will be relieved of both administrative tasks and decisions concerning the tribunal itself. To speed up proceedings, time limits for arbitrator appointments and filings have been shortened significantly. To assist in enhancing efficiency, the arbitral tribunal must hold a case management conference within 21 days and discuss not only the timetable with the parties but also a catalogue of measures to optimise efficiency and costs.

It is also new that in proceedings with parties of different nationalities, the sole arbitrator or, in the case of an arbitral tribunal, the chairperson must have a different nationality from the parties if appointed by the DIS.

The DIS will play a more active role in running the arbitration. Under the old rules, for example, the arbitral tribunal itself decided on a challenge against an arbitrator. The decision now rests with the newly created Arbitration Council, an independent body. The Council is also responsible for requests to remove an arbitrator from office and has the power to adjust the fees of the arbitral tribunal if an arbitration ends without an award or by settlement. At the request of the parties, the Council shall also review the determination of the amount in dispute by the arbitral tribunal, as it forms the basis on which the fees for the arbitrators are determined. Last but not least, it may reduce the arbitrators' fees if they have not brought the proceedings to a conclusion swiftly enough.

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Taylor Wessing's lawyers are based in 33 locations across 20 countries and provide practical advice on all issues of international and national business law. Our German team specialising in arbitration consists of 11 attorneys at office locations in Dusseldorf, Munich, Hamburg, Berlin and Frankfurt. We have decades of experience in arbitrational proceedings worldwide, be it on behalf of German companies doing business abroad or foreign enterprises doing business in Germany. We assist larger medium-sized industrial firms, major conglomerates and affluent private individuals. Such experience does not only provide us with a lot of practical legal expertise, but also with technical knowledge throughout different industries. Since we have over 1,200 lawyers in Europe, the Middle East and Asia, clients can also tap into seamless and customised legal advisory, no matter where in the world they happen to be.

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Ireland

Nicola Dunleavy

Gearóid Carey

Matheson

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The Arbitration Act 2010, which applies to arbitrations commenced in Ireland from 8 June 2010, applies Option 1 of Article 7 of the UNCITRAL Model Law to the requirements of an arbitration agreement. It provides that the arbitration agreement shall be in writing, whether in the form of an arbitration clause in a contract or in the form of a separate agreement. The concept of the agreement being in written form is broadly interpreted. 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 by other means. Electronic communications can satisfy the requirement that the arbitration agreement be in writing if useable for subsequent reference. An arbitration agreement will also be considered to be in writing if it is contained in an exchange of a claim and defence in which the existence of an agreement is alleged and not denied.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Various matters which facilitate the progress of the dispute before the arbitrator should be included in the arbitration agreement. To avoid delays and other difficulties after the dispute arises, it is often best to have a reasonably detailed arbitration agreement in place before any dispute.

The parties should consider making provisions for setting the number of arbitrators (the Arbitration Act 2010 sets one arbitrator as the default number), their qualification(s) and other criteria relevant to their appointment, as well as how they are to be chosen. The agreement should also set out a default mechanism if the parties cannot agree on the arbitrator, such as referring the question of who is to be appointed to a relevant professional body. Equally, the parties should consider whether they wish to make provisions for a replacement arbitrator if the appointed arbitrator cannot continue, for whatever reason. They should also consider whether they wish to make express provisions to adopt particular procedures or rules regarding the conduct of the arbitral proceedings.

In addition, they might consider whether to give the High Court jurisdiction in respect of security for costs and discovery (which are otherwise excluded from the High Court's jurisdiction under Section 10(2) of the Arbitration Act 2010). The arbitration agreement might also specifically address the question of interest and costs, although there are default positions set out in the Arbitration Act 2010. A statement as to the venue for any arbitration and the language in which it is to be conducted is helpful.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Historically, Irish courts have been very supportive of arbitration and this approach is continuing under the Arbitration Act 2010. Indeed, under the Arbitration Act 2010, the possibility of appeal is limited, which is indicative of the legislative support for arbitration. The Irish courts have displayed a strong policy of staying court proceedings in favour of agreements to arbitrate. Article 8 of the Model Law sets out the relevant principles that are applied in Irish law. If an action is brought before the court in a matter which is the subject of an arbitration agreement, the court shall refer the parties to arbitration if a party so requests, unless the court finds that the agreement is null and void, inoperative or incapable of being performed. A party seeking a stay of court proceedings and a referral of the dispute to arbitration must act without delay and, in any event, not later than when submitting his first statement on the substance of the dispute.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act 2010 applies to all arbitrations commenced after 8 June 2010 and it applies the UNCITRAL Model Law. The Arbitration Act 2010 itself entered into force as from 8 June 2010. It also applies to the enforcement of arbitration proceedings where the arbitration commenced after that date.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Arbitration Act 2010 applies to both domestic and international arbitrations.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the law governing international arbitration is based on the

UNCITRAL Model Law. The Arbitration Act 2010 adopts the UNCITRAL Model Law, as amended in 2006. The UNCITRAL Model Law is reproduced in its entirety as a schedule to the Act. Section 6 of the Arbitration Act 2010 provides that, subject to the provisions of that Act, "the Model Law shall have the force of law in the State". The Act clarifies the functions of the High Court, the court's powers in support of arbitration proceedings, the tribunal's powers in relation to the examination of witnesses, consolidation of arbitral proceedings and the holding of concurrent hearings, awards of interest, and costs, as well as the question of provision of security for costs.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The Arbitration Act 2010 (and, through it, the UNCITRAL Model Law) is applicable to all arbitrations commenced in Ireland on or after 8 June 2010.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

As a general principle, unwritten arbitration agreements do not fall within the scope of the Arbitration Act 2010. More specifically, Section 30 of the Act clarifies that the Act does not apply to disputes regarding the terms and conditions of employment or the remuneration of employees, or to arbitrations conducted under Section 70 of the Industrial Relations Act 1946. The Arbitration Act 2010 also does not apply to arbitrations conducted by a property arbitrator appointed under Section 2 of the Property Values (Arbitration and Appeals) Act 1960. Under the Arbitration Act 2010, consumer disputes, where the arbitration clauses are not individually negotiated and which are worth less than €5,000, are only arbitrable at the election of the consumer.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. Article 16 of the Model Law governs the situation and provides that the "arbitral tribunal may rule on its own jurisdiction", which includes any questions regarding the existence or validity of the arbitration agreement. Any assertion that the tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence. A plea that the tribunal is exceeding the scope of its authority should be raised as soon as the matter arises in the proceedings. The Arbitration Act 2010 designates the High Court as the relevant court for the purposes of Article 16(3) and any subsequent challenge to a tribunal's determination on jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

As set out above at question 1.3, the Irish courts are supportive of agreements to arbitrate. Where an arbitration agreement exists, the courts are obliged under Article 8 of the Model Law to refer the parties to arbitration, if an application by a party is brought no later than submitting the first statement on the substance of the dispute and provided that the written arbitration agreement is not null and void, inoperative or incapable of being performed. No appeal is permitted in respect of a decision of the High Court under Article 8.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

In relation to jurisdiction, see question 3.2 above.

Article 14 of the Model Law provides that if an arbitrator becomes *de facto* or *de jure* unable to perform his functions, or for other reasons fails to act without undue delay, his mandate terminates if he withdraws or the parties agree upon termination. However, if a controversy remains, the High Court may decide upon the termination of the mandate. Equally, Article 12 of the Model Law provides that an arbitrator may be challenged if circumstances exist that give rise to doubts as to his impartiality, independence, or if he does not possess the qualifications agreed upon by the parties. That latter issue, in particular, could touch upon issues of competence. If the challenging party does not agree with the tribunal's decision in respect of the challenge, the High Court can be asked to decide under Article 13.

There is no Irish case law in respect of the standard to be applied by the tribunal in considering such a challenge. However, although there is no definitive statement, there is authority in respect of the standard of review which the High Court is to adopt when it is faced with deciding upon the existence of an arbitration agreement under Article 8. In such cases, it appears that the court should reach its decision based on a full consideration of the position on hearing both sides. For a tribunal considering its jurisdiction, it would be prudent to adopt the same standard and not the alternative *prima facie* basis in taking the applicant's case at its highest and assuming that all evidence is true.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

None at all. The tribunal cannot exercise any jurisdiction over a party who is not a party to the arbitration agreement. Moreover, the tribunal cannot order the consolidation of arbitral proceedings or concurrent hearings unless the parties agree (Section 16, Arbitration Act 2010). The courts cannot give a tribunal jurisdiction over individuals or entities that are not a party to an arbitration agreement. However, pursuant to Section 32 of the Arbitration Act 2010, the courts can adjourn court proceedings to facilitate arbitration if it thinks it appropriate to do so and the parties consent.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Statute of Limitations Act 1957 (as amended) applies to arbitration in the same way as it applies to actions taken in the courts. Therefore, the limitation periods for the commencement of arbitrations are those limitation periods applicable to causes of action in the courts. The applicable limitation period will depend on the particular cause of action in law which is the subject matter of the dispute. As a general principle, the limitation period for contractual claims is six years from the date of commencement or

accrual of the cause of action. Section 7 of the Arbitration Act 2010 clarifies when arbitral proceedings are deemed to have commenced, amending the Irish Statute of Limitations. It should be noted that, unlike a court (which views these rules as procedural), an arbitral tribunal does not have any power to extend the limitation periods laid down by the Statute of Limitations. In such circumstances, any limitation issue falls to be determined by the law governing the underlying dispute. However, under Irish law, should that apply to the underlying dispute, the parties may, by agreement, circumscribe and foreshorten the limitation periods applicable to their dispute. Accordingly, the arbitration agreement itself may impose a limitation period for the commencement of arbitration.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Section 27 of the Arbitration Act 2010 provides that where an arbitration agreement forms part of a contract to which a bankrupt is a party, the agreement shall be enforceable by or against him if the assignee or trustee in bankruptcy does not disclaim the contract.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Generally, and in the first instance, the law applicable to the substance of the dispute is determined by reference to the choice of law governing the agreement. If there is no express choice of law, the arbitrator may determine the governing law by reference to applicable international standards (such as the Regulation 593/2008/EC on the Law Applicable to Contractual Obligations – the "Rome I Regulation").

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

As a general principle, none, save that certain provisions of local law will be mandatory in terms of the existence or otherwise of a binding arbitration clause, and the conduct of the arbitration itself. However, the principal difficulty that might arise is where the agreement between the parties, in respect of which the dispute arises, may be said to be contrary to the public policy of the seat of the arbitration (for example, if the subject matter involves fraud or corruption).

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

If the arbitration is being conducted in Ireland under the Arbitration Act 2010, Irish law governs the formation, validity and legality of arbitration agreements to the extent set out in that Act.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are no limits on the parties' autonomy to select arbitrators or the criteria for selection. The parties are also free to agree upon the number of arbitrators to form the tribunal. Given that agreement upon the arbitrator(s) can be difficult to reach, many agreements provide for a default mechanism, which typically involves an application by either party to the president of a named professional body requesting that he or she appoint an arbitrator. If the parties make no choice as to the number of arbitrators or mechanism of appointment, the default position is a tribunal of one arbitrator, with that arbitrator to be appointed by the High Court.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In the absence of agreement on appointment or an alternative default mechanism, the Arbitration Act 2010 provides that the default number of arbitrators shall be one and Article 11 of the Model Law, when read with the Arbitration Act 2010, provides that the High Court is the default appointing authority.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The courts cannot intervene in the selection of arbitrators, save under Article 11 in circumstances where the parties cannot agree upon an arbitrator and do not provide for an alternative default mechanism in their agreement. The High Court can also determine whether an arbitrator may continue to act where a challenge is brought under Articles 13 or 14 of the Model Law.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Article 12 of the Model Law 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 arbitral proceedings.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Article 19 of the Model Law confirms that the parties are entitled to set their own procedure and, failing agreement on that, it is for the tribunal to conduct the arbitration in such manner as it considers appropriate. However, pursuant to Article 18, there is a requirement that the parties be treated equally and each party is to be given a full opportunity to present their case. More generally, Chapter V of the Model Law sets out the basic principles regarding the conduct of arbitration proceedings in general terms.

In general, it will be for the parties to determine the procedure they want adopted, particularly through the adoption in the arbitration agreement of specific institutional or trade association rules. However, if no rules are chosen and the parties cannot subsequently agree upon how the procedure is to be conducted, the tribunal can set

the procedure, which will generally be done at a preliminary meeting between the parties and the tribunal, following which the tribunal will issue an order for directions. Article 24 of the Model Law 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 other materials.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

No, save that, as a basic principle, the tribunal is required to conduct the proceedings in a manner which treats each side equally and in accordance with the basic principles of natural justice, that both parties should be heard and that the tribunal should not be biased. As set out above in question 6.1, Chapter V of the Model Law sets out, in general terms, the basic principles regarding the conduct of arbitration proceedings. Very often the conduct of the hearing will depend on the nature and size of the dispute and the approach of the tribunal.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

None, save that Irish qualified legal practitioners (whether barristers or solicitors) would be expected to abide by their relevant professional conduct obligations. These rules or obligations would not be applicable to practitioners not holding an Irish legal qualification, but it would be expected that their own rules of professional conduct would be applicable to them.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators are expected to treat both parties equally, with impartiality, and to give each side the opportunity to put forward their case. Article 18 of the Model Law sets out that obligation in express terms. Pursuant to Article 12, arbitrators are also obliged, at the outset and on a continuing basis, to disclose any circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence.

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 tribunal may also: order the consolidation of arbitral proceedings or concurrent hearings; award interest; order security for costs; require specific performance of a contract (save in respect of land); and determine costs. The arbitrator is also expected to render a reasoned award in writing.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are restrictions with regard to lawyers not admitted in Ireland representing clients before the Irish courts. However, it is clear that these restrictions do not apply in relation to lawyers from other jurisdictions representing clients in arbitration proceedings in Ireland.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Section 22 of the Arbitration Act 2010 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, and appointing authorities are similarly immune arising from anything done or not done by an arbitrator. It should be noted that the immunity conferred by Section 22 is general and sweeping in nature and is not qualified by reference to any 'bad faith' proviso.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes. Pursuant to Section 10 of the Arbitration Act 2010, the High Court has the power to deal with procedural issues under Articles 9 and 27 of the Model Law. Accordingly, it can grant interim measures of protection (Article 9) and it can assist in the taking of evidence (Article 27). However, without the agreement of the parties, it cannot make any order for security for costs or for discovery of documents.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Article 17 of the Model Law provides that, unless otherwise agreed by the parties, and upon the application of one of the parties, the arbitral tribunal has the power to order interim measures of protection as may be considered necessary and to make preliminary orders. The tribunal can order a party to:

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

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

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

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

Accordingly, the arbitrator does not need to seek the assistance of the court. However, Article 9, in combination with Section 10 of the Arbitration Act 2010, provides that, before or during arbitral proceedings, a party may itself also request from the Irish High Court an interim measure of protection. This can be important where a party subject to the order is not a party to the arbitration agreement such that the tribunal has no jurisdiction over that party.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Pursuant to Section 10 of the Arbitration Act 2010, a party may seek

an interim measure of protection from the High Court under Article 9 of the Model Law before or during the arbitral proceedings. The powers of the High Court can be more important than those available to the tribunal, particularly where the arbitration has not yet commenced or where the tribunal has yet to be constituted, or where a party fears non-compliance with an interim measure that might be ordered by the arbitrator (such as where that party is not a party to the arbitration agreement and not subject to the tribunal's jurisdiction). However, an application to the High Court for such purpose would not prejudice the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In practice, applications to the High Court for interim relief in the context of arbitration proceedings are rare. However, the High Court is empowered to grant same and, if the facts of the case warrant it, will grant same.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

There is no Irish case law on anti-suit injunctions in aid of arbitration. However, based on EU law authority, it would seem that the possibility of seeking an anti-suit injunction only exists in respect of proceedings in a jurisdiction outside the EU. Where Irish court proceedings are involved and an arbitration agreement exists, rather than seeking an anti-suit injunction, a party may bring an application under Article 8 of the Model Law effectively to stay any Irish court proceedings.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Pursuant to Section 10 of the Arbitration Act 2010, the High Court shall not make any order for security for costs unless otherwise agreed by the parties.

For the arbitral tribunal, Section 19 of the Arbitration Act 2010 provides that unless agreed otherwise by the parties, the tribunal may order a party to provide security for the costs of the arbitration. However, qualifications with regard to the bases upon which such security might be ordered by a tribunal are set out at Section 19(2) of that Act. In particular, a tribunal 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.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The enforcement before the Irish courts of preliminary relief and interim measures ordered by arbitral tribunals – whether in Ireland or in other jurisdictions – is rare and there is no body of case law to which reference can be made. However, the Irish courts are supportive of arbitration and it is likely that preliminary relief or interim measures ordered by a tribunal by means of an award would be enforced. It is difficult to conceive that an Irish court would not enforce any interim measure of protection or preliminary order which is otherwise permissible under Article 17 of the Model Law (as addressed above in question 7.1).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Under Article 19 of the Model Law, in the absence of an agreement by the parties regarding the procedure to be followed in conducting the arbitral proceedings, it is for the tribunal to conduct the arbitration in such a manner as it considers appropriate and the arbitral tribunal is empowered to determine the admissibility, relevance and weight of any evidence.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Chapter V of the Model Law sets out the basic principles regarding the conduct of international arbitration proceedings, but has no specific provision regarding discovery/disclosure. In the absence of agreement by the parties, Article 19(2) provides that the tribunal may conduct the arbitration as it sees fit. Article 25 of the Model Law provides, *inter alia*, that unless otherwise agreed by the parties, if a party defaults and fails to produce documentary evidence, the tribunal may continue the proceedings and make its award on the evidence before it. As set out previously, an arbitral tribunal has no jurisdiction over a third party, whether to make disclosure or otherwise.

The tribunal has no direct power to compel attendance by witnesses although, as detailed at question 8.3 below, it is empowered to invoke the assistance of the national court in the taking of evidence. This, however, is rare and it is usually reserved for third-party witnesses. It is generally the case that it is for the party on whose behalf any particular witness is to attend to ensure that they do so.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Article 27 of the Model Law empowers the tribunal (or a party, with the approval of the tribunal) to request assistance from the court in the taking of evidence. Such court assistance can be very important in respect of potential third-party discovery or third-party witnesses. However, by Section 10(2) of the Arbitration Act 2010, the High Court is not empowered to make any order for discovery of documents unless otherwise agreed by the parties.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

In the absence of an agreement by the parties, Article 19(2) provides that the tribunal may conduct the arbitration as it sees fit and the production of (witness) evidence will therefore be subject to the tribunal's wishes. Moreover, Article 24 of the Model Law 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 other materials.

Where witnesses are to be called, Section 14 of the Arbitration Act 2010 provides that the tribunal may direct that a party or witness be

examined under oath and the tribunal is empowered to administer the oath. Whilst there is no express provision in the Arbitration Act 2010, it would be expected that witnesses before arbitral tribunals would have the same rights and privileges as witnesses in proceedings before the Irish courts.

Where arbitral proceedings involve witness evidence, it would be usual for them to be subject to cross-examination on their evidence in chief, or witness statement, as the case may be. Indeed, the ability to cross-examine a witness accords with Irish constitutional norms as to natural justice and fair procedures.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Documents will be privileged, and therefore exempt from production, if they can be said to fall into a recognised category of privilege. The most common privilege arising in the context of an arbitration will be legal professional privilege, which covers documents prepared in contemplation of or in relation to legal proceedings (often known as litigation privilege) and documents prepared for the purpose of giving or obtaining legal advice (often known as legal advice privilege). Generally, communications between a party and its lawyers, whether external or in-house counsel, will attract privilege if they are for the dominant purpose of receiving or requesting legal advice or relate to legal proceedings, whether in being or in contemplation. The exception, from the *Azko Nobel v. European Commission* case, arises in respect of in-house legal counsel who cannot claim legal professional privilege protection when under investigation by the European Commission in competition proceedings. Correspondence aimed at settlement or reducing issues in dispute which is expressed to be, or can properly be characterised as, "without prejudice" communications, is also exempt from production, subject to limited exceptions. In general terms, privilege in documents may be waived by the party who prepared the document or the party for whom it was prepared. Privilege will be waived where privileged documents are made available.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The legal requirements for an arbitral award are set out in Article 31 of the Model Law, which 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) and 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 Arbitration Act 2010, which are detailed in question 13.3 below. There is no obligation that the award be signed on every page by the arbitrators.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Article 33 of the Model Law sets out the powers of the arbitral tribunal to clarify, correct or amend an arbitral award.

Within 30 days of receipt of the award (unless another time period has been agreed), a party may: (i) with notice to the other party, request the tribunal to correct any computational, clerical, typographical or similar errors in the award; or (ii) if agreed by the parties, and with notice to the other party, request the tribunal to give an interpretation of a specific point or part of the award. If the tribunal considers the request justified, it shall make the correction or interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.

The tribunal may correct any computational, clerical, typographical or similar errors in the award on its own initiative within 30 days of the date of the award.

Unless otherwise agreed by the parties, a party may, with notice to the other party, request the tribunal within 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 tribunal considers the request to be justified, it shall make the additional award within 60 days.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

There is no appeal against an arbitral award under the Arbitration Act 2010.

However, there are limited grounds upon which recourse may be had against an award such that it might be challenged and set aside. These grounds are set out at Article 34 of the Model Law (which mirror the grounds on which recognition and enforcement might be refused as per Article 36 of the UNCITRAL Model Law, which itself mirrors Article V of the New York Convention) and require that:

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

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of 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 of the dispute 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 application to set aside the award must be made within three months of receipt by the applying party of the award.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

With regard to limiting the scope of challenge by agreement of the parties, the question has not been addressed by the Irish courts. In general terms, the parties should be free to limit the scope of challenge so long as it is properly based on agreement and the specific exclusion is not contrary to public policy.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties cannot agree to expand the grounds provided for by the relevant legislation.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

As set out in question 10.1 above, there is no appeal of arbitral awards as such and, therefore, no appeal procedure.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Ireland ratified the New York Convention in 1981 and no reservations have been entered. The relevant legislation is now the Arbitration Act 2010.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not signed or ratified any such regional Conventions.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The Irish courts have shown a supportive approach to the enforcement of arbitral awards. Unless there is reason to deny enforcement (the grounds for which are set out at Article 36 of the Model Law and mirror the grounds for recourse against an award set out in Article 34), enforcement is generally not problematic. The High Court has recently (*Yukos Capital SARL v. OAO Tomskneft VNK* – in which the authors acted for the successful respondent) held that the Court would not exercise jurisdiction over an application for enforcement of an arbitral award, where the parties, the arbitration and the performance of the underlying contract had no connection with Ireland, and the party against whom enforcement was sought had no assets in Ireland and no real likelihood of having assets in Ireland. In that case, the Court held that there was little to demonstrate any "solid practical benefit" to be gained by the applicant for enforcement, noting that enforcement proceedings already existed in the courts of France and of Singapore. In unrelated proceedings, the Court of Appeal has recently confirmed that this test applies where one is dealing with the enforcement of a foreign (i.e. non-EU/non-EFTA) judgment. This finding lends support to the application of this test in respect of the enforcement of arbitral awards.

Section 23(1) of the Arbitration Act 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 with the same effect. The Arbitration Act 2010 expressly excludes any possibility of an appeal in relation to the recognition and enforcement of an arbitral award.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Given that arbitral awards are "binding" on the parties (see Section 23(2) of the Arbitration Act 2010) and that there is no possibility of appeal, awards cannot be re-opened (although there are limited grounds for recourse under Article 34 of the Model Law). However, in circumstances where there may be some overlap between the issues considered in an arbitral award and separate proceedings, it would be for the subsequent tribunal or court to satisfy itself that, in determining its own issues, it would not be trespassing on a properly made award of which it had notice.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The leading Irish authority on public policy in the context of enforcement of arbitral awards confirms that the public policy relevant to enforcement actions brought 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. In order to be contrary to Irish public policy, such as to warrant refusal of enforcement, the standard is that there must be "some element of illegality, or possibility that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public". The public policy exception is therefore narrowly interpreted under Irish law.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

There is no express statutory provision in the Arbitration Act 2010 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 persuasive as a matter of Irish law to the effect that arbitration proceedings customarily remain confidential. There is also often an express provision in the arbitration agreement itself. The proceedings may not be subject to confidentiality if the parties agree to proceed on that basis, although this would be very unusual. Having said that, court applications related to arbitral proceedings are heard in open court and not *in camera*. The interaction of a general principle of confidentiality with the Irish constitutional imperative of justice being administered in public has yet to be challenged, so the position under Irish law cannot be definitely stated.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes. A party is not expressly prohibited from seeking to rely upon information disclosed in arbitration proceedings in subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Clearly, the remedies available to a tribunal will be circumscribed by the remedies permitted by the law applicable to the dispute. Subject to that, a tribunal subject to the Arbitration Act 2010 may determine and award damages as an Irish court would and would have at its disposal the full range of common law and equitable remedies, including, unless the parties agree otherwise, the award of specific performance (other than a contract for the sale of land). The availability of punitive or exemplary damages is recognised under Irish law, but such awards are limited to tortious claims in exceptional cases to mark the court's disapproval of outrageous conduct on the part of a defendant. Much of that case law relates to the tortious conduct of employees of the State in performing their duties, sometimes also involving alleged breaches of constitutional rights, which disputes are unlikely to be arbitrated since given their exceptional nature, are unlikely to fall within any arbitration agreement, even if one exists. Save for very exceptional cases, therefore, it is unlikely that, as a matter of Irish law, a tribunal would be faced with a circumstance where it could legitimately award such damages.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Section 18(1) of the Arbitration Act 2010 states that the parties to an arbitration agreement may agree on the tribunal's powers regarding the award of interest. In the event the parties do not agree this, Section 18(2) permits the tribunal to award simple or compound interest from the dates agreed, at the rates that it considers as fair and reasonable. It can determine such interest to be payable on all or part of the award to the date of the award, or on all amounts claimed in the arbitration, but actually paid over before the award to the date of payment. It can also determine such interest to be payable on the sums due under the award from the date of the award to the date of payment. Accordingly, if there is no prior agreement on the tribunal's powers with regard to interest, the tribunal has substantial discretion regarding interest. In practice, the prevailing commercial rate would often be applied.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Section 21(1) of the Arbitration Act 2010 provides that, subject to an exception for consumers (Section 21(6) of the Arbitration Act 2010), the parties may make such provision with regard to the costs of the arbitration as they see fit. Therefore, they may agree even prior to any dispute how the costs of the arbitration will be dealt with, potentially removing all power to determine this from the tribunal.

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. 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. The general principle in respect of costs for domestic arbitrations is that costs follow the event and the loser pays, although for international arbitrations conducted in Ireland, parties often bear their own costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The nature of the damages can be dependent upon the governing law of the dispute, but, under Irish law, it will depend on what any damages relate to. For example, if the damages relate to work carried out, services rendered or goods supplied, such that the damages are effectively income or remuneration that would otherwise have been received, to that extent, the award may be taxable. It is recommended that specific tax advice be sought in all cases.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

A Supreme Court decision has confirmed that Irish law still retains the common law principles of maintenance and champerty, which generally preclude those with no legitimate interest in proceedings taking part in the proceedings or obtaining any benefit therefrom. Therefore, professional litigation funders are not active in the Irish legal market, although "after the event" insurance is permissible and is marketed in Ireland. However, contingency fees are, subject to limits and rules on methods of calculation, permissible under Irish law. Success fees and fee arrangements involving payment contingent on success are permitted.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Ireland signed the Washington (ICSID) Convention in 1966. Ireland ratified the Washington Convention in 1981.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Although Ireland is a party to the Energy Charter Treaty, it has only ever been a party to one bilateral investment treaty (with the Czech Republic).

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

No, it does not.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

This question has not been addressed by the Irish courts.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

In Ireland, some of the most common types of significant disputes referred to arbitration are those arising under construction contracts. M&A sale and purchase agreements and Irish public sector agreements also sometimes provide for arbitration as the dispute resolution mechanism and significant disputes can arise. Arbitration is also commonly used for certain types of dispute, e.g. holiday disputes, which are generally worth far less. However, Section 31 of the Arbitration Act 2010 provides that a consumer shall not be bound by an arbitration agreement where the arbitration agreement has not been individually negotiated and where the claim is for less than €5,000. In addition, enforcement of awards has become more straightforward, as there is no appeal and the grounds for recourse against an award are very limited.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Although Irish arbitration bodies (generally industry bodies) have not adopted any recent steps to address current issues such as time and costs, they are conscious of such issues. These bodies endeavour, wherever possible, to streamline arbitration procedures to permit expeditious arbitral proceedings and they are also active in seeking to make the arbitral process as cost-effective as possible.

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Nicola is an Associate of the Irish Taxation Institute and an Associate of the Chartered Institute of Arbitrators. She is a frequent speaker at conferences and workshops in relation to regulatory enforcement and multinational and public sector arbitration and litigation. She has co-authored contributions to a number of publications including *The International Comparative Guide to: International Arbitration 2011–2017*. Nicola is a Member of Council of the Law Society of Ireland.

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He has also published numerous articles in legal journals, principally focusing on issues of substantive contract law, as well as civil practice and procedure issues, including mediation and arbitration. He has co-authored numerous chapters in arbitration texts, including the Ireland chapter of the *ICCA Handbook* and *The International Comparative Guide to: International Arbitration 2007–2017*. Gearóid is also the Irish correspondent for the International Law Office (ILO) litigation newsletter and co-author of *The International Comparative Guide to: Enforcement of Foreign Judgments 2016–2018*. He is also a Member of the Chartered Institute of Arbitrators and a member of the Irish Society of Insolvency Practitioners and the Dublin Solicitors Bar Association (in respect of which he is a member of the Commercial Law Committee).

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Matheson

Established in 1825 in Dublin, Ireland and with international offices in London, New York, Palo Alto and San Francisco, more than 670 people work across Matheson's five offices, including 86 partners and tax principals and over 440 legal and tax professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Our clients include over half of the world's 50 largest banks, 7 of the world's 10 largest asset managers, 7 of the top 10 global technology brands, and we have advised the majority of the Fortune 100.

Italy

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Arbitration agreements are set out by Sections 807, 808 and 808-*bis* of the Code of Civil Procedure (**CCP**), which govern, respectively, (i) arbitration agreements entered into after a dispute has arisen, (ii) arbitration clauses included in the main contract, and (iii) arbitration agreements in non-contractual matters.

All three provisions require the relevant agreements to be in writing and to set out the subject matter of the dispute.

If the above requirements are not met, the arbitration agreement will be void and not enforceable.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Pursuant to Section 809 of the CCP, the arbitration agreement should also include the appointment of the arbitrators or, at least, the relevant number and the appointment procedure.

If the parties do not indicate the number of the arbitrators or do not proceed with appointing them, the President of the court where the arbitration has its seat shall have the power to appoint the arbitrators, further to an application by one of the parties (Section 810 of the CCP). For further details, see below under section 5.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

In general, the approach is positive, considering that arbitral tribunals are the only ones which can rule on their own competence and that national courts rarely uphold challenges against arbitral awards.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Sections 806 to 840 of the CCP govern arbitration proceedings. In particular, Section 825 of the CCP governs enforcement of Italian awards, while Section 839 and 840 of the CCP govern enforcement of foreign awards in Italy.

Additional rules on particular types of arbitration proceedings are set out in other Acts, e.g.:

(i) Articles 34 and 35 of the Legislative Decree no. 5 of 2003 regulate proceedings established under arbitration clauses included in the companies' bylaws; and

(ii) Articles 210 and 211 of the Legislative Decree no. 50 of 2016 regulate arbitration proceedings for public contracts.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes, the same rules under question 2.1 above (Sections 806 to 840 of the CCP) apply also in relation to international arbitration proceedings, i.e. to proceedings where the parties have different nationalities or are domiciled in different countries, provided that the seat of the arbitration is in Italy.

In addition, in 1969 Italy ratified the New York Convention and thus provides enforcement to arbitration awards made in other contracting States.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Italy has not adopted the UNCITRAL Model Law on International Commercial Arbitration.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

All the provisions set out by the CCP in relation to arbitration are mandatory.

However, Section 816-*bis* of the CCP sets out that the parties are free to determine the procedure applicable to arbitrations, as well as its language, provided that the due process principle is respected. In addition, the parties may also opt for an institutional arbitration (instead of an *ad hoc* one) and thus rely on the rules set out by the relevant institution as per Section 832 of the CPC.

The most prominent arbitration institution in Italy is the Milan Chamber of Arbitration, which is run by the Milan Chamber of Commerce.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Section 806 of the CCP sets out the subject matters which are not capable of arbitration:

(i) disputes which refer to subject matters upon which the parties to the dispute may not enter into an agreement upon (so-called "*diritti indisponibili*"); for instance, matters on status and family law; and

(ii) disputes which cannot be arbitrated under specific laws. In this respect, for instance, employment disputes can be arbitrated only if the arbitration agreement is included in the contract or in the collective agreement.

In addition, under Section 818 of the CCP arbitrators cannot issue interim or precautionary measures (also see section 7 below).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Under Section 817 of the CCP, the arbitral tribunal is the only body permitted to rule on the validity, content and scope of the arbitration agreement if these are challenged during the arbitration proceedings.

However, the defendants need to raise the above objections in their first defence after the acceptance of the arbitrators; if they fail to do so, they will not able to challenge the award based on these reasons, unless the matter was not capable of being arbitrated.

The tribunal will thus rule through either a final (if the objection is accepted) or non-final (if the objection is rejected) award.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The lack of jurisdiction of national courts in case of an arbitration agreement cannot be raised or ascertained *ex officio* by the courts. Indeed, under Section 38 of the CCP, the relevant objection lies upon the defendant, who shall raise it in his/her first defence, filed at least 20 days in advance of the first hearing of the case. If the objection is not raised, the national court maintains its jurisdiction and the relevant decisions cannot be appealed based on such lack of jurisdiction.

If, instead, the objection is raised and accepted by the court, the parties will have to resume the proceedings before the arbitration tribunal.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Only arbitral tribunals can rule on their jurisdiction and competence, and not national courts, according to the *Kompetenz-Kompetenz* principle.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Arbitration agreements only bind the parties to it. However, there are some circumstances when an arbitral tribunal can assume jurisdiction over third parties:

(i) the voluntary intervention of third parties and the joinder of third parties by one of the parties to the arbitration are admitted only if the parties to the arbitration and arbitral tribunal consent to it (Section 816-*quinquies*, first paragraph, of the CCP); and

(ii) the intervention of third parties who wish to support the claims of the existing parties, as well as the intervention of a necessary party ("*litisconsorte necessario*") under Italian law is always admitted (Section 816-*quinquies*, second paragraph, of the CCP).

In addition, Sections 816-*quinquies*, third paragraph, of the CCP, provides that Section 111 of the CCP shall apply to arbitration proceedings. Thus, in case of assignment of the contract which includes the arbitration agreement, the arbitration can proceed between the original parties; however, the assignee can intervene in the proceedings or be joined to them.

Lastly, under Section 816-*sexies* of the CCP, in case of death or lack of capacity of a party, the arbitral tribunal shall take all possible measures to ensure the continuation of a due process between the proper parties (including by requesting the parties to communicate the existence of the proceedings to the parties who should substitute the dead persons or those who lack capacity). In case the arbitrators' measures are not fulfilled by the parties, the arbitrators may resign.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Typically, the length of such periods is 10 years for contractual claims and five years for tort claims.

The limitation period is interrupted when the party exercises their right (by commencing court or arbitration proceedings or by sending a warning in which a party clearly and unequivocally expresses the will to claim their right) or when the other party acknowledges the claimant's right.

Under Italian law, a limitation objection is a substantive and not a procedural argument: thus, the law applicable to the case also governs the statutes of limitation and relevant objections.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

If bankruptcy procedures are commenced after the commencement of arbitration proceedings, Article 83-*bis* of the Italian Insolvency Act sets out that the arbitration cannot proceed if the contract of the arbitration agreement is terminated either automatically in virtue of the application of the insolvency law rules or by the court-appointed receiver ("*curatore*"). In this case, the proceedings shall continue before the competent national courts.

In case of composition with creditors' procedures ("*concordato preventivo*"), legal authors believe that arbitration proceedings can continue normally and that the award will produce its effects towards the insolvent party.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

If the dispute does not present foreign elements, legal scholars are divided between those who believe that the arbitral tribunal should in any case apply Italian law and those who believe that the parties should be free to choose the law applicable to the dispute (subject to the limits set out below under question 4.2).

If, instead, the dispute presents foreign elements, the law applicable to the substance of the dispute is determined either by the choice of the parties (subject to the limits set out below under question 4.2) or, if there is no such choice, according to Italian private international law rules, set out by Law 31 May 1995, no. 218.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The choice of the parties is limited by Articles 16 and 17 of Law 31 May 1995, no. 218, which state, respectively, that foreign law is applicable only if its effects are not incompatible with Italian public policy (Article 16) and that Italian overriding mandatory provisions shall in any case prevail over the law chosen by the parties (Article 17).

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Pursuant to Section 808, paragraph 2, of the CCP, the validity of the arbitration agreement shall be ascertained autonomously from the validity of the contract in which the arbitration agreement is included.

As to the law applicable to such ascertainment, the principles as per the items above shall apply.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Pursuant to Section 809 of the CCP, the arbitration agreement shall include the appointment of the arbitrators, or in any case, the relevant uneven number and the appointment procedure.

The only limit for the parties is set out by Section 812 of the CCP, under which, persons who lack capacity cannot be appointed arbitrators.

Some individuals, like civil servants, university professors and magistrates (i.e. judges and public prosecutors), need the authorisation of the relevant employer to be appointed arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Sections 809 and 810 of the CCP set out the default procedure for the appointment of the arbitrators.

If the parties have indicated an even number of arbitrators and have not otherwise agreed, a further arbitrator is appointed by the President of the court where the arbitration has its seat, upon an application of the claimant.

If the parties have not agreed upon the number or appointment method of the arbitrators, the arbitrators are three and are appointed by the President of the court where the arbitration has its seat.

Lastly, if the claimant has served a request of arbitration and has appointed an arbitrator, requesting the defendant to do the same, in case the defendant does not proceed to do so within 20 days, the claimant may apply to the President of the court where the arbitration has its seat to request the appointment.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

As stated under question 5.2 above, under Section 810 of the CCP, the President of the court where the arbitration has its seat is competent to intervene in the selection of the arbitrators in certain cases.

If the parties have not yet determined the seat of the arbitration, the application is filed with the President of the court where the parties have entered into the arbitration agreement or, if such place is abroad, with the President of the Court of Rome.

The President of the competent court will proceed only if the arbitration agreement is not manifestly inexistent or it does not manifestly provide that the seat of the arbitration shall be abroad.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Section 815 of the CCP sets out the rules that govern disqualification (or recusal) of the arbitrators, which is based on the similar provision applicable to national judges.

The provision lists six circumstances in which parties may apply to the President of the competent court (see question 5.3 above) within 10 days from the notification of the appointment of the arbitrators or from the knowledge of the grounds for disqualification:

(i) the arbitrator lacks the requirements agreed upon by the parties;

(ii) the arbitrator or their spouse has an interest in the proceedings;

(iii) the arbitrator or their spouse is related, lives with or has close connections with the parties or their lawyers;

(iv) the arbitrator or their spouse have pending proceedings or serious hostility against the parties or their lawyers;

(v) the arbitrator is an employer, employee, consultant or has other financial relationships with the parties (or their holding or subsidiary company) which may undermine their independence, or is a guardian or deputy of one of the parties; and/or

(vi) the arbitrator has acted as consultant, expert, or lawyer of one of the parties in a previous phase of the case or has acted as a witness.

A party cannot apply for the disqualification of the arbitrator they have appointed, unless the grounds for disqualification are known after the appointment.

The Arbitration Rules of the Milan Chamber of Arbitration also set out that, when giving notice of their acceptance, the arbitrators shall submit a statement of independence, in which they must disclose the time and duration of any relationship with the parties which might affect their independence (Article 18).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Pursuant to Section 816-*bis* of the CCP, the parties are free to determine the rules applicable to the procedure of arbitration before the commencement of the latter.

If the parties have not set out the rules, the arbitral tribunal is free to determine the procedural rules in the way they deem opportune.

In any event, the arbitrators must respect the due process principle, by granting the parties reasonable and equal possibilities of defence.

Under Section 832 of the CCP, the parties may also choose an institutional arbitration, so that the rules and the procedure are those of the institution chosen by the parties. The most prominent institution, which runs the largest number of institutional arbitrations in Italy, is the Milan Chamber of Arbitration, which is run by the Milan Chamber of Commerce (a public body).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no specified or mandatory procedural steps; however, as stated under question 6.1 above, the arbitrators must follow the due process principle.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Articles 53 and 54 of the Code of Conduct for Italian lawyers set out that lawyers' relationships with arbitrators shall be based on dignity and mutual respect. In addition, lawyers shall not discuss the proceedings with the arbitrator without the lawyer for the adverse party being present.

The Code of Conduct applies to Italian counsel in Italian arbitrations and also to Italian counsel in arbitrations seated elsewhere; it does not, however, apply to foreign counsel in Italian arbitrations.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitrators have certain powers in relation to evidentiary matters, as set out under question 8.2 below.

The arbitrators also have certain duties, namely to issue the award within the deadline set out by the parties or by Section 820 of the CCP.

If they fail to do so, they are liable for the damages caused by the parties under Section 813-*ter* of the CCP, which sets out different procedures in relation to the wilful or negligent conduct of the arbitrators. The arbitrators are also liable pursuant to the provisions setting out civil liability for national judges.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

To assist a client before national courts, a lawyer must be registered with an Italian Bar Council. EU-qualified lawyers can be registered as established lawyers and appear before national courts. Lawyers from non-EU countries can apply for the recognition of their title and must pass an exam, to register with an Italian Bar Council.

These requirements do not apply to arbitration proceedings. Indeed, according to Section 816-*bis* of the CCP, the parties "*may be assisted by counsel*". According to legal authors, this means that the parties may be assisted by lawyers or by other professionals (thus, including foreign lawyers) with no specific requirements.

This allowance does not extend to the assistance before courts and courts of appeals when, during arbitration proceedings, they are involved.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no such rules under Italian law.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

No, the arbitral tribunal is competent to rule on procedural issues and to rule on its jurisdiction (see question 3.4).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Section 818 of the CCP prohibits arbitrators from issuing seizures and any other interim or precautionary measures, which can only be granted by national courts. The only exception to this rule is provided for by the rules on corporate arbitration, which allows arbitrators to stay the efficacy of a resolution by a company's general meeting.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Given the general prohibition by Section 818, the competent national courts are always entitled to grant preliminary or interim relief even when arbitration proceedings are pending, or the dispute shall be awarded by an arbitral tribunal not yet constituted; however, they cannot rule on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Since the application to national courts is the only option for

obtaining interim relief, the approach of the courts to such requests by parties to arbitration agreements is the same adopted in connection with litigations submitted to state court proceedings.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions cannot be issued by Italian courts in aid of an arbitration. Please see the answers to questions 3.3 and 3.4 for the relationship between parallel ordinary and arbitration proceedings.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Under Section 816-*septies* of the CCP, the arbitral tribunal may subject the continuation of the proceedings upon the advance payment by the parties of predictable costs. This is usually done before the commencement of the proceedings. If the parties fail to pay, the arbitration agreement shall be no longer effective, and the dispute can be brought before national courts. Costs include travel and secretarial expenses and not arbitrators' fees. However, according to some legal scholars, arbitrators may request the advance payment of their fees pursuant to Section 816-*septies* of the CCP and may resign if the parties do not fulfil their request. In case the other party does not fulfil the payment instead of the defaulting party, the arbitration agreement ceases to be applicable between them.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

As said above, Italian arbitral tribunals cannot issue interim measures; thus, it is highly disputed that interim measures issued by foreign arbitral tribunals can be enforced in Italy, without first applying to an Italian national court.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Pursuant to Section 816-*bis* of the CCP, the parties or, in case they do not, the arbitral tribunal is free to determine the rules applicable to the taking of evidence in arbitral proceedings. In any event, the arbitrators shall respect the principle of due process, the rules relating to the relevance and admissibility of evidence and to the burden of proof.

In addition, Section 816-*ter* of the CCP sets out that the arbitral tribunal will have the following powers:

(i) take witness evidence at the seat of the arbitration or at the witness' residence or office;

(ii) appoint one or more expert(s) to assist with technical issues; and

(iii) request the public administration to disclose information or documents necessary for the case.

The arbitral tribunal is also free to allow the taking of evidence through different systems; for instance, in accordance with common law practices (i.e. written witness statements, cross-examination, etc.), provided that the principles under the first paragraph are respected, even if such practices are different from Italian procedural rules.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Compulsory disclosure/discovery does not exist under Italian procedure rules and the parties are free to file only the documents to support their claims and arguments. A party can, however, request the arbitral tribunal to order the other party to disclose certain documents, provided that the documents are specifically indicated by the parties and their disclosure is essential for the decision of the case. The application of such procedure is not so common in ordinary proceedings and even less common in arbitration proceedings, considering that the arbitral tribunal does not have the power to compel disclosure in case the parties fail to do so.

In relation to witnesses, refer to the answers to questions 8.1 and 8.3.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Under Section 816-*ter* of the CCP, if a witness refuses to appear before the arbitral tribunal, the latter, if deemed opportune, may request the President of the court where the arbitration is seated to order the appearance of the witness.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

As mentioned under the previous questions of this section, the arbitral tribunal is free to determine the procedure applicable to the evidentiary phase.

Thus, for instance, if Italian procedural rules apply, the parties will have to list the circumstances which the witnesses will have to confirm orally before the arbitral tribunal, with no possibility for the parties' counsel to examine or cross-examine the witness. The witness shall declare that (s)he commits to say the truth. If, instead, the arbitrators opt for a different system, a cross-examination may be allowed. For the examination to be valid, no provision imposes that the witness shall be sworn in.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

As said, under Italian law there are no disclosure/discovery obligations, so a party will not be forced to disclose documents they wish not to produce in the proceedings, unless in the rare case under question 8.2 above.

There are, however, certain provisions in Italy which protect confidentiality:

(i) Section 249 of the CCP which allows lawyers (only external lawyers and not in-house counsel) to refuse to give oral witness testimonies in relation to facts they have learned by reason of their profession; and

(ii) the Code of Conduct for Italian lawyers prohibits lawyers from producing communications between lawyers marked as "confidential" and those related to settlement negotiations.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Sections 820 to 826 of the CCP govern the formation of arbitral awards.

In the first place, Section 820 sets out that the award must be issued within the deadline set by the parties or, if the parties have not set such a deadline, within 240 days from the acceptance of the arbitrators. The deadline can be extended in certain circumstances; for instance, in case of motivated requests by the parties, or in case the arbitral tribunal admits the taking of evidence or appoints an expert to deal with technical issues.

Pursuant to Section 821 of the CCP, if the award is not issued within the prescribed deadline, any award issued later may be declared void if one of the parties has communicated to the other parties and to the arbitral tribunal, prior to the issuance of the award, the intention to exercise the right to have the arbitration terminated. In this case, the arbitral tribunal discontinues the proceedings.

The formal requirements of the award are set out by Section 823 of the CCP, according to which the award must be in writing and must have been decided upon by the majority of the arbitrators. In addition, the award must include:

(i) the name of the arbitrators;
(ii) the seat of the arbitration;
(iii) the name of the parties;
(iv) the arbitral agreement and the relief sought by the parties;
(v) the reasoning;
(vi) the decision;
(vii) the signature of the arbitrators or of the majority of the latter, provided that it is stated that the award was decided by all of the arbitrators and that those who have not signed did not want to or could not sign it; the arbitrators may sign the award on the last page and they do not need to sign every page; and
(viii) the date of the signatures.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The arbitral tribunal must communicate the award to the parties within 10 days from the date of the last signature of the award by the arbitrators (Section 824 of the CCP).

Pursuant to Section 826 of the CCP, within one year from such communication, the parties may request the arbitrators to:

(i) correct omissions, errors or calculation mistakes; and
(ii) amend the award by including the elements ((i), (ii), (iii) and (iv)) listed under question 9.1.

The arbitral tribunal has 60 days to correct or amend the award and if they fail to do so, the parties may apply to the court where the arbitration was seated.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Under Section 827 of the CCP, an arbitral award may be challenged in three ways: challenge for invalidity; revocation; or third-party opposition.

Challenge for invalidity

Under Section 829 of the CCP, an award may be declared void in the following cases:

(i) the arbitration agreement is invalid;
(ii) the arbitrators were not appointed according to the rules set out by the law or by the parties, provided that this objection was raised during the proceedings;
(iii) the award was issued by persons who lacked capacity;
(iv) the award exceeded the scope of the arbitration agreement;
(v) the award lacks the reasoning, the decisions or the signature of the arbitrators;
(vi) the award was rendered after the deadline set by the parties or by the law;
(vii) during the proceedings the formalities prescribed by the parties under express sanction of invalidity were not complied with and the invalidity has not been remedied;
(viii) the award is contrary to a previous award which is no longer challengeable or to a previous final judgment between the parties (provided such award or such judgment has been submitted in the proceedings);
(ix) due process was not respected in the proceedings;
(x) the award did not decide the merits of the dispute and the merits had to be decided by the arbitral tribunal;
(xi) the award is contradictory; or
(xii) the award did not decide on all the claims and objections raised by the parties in compliance with the arbitration agreement.

An appeal on a point of law is permitted only if expressly set out by the parties in the arbitration agreement or by the law. Appeals on a point of law are permitted in employment disputes and in cases where the points of law in question relate to preliminary matters which are not arbitrable.

Appeals are always permitted to challenge awards which are contrary to public policy.

Revocation (Section 831 of the CCP)

The revocation of an award is a particular challenging option, possible only in the following cases:

(i) wilful misconduct of a party against the other party;
(ii) the award was based on false evidence and the falsity was established after the award was given;
(iii) after the award was given, the party seeking revocation finds decisive documents which could not be filed in the proceedings due to *force majeure* or wilful misconduct of the other party; or
(iv) wilful misconduct by the arbitrators ascertained by a final judgment.

Third-party opposition (Sections 827 and 831 of the CCP)

A third party can oppose the award when it jeopardises its rights.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties cannot exclude any basis of challenge that is applicable as a matter of law.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

As mentioned under question 10.1, the parties can set out in the arbitration agreement that the award can also be challenged on a point of law; otherwise, the award can be challenged only on the grounds listed in question 10.1.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The procedure for challenging an arbitral award for invalidity of the latter is set out by Sections 828 and 830 of the CCP, whereas the procedures for seeking the revocation or a third-party proposition are set out by Section 831 of the CCP. All challenges are decided upon by the Court of Appeals competent for the place where the arbitration was seated.

To challenge an award for invalidity, the relevant appeal must be served on the other party within 90 days from the service of the award by the winning party on the losing party or within one year from the last signature on the award if the award has not been served by the winning party.

Pending the appeal, the award is enforceable; however, the appellant may apply to the Court to seek a stay of the enforceability of the award on the basis of serious grounds; for instance, in case the enforcement of the award would cause irreparable harm to the appellant.

If the Court of Appeals ascertains the presence of grounds for voiding the award, it will declare it null and void through a judgment and will decide on the merits of the case, unless this was ruled out by the arbitration agreement or if one of the parties was domiciled abroad at the time the arbitration agreement was entered into, in which case the possibility for the Court of Appeals to rule on the merits must have been expressly set out by the parties.

When the Court of Appeals does not decide on the merits of the case, the arbitration agreement will apply to the dispute, unless the invalidity of the award depends on its invalidity.

The parties may appeal the judgment of the Court of Appeals to the Supreme Court of Cassation only on points of law in relation to the decision of the Court of Appeals.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Italy ratified the New York Convention in 1969 with no reservation. The procedure for the recognition and enforcement of foreign arbitral awards is set out by Sections 839 and 840 of the CCP.

Pursuant to these provisions, the party wishing to enforce a foreign award must file an application with the Court of Appeals of the place where the other party is domiciled. If the other party is domiciled abroad, the Court of Appeals of Rome will be competent.

The applicant must file the original of the award or a certified copy, a certified translation if the award was not rendered in Italian and the arbitration agreement.

The President of the Court of Appeals verifies the formal regularity of the application and the attached documents and issues an order which renders the award enforceable in Italy, unless the dispute was not capable of arbitration according to Italian law or the award is in contrast with Italian public policy.

Pursuant to Section 840 of the CCP, the order of the President of the Court of Appeals can be challenged before the Court of Appeals within 30 days. The Court of Appeals will refuse recognition of the award for the reasons set out in the New York Convention as well as if the dispute was not capable of arbitration or if the award is in contrast with Italian public policy.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Italy is also party to the:

(i) **Convention on the Execution of Foreign Arbitral Awards 1927**. This entered into force on 12 February 1931. Italy is bound by this Convention for commercial relationships with jurisdictions that did not sign the New York Convention;

(ii) **European Convention on International Commercial Arbitration 1961 (Geneva Convention)**. This came into force in Italy on 3 August 1970, with no reservation or declaration; and

(iii) **ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States**. This entered into force on 28 April 1971.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The procedure in relation to foreign awards has been described above. In relation to domestic awards, a party seeking to enforce an award should follow the steps under Section 825 of the CCP. In particular, the requesting party must file an application with the competent court for the place where the arbitration was seated, attaching the original or a certified copy of the award, together with the original or a certified copy of the arbitration agreement.

The court verifies the formal regularity of the award and issues an order which renders the award enforceable (the so-called "*exequatur*"). The order may be appealed to the Court of Appeals within 30 days.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Pursuant to Section 824-*bis* of the CCP, from the date of the last signature, the award has the same effect as a judgment issued by national courts: thus (according to most legal scholars), it is capable of acquiring *res judicata* effect in the same way as ordinary decisions, when appeals or challenges are no longer available.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The standard applied by courts of appeal to refuse enforcement of foreign awards on the grounds of public policy has so far been a restrictive one, aimed at allowing the international circulation of awards.

Public policy is usually interpreted as including only domestic public policy and not international public policy. In particular, legal authors define domestic public policy as the core of fundamental principles which shape the ethical and social structure of the national community in a certain period. In practice, court precedents have included in the concept of domestic public policy:

(i) the provisions and principles of the Constitution, the principles which derive from criminal law, the fundamental principles of EU law, including competition principles; and

(ii) according to some authors, courts of appeal should also consider violations of procedural public policy, including violations of the principle of due process or the contrast of the award with a previous final award or judgment between the parties. Given the nature of the elements, however, such violations are more likely to be ascertained in the challenge phase (described under question 11.1), where the other party will have the chance to allege them.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Italian procedure rules do not provide anything in relation to the confidentiality of arbitration proceedings.

However, the parties' counsel, as the lawyers subject to Italian law and to the relevant Code of Conduct, are bound by strict confidentiality duties. The same would apply to arbitrators in case they are Italian-qualified lawyers or belong to other professional categories with the same duties (for instance, accountants, engineers, etc.).

The Arbitration Rules of the Milan Chamber of Arbitration set out that the Chamber, the arbitral tribunal, the parties and the experts appointed by the tribunal will have to keep the proceedings and the award confidential (Article 8).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

As mentioned under question 12.1, Italian procedure rules do not provide anything in this respect. Though the issue has not been dealt with in detail by Italian legal authors, the most common opinion is that a party may use information or documents obtained in arbitration proceedings if these are needed to protect their rights in subsequent proceedings.

The issue is partially dealt with by the Arbitration Rules of the Milan Chamber of Arbitration, pursuant to which the parties may use the arbitral award to protect their rights (Article 8).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

As with ordinary proceedings, in arbitration proceedings the parties may seek the following:

(i) **declaratory relief**: i.e. an award which ascertains a certain situation;

(ii) an **order**: i.e. in addition to ascertaining a certain situation, ordering the other party to do something, for instance to pay damages; in this respect, punitive damages have always been denied by the Italian Court of Cassation and are not provided by Italian law; however, recently the joint divisions of the Court of Cassation issued a landmark decision allowing the enforceability in Italy of foreign decisions with condemnations to punitive damages, when certain conditions are met (so, completely shifting the previous trend); and

(iii) **"constitutive" judgment**: i.e. a judgment that modifies the legal situation and constitutes a right.

As mentioned under section 7, arbitrators cannot issue interim measures.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Interest can be awarded by the arbitral tribunal as in ordinary national proceedings. If a specific interest has not been agreed upon by the parties, the rate is awarded according to the legal rate, which is currently 0.1%, or, in case of commercial contracts between businesses, 8%. From the date of the commencement of arbitration proceedings, the rate becomes 8% in all cases (Section 1284, paragraphs 4 and 5, Civil Code).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Nothing is said in the CCP in respect of arbitration proceedings; however, it is believed that the principles applicable to ordinary proceedings should also apply to arbitration.

The general principle is that the losing party must reimburse the winning party for legal costs and fees. However, there are certain exceptions (complexity of the case, new or highly debated points of law discussed in the proceedings, parties' behaviour during the proceedings), in which case, the court may issue no order as to costs (i.e. each party bears his/her own costs).

In practice, it is not rare for arbitral tribunals to set off legal costs especially in complex cases in which cross-claims among the parties are submitted and none of them is totally successful.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

If an award obtains the so-called "*exequatur*" by the competent court (see above under question 11.3), the award needs to be registered with the revenue agency and the parties need to pay the stamp duty and are jointly and severally liable towards the tax authorities for the payment of the taxes. The amount differs depending on the type of subject-matter; in case of an order to pay damages award, the tax is 3% of the awarded amount.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Third-party funding is possible under Italian law, though it is not so common yet, nor are there prominent active funders in the market.

Contingency fees are legal.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, Italy has signed the ICSID Convention in 1965 and ratified it in 1971.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Italy is party to many BITs with several countries; however, Italy is not a party to the Energy Charter Treaty, but has the status of observer, as a State who has signed the 1991 European Energy Charter.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The BITs signed by Italy usually contain the most usual clauses which are used in these types of international treaties, including the "most favoured nation" provision. The treaties signed by Italy do not instead include "exhaustion of local remedies" clauses. In this respect, the BITs signed by Italy usually neither require nor waive the exhaustion domestic remedies before the commencement of international proceedings against it.

On the debated issue of whether the most favoured nation clause includes only substantive rules for the protection of investments or whether the treatment extends to procedural protections (like dispute resolution), the ICSID has issued one decision in relation to the Italy-Jordan BIT (in case no. ARB/02/13, Award, 31 January 2006). In that case, the Italian claimants sought to rely on the most favoured nation clause to expand the scope of the dispute resolution provision of the treaty in relation to other BITs signed by Jordan. The tribunal, however, ruled that the most favoured nation clause in question could not widen the ambit of the disputes and held that its jurisdiction was limited by the Italy-Jordan BIT's dispute resolution clause.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

In 2013, Italy ratified the UN Convention on Jurisdictional Immunities of States and Their Property of 2004. Previously, it was not party to any international conventions in relation to State immunity and thus applied the principle mostly in relation to execution against States by way of customary international law.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

In 2016, a commission was instituted at the Ministry of Justice to draft a reform of ADR proceedings and in January 2017 it issued a report with proposed amendments to the CCP. Though, the report never became a bill and was never brought before the Parliament for the discussion.

For what pertains to BITs, the Court of Justice of the European Union recently issued a decision declaring BITs generally incompatible with EU law. It is still unclear what consequences this ruling will have on current proceedings.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Milan Chamber of Arbitration issues a periodic report on the duration of the proceedings managed by the Chamber. The latest report mentions an average duration of 13 months. Specifically, when a sole arbitration is appointed, the length is 12 months; while, when an arbitral tribunal is appointed, the length is 15 months.

For transparency reasons, the Milan Chamber of Arbitration publishes also the names of arbitrators appointed every six months – without specifying the parties' names or the claims' value.

As to costs, the Milan Chamber of Arbitration publishes on its website the fees for the administration of the procedure and for the arbitral tribunal, which are determined according to the value of the dispute. In addition, the Arbitration Rules by the Milan Chamber set out that the award must decide on the allocation of the costs between the parties (Article 30). Please refer to question 13.3 for a comparison with the CCP rules.

Acknowledgment

The authors would like to acknowledge the third author of this chapter, Filippo Frigerio.

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Martina acted as sole arbitrator and co-arbitrator in proceedings administered by the Milan Chamber of Arbitration. She is also a member of ArbitralWomen, the Italian Arbitration Association (AIA) and the ICC (Italy).

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Liechtenstein

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The content and scope of an arbitration agreement are governed by § 598 of the Liechtenstein Code of Civil Procedure ("Liechtenstein CCP"). This provision forms part of the Eighth Section of the Liechtenstein CCP which incorporates the Liechtenstein law on arbitration (§§ 594-635 Liechtenstein CCP).

Pursuant to § 598 Liechtenstein CCP, an arbitration agreement is an agreement between parties to submit any or all disputes which have arisen or will arise between them that relate to a contractual or non-contractual relationship between them to arbitration. The arbitration agreement may be concluded by way or a separate agreement or in the form of a clause forming part of a main agreement.

The rules on arbitration of the Liechtenstein CCP also apply to arbitral proceedings which are instigated on the basis of a last will and testament, certain non-contractual legal relations, or statutes or articles of incorporation of a corporate legal entity.

1.2 What other elements ought to be incorporated in an arbitration agreement?

An arbitration agreement ought to incorporate provisions on whether a dispute shall be submitted to *ad hoc* arbitration or to institutional arbitration. In the former case, reference ought to be made to the procedural rules which shall to govern the arbitral proceedings, and in the latter case a reference to the arbitral rules which the parties would wish to see applied. Furthermore, an arbitration agreement ought to contain provisions on the number of arbitrators, the venue of the arbitral proceedings and the language in which these proceedings ought to be conducted.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Based on the above-referenced legislation, the ordinary courts will recognise and enforce validly concluded arbitration agreements (see question 3.3 below).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The provisions on arbitral proceedings are contained in the Eighth Section of the Liechtenstein CCP (§§ 594-635 Liechtenstein CCP) which is itself divided into 10 Titles.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes. Liechtenstein law does not make a distinction between national and international arbitral proceedings. As a matter of principle, the provisions of the Eighth Section of the Liechtenstein CCP apply to arbitral proceedings with respect to which the seat of the arbitration is within Liechtenstein. However, § 594 para. 2 Liechtenstein CCP provides that certain provisions of the Liechtenstein law on arbitration also apply to arbitral proceedings if the seat of the arbitration is outside of Liechtenstein or if the seat of the arbitration has not (yet) been determined.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Liechtenstein law on arbitration has been modelled on the basis of the Austrian law on arbitration which is in turn based on the UNCITRAL Model Law. As a consequence, the first eight out of the 10 Titles of the Eighth Section of the Liechtenstein CCP replicate the structure of the UNCITRAL Model Law. But the Liechtenstein law on arbitration has a wider scope than the UNCITRAL Model Law in that it does not only govern international commercial arbitration but also national and international commercial and non-commercial arbitration.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The basic mandatory principles of Liechtenstein arbitral proceedings are the equal treatment of the parties, the parties' right to be heard and the parties' right to be represented in arbitral proceedings by a person of their own choosing.

Apart from that, the following rules qualify (among several others) as mandatory: (a) the limitations imposed on the arbitrability of disputes; (b) the rules on the form of the arbitration agreement; (c) the rules on application to the ordinary court for the granting of preliminary or interim relief; (d) the rules on the impartiality and independence of arbitrators; (e) the principles of the gathering of evidence and the consideration of evidence; (f) the right of the defendant to reply to the statement of claim; (g) the rules on judicial assistance; (h) the rules on the arbitral award and its effects; (i) the rules governing the closing of the arbitral proceedings and the right to challenge the arbitral award; and (j) the rules on consumer and employee protection.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Pursuant to § 599 Liechtenstein CCP, any claim involving an economic interest ("*vermögensrechtlicher Anspruch*") in relation to which the ordinary courts would have jurisdiction may be the subject matter of an agreement to arbitrate.

An arbitration agreement, the subject matter of which does not involve an economic interest, nevertheless has legal effect to the extent that the subject matter can be resolved by way of a settlement.

Family law matters and claims under apprenticeship contracts pursuant to the Law on Vocational Training are not arbitrable (§ 599 para. 2 Liechtenstein CCP).

§ 599 para. 3 Liechtenstein CCP finally provides that the jurisdiction of the Liechtenstein courts in proceedings that can only be initiated on the basis of mandatory provisions of Liechtenstein law (i.e. *ex officio* or upon application or notification by the foundation supervisory authority or the public prosecutor) may not be waived by an arbitration clause in the statutes or similar constitutional documents of a corporate entity, foundation or trust.

With respect to commercial disputes, there is no doubt that such disputes are arbitrable. With respect to certain non-commercial disputes involving corporations, foundations or trusts the prevailing opinion is that such disputes are arbitrable unless these proceedings would aim at the initiation of supervisory proceedings. Claims for the removal of a member of the Foundation Council of a Liechtenstein foundation and claims for the rescission or nullification of resolutions of the Foundation Council of a Liechtenstein Foundation are not arbitrable.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. The arbitral tribunal rules on its own jurisdiction, either in the context of the arbitral award on the merits of the dispute or in a separate (interim) arbitral award (see § 609 para. 1 Liechtenstein CCP).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

If a plaintiff files a lawsuit in a matter which falls within the scope of an arbitration agreement, the court has to dismiss the action for formal reasons unless the defendant files submissions on the merits of the dispute or argues the matter in a hearing without raising an objection (see § 601 para. 1 Liechtenstein CCP).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

A national court will address the issue of the jurisdiction and competence of an arbitral tribunal if (a) a party commences ordinary court proceedings following a decision of the arbitral tribunal denying its jurisdiction for lack of an agreement to arbitrate or for inoperability of the agreement to arbitrate, or (b) if a party files an application challenging an arbitral award based on the argument that the arbitral tribunal unduly assumed or denied jurisdiction.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There are several instances in which an arbitration clause can, under Liechtenstein law, have binding effect on non-signatories: as an example, in cases of succession – both singular succession and universal succession – the successor will (in principle) be automatically bound by the arbitration agreement. Also, a third-party beneficiary of a contractual relationship may – when asserting his claim – rely on the arbitration clause which forms part of the underlying contract.

Even more important from a Liechtenstein perspective is the personal scope of arbitration clauses contained in the statutes of Liechtenstein corporate entities and foundations, and in the trust deeds/declarations of trust of Liechtenstein trusts.

An arbitration clause contained in the statutes of a corporation is binding upon the corporation, its shareholders and its corporate bodies. In the case of Liechtenstein foundations, the arbitration clause can be unilaterally imposed by the founder upon the foundation's formation. It is (in principle) binding on all foundation participants, i.e. the founder, the beneficiaries, and (depending on the nature of the respective claim) also the foundation bodies.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Limitation periods are governed by general civil law (see §§ 1451 *et seq.* Liechtenstein General Civil Code). These periods can be up to 40 years long and are of a substantive, not a procedural nature. Hence, from a conflict of laws perspective, the law applicable to the limitation period is usually the law applicable to the underlying claim.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

As soon as insolvency proceedings are formally opened, all court and arbitral proceedings are discontinued. Discontinued arbitral proceedings may be resumed by the receiver, by joined parties on the side of the insolvent party, and by the opposing party in the arbitration.

However, if the claim in dispute needs to be registered in the respective insolvency proceedings, the arbitral proceedings may not be resumed prior to the hearing on the recognition of the registered claims.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The law applicable to the substance of the dispute is determined in accordance with the provisions of § 620 Liechtenstein CCP. Pursuant to said provision, the arbitral tribunal has to decide the dispute on the basis of the laws or legal rules chosen by the parties. A choice of law relates to the respective jurisdiction's substantive laws to the exclusion of the provisions on conflict of laws.

If the parties have not chosen laws or legal rules to be applied by the arbitral tribunal, the arbitral tribunal will apply the laws which it considers to be appropriate. The arbitral tribunal must only decide on the basis of equitable principles if the parties have expressly authorised the tribunal to do so.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

§ 620 Liechtensten CCP does not contain any provision on the application of mandatory substantive provisions of the law of the forum. However, the arbitral tribunal is under an obligation to prevent a violation of the procedural or substantive *ordre public*, which would constitute grounds for a challenge of the arbitral award.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Liechtenstein law on arbitration does not contain provisions on the law governing the formation, validity and legality of the arbitration agreement. Therefore, the general rues of the Liechtenstein Code of International Private Law on mutual contracts will apply. As a general remark, the arbitration agreement is governed by the law chosen by the parties and in the absence of a (valid) choice of law by the laws of the forum.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties do have absolute autonomy with respect to the determination of criteria which an arbitrator must fulfil for being eligible to act in such capacity. Irrespective of whether or not the parties have agreed on such criteria in the arbitration agreement, they must take into consideration that arbitrators must be independent and impartial (see § 605 Liechtenstein CCP).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, a default procedure is available. If the parties have not agreed on a procedure for the selection of arbitrators or if the agreed procedure for arbitrator selection fails, the ordinary courts will intervene.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

If the parties have not agreed on a procedure for the selection of arbitrators, the following applies: if the parties fail to agree on the appointment of a sole arbitrator within a period of four weeks from the receipt by a party of the respective request to do so from the other party, the court will appoint the sole arbitrator upon application by one of the parties. If a party fails to appoint an arbitrator in the context of the appointment procedure for the composition of an arbitral tribunal, the same procedure as set out above applies in principle.

If the parties have agreed on a procedure for the selection of arbitrators but one of the parties does not follow the agreed-upon procedure, or the parties or arbitrators cannot find an agreement under the agreed-upon procedure, or if a third party does not fulfil tasks delegated to him or her in the context of the agreed-upon procedure, each party can file an application with the court to appoint the arbitrators unless the agreed-upon procedure provides otherwise (see § 604 Liechtenstein CCP).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

A person willing to act as an arbitrator has to disclose all factual circumstances which may create doubts as to such person's independence and impartiality or which are not in line with the parties' agreed criteria. Active judges of ordinary courts may not accept an appointment to act as an arbitrator (see § 605 Liechtenstein CCP).

The Liechtenstein Rules issued by the Liechtenstein Chamber of Commerce and Industry ("LCCI") contain corresponding provisions (see Article 10 of the Liechtenstein Rules). The Liechtenstein Rules also expressly stipulate that the appointing party is under an obligation "*to provide the requested arbitrator with the necessary information for this purpose concerning the parties and the matter in dispute*" (see Article 10.2 of the Liechtenstein Rules).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Yes. The rules governing the conduct of the arbitral proceedings are contained in §§ 611 CCP *et seq.* Liechtenstein CCP. The Liechtenstein Rules – if agreed by the parties to the arbitral proceedings – contain more specific provisions governing the arbitral proceedings in Section I.C. Article 15 *et seq.* of said Rules.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties can agree on the criteria for the conduct of the arbitral proceedings autonomously. The provisions of the Liechtenstein CCP governing the arbitral proceedings are default provisions.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no specific rules that would govern the conduct of counsel in arbitral proceedings. The general rules set forth in the Attorneys' Act and in the Code of Conduct apply.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

As far as the arbitral tribunal's obligations are concerned, the arbitral tribunal has to conduct the arbitral proceedings and has to render the arbitral award. As part of this obligation, arbitrators have to disclose all potential conflicts of interest prior to accepting their appointment. The arbitrators have to participate in the vote of the arbitral tribunal on the arbitral award. Arbitrators are also obligated to execute the arbitral award in writing and to sign the award. Whether or not arbitrators are under an obligation to render an enforceable award is disputed. Arbitrators are further under an obligation to act impartially and independently. Arbitrators are obligated to render accounts and to provide all relevant information in that context. They are not obliged, however, to disclose information relating to the arbitral tribunal's deliberations. Arbitrators are also obliged to preserve confidentiality of the arbitral proceedings which does not result from a provision of the Liechtenstein law on arbitration, but is a principle which can be deduced from provisions of general civil law. The Liechtenstein Rules contain further specific provisions in relation to the confidentiality obligation. Finally, arbitrators are liable in case of a violation of their duties and obligations.

Arbitrators are entitled to a fee and the compensation for expenses and they may ask for advances on costs.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Yes, these rules are contained in the Attorneys' Act. Only lawyers admitted to practise in Liechtenstein and the European Economic Area may in principle provide legal service or professionally represent parties in judicial or extra-judicial proceedings. There are no specific rules governing the issue of the appearance of lawyers from other (non-EEA) jurisdictions in arbitral proceedings conducted in Liechtenstein.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There is no provision under Liechtenstein law on arbitration that would provide for arbitrator immunity.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Ordinary courts may only intervene in matters governed by the Liechtenstein law on arbitration if expressly provided for (see § 595 Liechtenstein CCP). In the context of the conduct of the arbitral proceedings as such, the only reference to the court's authority to intervene in these proceedings is the provisions on judicial assistance contained in § 619 Liechtenstein CCP. Pursuant to the terms of this provision, however, the court may only become active upon request of the arbitrators, or of the parties, provided in the latter case that the arbitrators have given their prior consent. The arbitrators or the parties can request the court to take judicial measures which the arbitral tribunal would not be authorised to take. In the context of a request for judicial assistance, the court may also request a foreign court or authority to take the requested measures. The provisions of §§ 27, 28 and 29 Liechtenstein Act on Jurisdiction apply which govern inbound judicial assistance.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes, an arbitral tribunal may award preliminary or interim relief if otherwise the assertion of a claim would be rendered impossible or more difficult, or in case of a threat of an irrecoverable damage unless the parties have agreed otherwise). Preliminary or interim relief will only be granted after the arbitral tribunal will have heard both parties. No preliminary or interim relief will be granted on an *ex parte* basis. Arbitral tribunals do not have the authority, however, to grant preliminary or interim relief against third parties ("*Drittverbote*").

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The conclusion of an arbitration agreement does not prevent the parties to request the grant of preliminary or interim relief by an ordinary court (see § 602 Liechtenstein CCP). The grant of preliminary or interim relief by a court does neither imply a renunciation of the arbitration agreement nor of the jurisdiction of the arbitral tribunal in the main arbitral proceedings. In the context of preliminary or interim relief, there is a mandatory dual jurisdiction of ordinary courts and the arbitral tribunal. While the competences of an arbitral tribunal to grant preliminary or interim relief can be waived, the parties cannot exclude the ordinary court's jurisdiction in that respect.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Even before the amendments to the Liechtenstein arbitration law, the ordinary courts had jurisdiction to grant preliminary or interim relief. Hence, they will hear party applications in the context of arbitral proceedings in that respect.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions are not recognised under Liechtenstein law on civil procedure, and applications seeking such relief would be dismissed by the court.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The Liechtenstein law on arbitration does not contain an express provision which would authorise the arbitral tribunal to order security for costs. However, the parties may agree to add provisions governing security for costs in the arbitration agreement. If the arbitral proceedings are governed by the Liechtenstein Rules, these contain extensive provisions on security for costs. In all other instances, i.e. in the absence of an agreement between the parties, the arbitral tribunal may order security for costs at its discretion based on the general rules of the Liechtenstein CCP that govern the arbitral proceedings (§ 611 Liechtenstein CCP). If the claimant in the arbitral proceedings is domiciled outside of the European Union, the arbitral tribunal may grant the defendant security for costs if it is likely that the claim for costs will not be enforceable in his country of domicile.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The ordinary court will enforce an arbitral tribunal's grant of preliminary or interim relief pursuant to § 610 para. 3 Liechtenstein CCP unless (a) the seat of the arbitration is in Liechtenstein and the measure suffers from a deficiency which would in the case of a national arbitral award constitute grounds for challenge of such award, (b) the seat of the arbitration is not in Liechtenstein and the measure suffers from a deficiency which would in case of an arbitral award constitute grounds for the denial of the recognition and enforcement of such award, (c) the enforcement of a measure would be incompatible with the enforcement of court measures granted earlier, or (d) the measure provides for an unknown means of enforcement. The ordinary court will lift the respective enforcement measure upon application of a party if certain statutory criteria have been met (e.g. the term of the measure has expired or the arbitral tribunal has limited or lifted the respective measure).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The parties may autonomously determine the rules for the conduct of the arbitral proceedings. The law provides that the parties may present all evidence they wish to rely upon in their respective submissions (statement of claim; statement of defence) or that they may indicate in such submissions on which pieces of evidence they would wish to rely upon in the course of the arbitral proceedings.

Unless otherwise agreed by the parties, the arbitral tribunal decides whether an oral hearing shall take place or whether the proceedings are to be conducted in written form only. It is up to the arbitral tribunal to decide on the admissibility of evidence, to conduct evidentiary proceedings and to consider their outcome at its discretion (see § 616 Liechtenstein CCP). Furthermore, the arbitral tribunal may appoint expert witnesses and may obligate the parties to provide all relevant information to them.

If made applicable by the parties, the Liechtenstein Rules contain further provisions on the conduct of evidentiary proceedings which refer to the respective provisions of the Liechtenstein CCP governing the taking of evidence in ordinary court proceedings (see Article 18 of the Liechtenstein Rules and §§ 303 *et seq.* Liechtenstein CCP).

As a general matter, the arbitral tribunal has wide discretion (within the limits imposed by the parties) to structure the evidentiary proceedings. It is also possible that an arbitral tribunal conducts the evidentiary proceedings under the IBA Rules on the Taking of Evidence, in particular in cases involving parties from civil and common law jurisdictions.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The arbitral tribunal is a body created on the basis of the principle of party autonomy. It therefore lacks sovereign powers. It may neither compel the production of evidence such as the appearance of witnesses and their providing testimony, nor may it request a witness or expert witness to swear an oath. The arbitral tribunal may freely consider (e.g.) a witness' refusal to provide evidence but has no authoritative power to coerce such witness to do so. In such cases, the arbitral tribunal or the parties with the arbitral tribunal's prior consent may apply to the ordinary court for judicial assistance.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Typically, a court would render judicial assistance in the following instances: when a witness needs to be compelled to testify, when it is necessary to request a witness to swear an oath, when documents need to be formally served, or when a request needs to be submitted to a foreign court or authority. Also, in case a curator needs to be appointed, the ordinary court will intervene upon application.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The production of written and/or oral testimony is governed by the Liechtenstein CCP, by the Liechtenstein Rules, by the Code of Conduct for Liechtenstein lawyers and by the Attorney Act.

Witnesses may not be sworn in by the arbitral tribunal. The arbitral tribunal would have to submit an application to that effect to the ordinary court. The law on arbitration does not contain a specific provision prohibiting cross-examination.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Professional privilege in case of attorneys covers all information ever disclosed to a person in his or her capacity as an attorney.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An arbitral award needs to be in writing and must be signed by the sole arbitrator or the arbitral tribunal respectively. Unless otherwise agreed between the parties, the signature of the majority of the members of an arbitral tribunal on the arbitral award is sufficient if the chairman of the arbitral tribunal or another member makes a note on the arbitral award what circumstance has caused the missing signature(s). The arbitral award needs to contain the arbitral tribunal's legal reasoning, unless the parties have agreed to the contrary. The arbitral award needs to be dated and has to contain a reference to the seat of the arbitration. The arbitral award is deemed to have been rendered on that date and at that place (see § 623 Liechtenstein CCP). If the arbitral award needs to be enforced in Liechtenstein, the arbitral tribunal needs to confirm that the arbitral award has become final, binding and enforceable (see Article 33 para. 2 Execution Act).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The arbitral tribunal may – even in the absence of a party application to that effect – rectify the arbitral award within a period of four weeks from the date of the arbitral award. This rectification may only relate to calculation errors, clerical errors, misprints or similar errors. The parties may demand that the arbitral tribunal rectifies the award, but they may also demand that the arbitral tribunal provides them with explanatory remarks in relation to (unclear) parts of the arbitral award. They can also file an application with the arbitral tribunal to issue a supplementary award in cases in which a claim has been asserted in the course of the arbitral proceedings but has not been decided by the arbitral tribunal in the arbitral award (see § 627 Liechtenstein CCP).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The only legal remedy available against an arbitral award is an application to the ordinary court to set the award aside. Grounds on the basis of which such application can be brought are the following: (a) the lack of a valid arbitration agreement, the denial of the arbitral tribunal's jurisdiction despite the existence of a valid arbitration agreement, or the lack of capacity of a party under the applicable law to enter into an arbitration agreement; (b) the lack of notification of a party about the arbitral proceedings or about the appointment of the arbitrators; (c) the arbitral award exceeded the scope of the arbitration agreement; (d) the composition of the arbitral tribunal was not in compliance with either the agreement between the parties or the applicable provisions of the Liechtenstein CCP; (e) the arbitral proceedings were conducted in a way violating the Liechtenstein procedural *ordre public*; (f) the prerequisites that would otherwise allow the reinstatement of ordinary court proceedings have been fulfilled; or (g) the subject matter of the dispute is not arbitrable under national law, or the arbitral award violated the Liechtenstein substantive *ordre public* (see § 628 para. 2 Liechtenstein CCP).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

§ 628 para. 3 Liechtenstein CCP provides that the grounds for a challenge of an arbitral award which are set out in § 628 para. 2 sub-para 7 (lack of arbitrability) and 8 (violation of the Liechtenstein *ordre public*) Liechtenstein CCP may also be raised *ex officio*. From that provision the majority of legal scholars conclude that parties to an arbitration cannot waive these two grounds as a basis of challenge, neither prior to nor after the conclusion of the arbitral proceedings. All other grounds stipulated in § 628 para. 2 sub-paras. 1–6 Liechtenstein CCP may be waived after the award has been rendered, but not before, in particular not in the arbitration agreement.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The enumeration of the grounds for challenge in § 628 para. 2 Liechtenstein CCP is exhaustive. Therefore, the parties may not introduce further grounds as a valid basis for the challenge of an arbitral award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The application for setting aside an arbitral award needs to be filed within a period of four weeks from the day on which the plaintiff/applicant has received the arbitral award (or the supplementary arbitral award) (see § 628 para. 4 Liechtenstein CCP). The Liechtenstein Court of Appeals has exclusive jurisdiction to decide on applications to set aside an arbitral award. There is no further court to which the decision of the Court of Appeals could be appealed (see § 632 Liechtenstein CCP).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Liechtenstein ratified the New York Convention on 7 July 2011. Liechtenstein has entered the reservation that it will only recognise and enforce arbitral awards on the basis of reciprocity, but irrespective of whether the merits of the disputes were of a commercial or non-commercial nature.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Yes. Liechtenstein concluded bilateral agreements on the mutual recognition of judgments and arbitral awards with Austria in 1975 and with Switzerland in 1970.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Pursuant to Article 1 para. m) of the Liechtenstein Enforcement Act ("*Exekutionsordnung*"), awards of an arbitrator or an arbitral tribunal that are not or no longer appealable to a higher arbitration body, as well as settlements concluded before an arbitrator or an arbitral tribunal will be enforced by the Liechtenstein courts.

With respect to foreign arbitral awards, there are no provisions under the Liechtenstein CCP that would govern such foreign arbitral awards' recognition or enforcement. Pursuant to § 631 Liechtenstein CCP, the recognition and declaration of enforceability (i.e. *exequatur*) of foreign arbitral awards are governed by the Liechtenstein Enforcement Act, which, however, does not contain provisions on separate *exequatur* proceedings. As a result, the Execution Act provides that the issue of enforceability of a foreign award needs to be decided as a preliminary question in enforcement proceedings.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The effect of an arbitral award is the same as the effect of a final and binding judgment of a Liechtenstein ordinary court. Therefore, a Liechtenstein arbitral award has a *res judicata* effect and precludes the issues which have been finally decided in the arbitral award from being re-heard before an ordinary court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Both a violation of the procedural *ordre public* and of the substantive *ordre public* constitute grounds for challenging an arbitral award. The courts are, however, hesitant to rely on these grounds for challenge unless the content of the arbitral award contradicts the fundamental principles of the Liechtenstein legal system. It is neither sufficient that the result of an arbitral award is unequitable or unjust nor that the legal analysis of the arbitral tribunal is wrong.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Liechtenstein law on arbitration does not contain any provision which would stipulate a confidentiality obligation for arbitral proceedings. Only § 633 para. 2 Liechtenstein CCP provides that the public can be excluded upon application of a party from proceedings following the challenge of an arbitral award, but only if a legitimate interest is at stake. Hence, it is advisable to include provisions on the preservation of confidentiality in the arbitration agreement.

To make up for this deficiency, the Liechtenstein Rules contain numerous provisions on confidentiality obligations. First, Article 6 of the Liechtenstein Rules provides that only a person may be appointed to serve as an arbitrator who is subject to certain professional confidentiality obligations (such as lawyers, professional trustees that are regulated under Liechtenstein law, patent lawyers or auditors). If nominated, the nominee has to confirm that he/she satisfies this eligibility condition.

The substantive scope of the confidentiality obligation extends to (a) all awards and orders, (b) all materials submitted, and (c) all facts made available by other participants in the arbitral proceedings. The personal scope of the confidentiality obligation extends to the parties, their respective representatives, the experts, the arbitrators, any commissioner, the secretariat and their auxiliary personnel.

In case of specific needs for confidentiality the arbitral tribunal may make documents accessible to an expert "without granting the other parties access to these documents" (Article 29.3 of the Liechtenstein Rules).

The parties, their representatives, the arbitrators and any commissioner shall take appropriate organisational measures to safeguard the confidentiality of the arbitral proceedings, including e.g. encryption of email correspondence.

The obligation to preserve confidentiality does not terminate upon the conclusion of the arbitral proceedings, and is fortified by a contractual penalty of CHF 50,000.00 for each violation (Article 29.7 of the Liechtenstein Rules).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Liechtenstein law on arbitration does not contain an express rule to that effect. However, if the parties have agreed on the application of the Liechtenstein Rules and if they have not modified the respective provisions governing confidentiality in arbitral proceedings, the parties would have to continue to preserve confidentiality even after the conclusion of the arbitral proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The type of remedy available in arbitral proceedings depends on the arbitrability of the subject matter of the underlying dispute and on the remedies available under the substantive law applicable to the issues at hand.

As an example, family law matters and claims under apprenticeship contracts pursuant to the Law on Vocational Training are not arbitrable under the Liechtenstein law on arbitration. Furthermore, only the Liechtenstein ordinary courts have jurisdiction in cases which as a matter of mandatory law can only be instigated upon application by the foundation supervisory authority or *ex officio*. The jurisdiction of the ordinary courts may not be excluded in favour of arbitration. Hence, claims that are directed towards the initiation of supervisory proceedings are not arbitrable. If the remedy sought is the removal of a member of the Foundation Council of a Liechtenstein Foundation, such remedy cannot be achieved by way of arbitration. Similar considerations apply in case the remedy is the invalidation of a resolution of the Foundation Council of a Liechtenstein Foundation.

With respect to damages claims, those are arbitrable as a matter of principle; under Liechtenstein substantive law, punitive damages are not an available remedy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The rate of statutory rate of interest available under the Liechtenstein Code of Civil Procedure is 5% *per annum*.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

As soon as the arbitral proceedings are concluded, the arbitral tribunal has to decide on the compensation for costs, unless the parties have agreed otherwise. The arbitral tribunal has to take all circumstances of the case into consideration including the outcome of the arbitral proceedings. The decision on the compensation for costs needs to be made in the form of an arbitral award.

The Liechtenstein Rules contain more detailed provisions in that respect. Under the Liechtenstein Rules, the costs of the arbitration shall in principle be borne by the unsuccessful party to the extent it was unsuccessful (see Article 27 of the Liechtenstein Rules).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Whether or not an award is subject to tax in Liechtenstein depends on the residence or domicile of the parties for tax purposes and on the nature of the payment under the arbitral award.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Contingency fee arrangements are prohibited in Liechtenstein. There are professional funders active in the market both for litigation and arbitration.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Liechtenstein is not a party to the ICSID Convention.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Liechtenstein is not a party to the Energy Charter Treaty or to Bilateral Investment Treaties.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Liechtenstein is not a party to Bilateral Investment Treaties.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

As Liechtenstein is not a party to any of the above, no comment can be made in that respect.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The Liechtenstein law on arbitration has been extensively modified following the revision of the Austrian law on arbitration as set out in the Austrian Code of Civil Procedure. The revised law on arbitration entered into effect on 1 November 2010.

Since then, one major revision has taken place, which became effective on 1 August 2017. Under the newly enacted rules, arbitration clauses contained in statutes of corporate entities, statutes of foundations and trust deeds/declarations of trust are relieved from all restrictions which otherwise apply to arbitration agreements with natural persons. As a result, the restrictions for arbitration agreements with consumers do no longer apply to the aforementioned (statutory) arbitration clauses.

On 7 July 2011, Liechtenstein ratified the New York Convention. Finally, the Liechtenstein Chamber of Commerce and Industry in May 2012 issued the Liechtenstein Rules, as a result of which Liechtenstein adapted to international standards and – in case of the Liechtenstein Rules – even set new ones in some respects.

Liechtenstein is a comparatively small State but has a very well developed industrial and financial services sector. Furthermore, by the end of the year 2016, 24,496 foundations, trusts and establishments were either registered or deposited with the Liechtenstein Commercial Register. The arbitration of foundation and trust disputes has therefore gained importance.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Given that the Liechtenstein law on arbitration has only been recently amended and that the Liechtenstein Rules are comparatively new, no major initiatives are currently on the way.

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MARXER & PARTNER
RECHTSANWÄLTE

Marxer & Partner Attorneys-at-Law was very much involved in shaping Liechtenstein as a financial centre and has been growing with it. Established in 1925, it is the oldest and largest law firm in Liechtenstein, having 14 partners, four of-counsels, 12 associates and a supporting staff of about 50 paralegals and administrative specialists. Of all firms providing legal services to a demanding international clientele, Marxer & Partner has certainly become the most renowned in Liechtenstein.

For many years Marxer & Partner has focused its activities on the fields of corporate law, M&A, trust and estate planning, and capital markets, as well as tax. The firm provides in-depth knowledge and excellent advice in these fields to its international client base. Together with its auxiliary trust, management and auditing companies, Marxer & Partner form a centre of excellence that can handle all sorts of issues in financial, legal, tax, business management, and real estate affairs.

The firm represents Liechtenstein exclusively at Lex Mundi, the worldwide association of independent law firms.

Luxembourg

Pierre Thielen Avocats S.à r.l

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The Luxembourg New Civil Procedure Code (the "NCPC") contains a specific section dedicated to arbitration (Title I, Book III, Part II).

Articles 1224 to 1251 of the NCPC are the relevant legislation governing arbitration in Luxembourg under the title "*Des arbitrages*".

The first legal requirement of an arbitration agreement is that the dispute relates to a matter authorised for arbitration under Article 1225 of the NCPC.

Article 1226 of the NCPC then provides that arbitration clauses or arbitration agreements must have a written form "*by way of meeting minutes before the chosen arbitrators, by public or private deed before a notary, or by private instrument*".

In practice, the arbitration agreement takes the form of an arbitration clause or a compromise.

The "arbitration clause" is the written agreement by which the parties to one or more contracts undertake to submit to arbitration any disputes that may arise in relation to one or more specified legal relations.

"Compromise" is the convention by which the parties to a litigation submit it to arbitration after the dispute has occurred, and even when a proceeding already exists before a court, by the means of an arbitration agreement.

Article 1227 of the NCPC also provides that the arbitration agreement must specify the subject of the dispute and the arbitrators' names in order to be valid.

Discussions for a reform for the modernisation of arbitration are currently under way in Luxembourg and in the context of these discussions, it has been proposed that in the future the arbitration agreement will not be subject to any conditions of form anymore.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The other elements which should be incorporated into an arbitration are, in most cases, the number of arbitrators to be appointed and the method of appointment.

The language of the arbitration procedure, the seat of the arbitration and the applicable law should also be incorporated.

Finally, the parties should determine the applicable procedural rules.

Article 1230 of the NCPC provides that "*the parties and the arbitrators shall follow in the proceedings the time limits and forms established for the courts, if the parties have not otherwise agreed*".

In practice, the parties often choose to derogate from it and then provide the rules applicable in the agreement.

Parties may also plan to waive the appeal.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Pursuant to the Luxembourg Civil Code, which provides in its Article 1134 paragraph 1 that "*the legally formed agreements take the place of law to those who have made them*", a valid arbitration clause or agreement has to be respected by a state court.

In our country, the evolution of the case law is favourable to arbitration so that National Courts recognise the binding force by interpreting rather than restricting the clauses of arbitration, and decline jurisdiction when a party invokes an arbitration clause even though the arbitral tribunal had not yet been appointed or formed when the parties filed the action before the court.

In the same vein of promoting arbitration when the parties have agreed to it, the civil courts have a very limited power to sanction arbitration decisions. Article 1244 of the NCPC limits cases of annulment; for example, when the arbitration award is contrary to public policy or where there is no valid arbitral agreement.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The parties shall mostly voluntarily comply with the award. Otherwise, the award can be enforced upon the request of a party in accordance with Articles 1241 and 1242 of the NCPC which govern the enforcement of arbitration under Luxembourg law.

The arbitral award is rendered enforceable by an order of the President of the District Court in whose jurisdiction it was rendered. For this purpose, the minutes of the award must be filed with the registrar of the District Court by one of the arbitrators or one of the parties (Article 1241 of the NCPC).

A sentence given in another state must be submitted to the *exequatur* formalities to have legal effect in Luxembourg.

They are made enforceable by order made upon request by the President of the District Court in accordance with the provisions

relating to the execution of foreign judgments pursuant to Article 1250 of the NCPC.

Luxembourg is party to the New York Convention of June 10, 1958 which apply on the basis of reciprocity for the recognition and enforcement of arbitration awards made in the territory of another contracting state.

Luxembourg is also party to the European Convention on International Commercial Arbitration of 1961, the ICSID Convention of 1965 and the Convention on Conciliation and Arbitration within the OSCE of 1992.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Luxembourg arbitration law does not make the distinction between domestic and international arbitration proceedings which means it does not provide for any different rules applicable for domestic arbitration and for international arbitration. The provisions of the NCPC apply to all arbitration proceedings governed by Luxembourg law.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Actually, Luxembourg law on arbitration is not directly based on the United Nations Commission on International Trade Law Model Law (UNCITRAL Model Law) but NCPC provisions are similar and compatible with international arbitration requirements.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Mandatory rules governing international arbitration proceedings located in Luxembourg do not exist, except for the fundamental principles relating to the due process of law.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Article 1224 of the NCPC provides in a general way that all people are allowed to enter into an arbitration agreement "*on the rights they have at free disposal*".

The following article specifies some exclusions and lists subject matters that may not be referred to arbitration.

Disputes in relation to (i) the status and legal capacity of natural persons, (ii) the conjugal relationship, (iii) the application for divorce or legal separation, and (iv) the representation of incapacitated persons and those of the absent or presumed absent are prohibited for recourse to arbitration (Article 1225 of the NCPC).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The arbitral tribunal is permitted to rule on the question of its own jurisdiction. An *ex post* control by state courts is also available by way the grounds for annulment provided in Article 1244 (4) of the NCPC providing that a decision can be challenged in court if the arbitral tribunal exceeded its competence.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The apparent breach of an arbitration agreement is a ground for considering the request inadmissible but such an exception of incompetence is to raise "*in limine litis*"; that is to say, before any other defence on the merits (Court of Appeal, 4th Chamber, March 14, 2012).

For that reason, the apparent breach of an arbitration agreement must be invoked from the beginning of the trial. If none of the parties invoke it within the time limit before arguing on the merits, the parties are deemed to have waived the right to settle the dispute by arbitration.

When a party invokes such a breach *in limine litis*, National Courts decline jurisdiction.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

A court can address the issue of the jurisdiction and competence of the national arbitral tribunal if a party asks for it *in limine litis* or *ex post* in the context of the annulment of the arbitration award.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

In principle, individuals or entities which are not themselves party to an arbitration agreement or an arbitration clause cannot be bound by such an agreement in Luxembourg because of the voluntary and contractual nature of the arbitration.

If they have an interest in the arbitral proceedings and unless otherwise provided in the arbitration rules agreed between the parties, those individuals or entities may join or intervene in the arbitration procedure on a voluntary basis and on the condition that the parties already in the proceeding also agree.

Luxembourg case law also has confirmed that in the event of the assignment of a contract or the stipulation in favour of a third party, the arbitration clause may be enforceable against a third party.

In all cases, Article 1243 of the NCPC specifically provides that an arbitration decision may not bind a third party who was not party to the arbitration.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Article 1230 of the NCPC provides that unless otherwise agreed by the parties "*the rules applying to the judicial proceedings will apply*".

Usually, the arbitration process is started by sending an arbitration request to the opponent, and the time limits are set directly by the arbitrators themselves extending the period of three months provided by Article 1233 of the NCPC.

In practice, the procedure most often takes the model of the judicial procedure and the contradictory character is maintained in an exchange of briefs.

The length depends on the substance of the case and if investigations or expertise are pronounced but in a general way, sentences are made within a few months, so that the rapidity to obtain a decision compared to traditional lawsuits remains one of the advantages of arbitration.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Under Luxembourg law, pending proceedings are not *de jure* terminated, nor suspended because of the insolvency of a company but all enforcement pursuals are suspended. Parties decide with curators, liquidators or legal representatives whether to continue the proceedings.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

When entering into an arbitration agreement, the chosen law is usually a standard clause for the parties.

In 80% of cases, it is therefore the parties who freely choose the law applicable to the merits of the case in the arbitration agreement.

If they have not made such a choice, arbitrators determine the applicable law according to the rules applicable in private international law.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Article 1230 of the NCPC states that parties and arbitrators shall comply with the civil procedural rules for ordinary courts if the parties did not agree otherwise. This implies the respect of principles governing judicial proceedings, i.e., the observance of the adversarial nature of proceedings, equality between parties, ensuring the rights of defence.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

By virtue of the principle of autonomy, the arbitration agreement may be subject to a different law than the law applicable to the substance of the dispute submitted to arbitration.

Parties are also allowed to make a choice about the law rules governing the formation, validity and legality of arbitration agreements.

If it was not agreed by the parties, arbitrators have to determine the applicable law using principles of private international law.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The only limit to the parties' autonomy to select arbitrators is that the selection must stay in line with the arbitration agreement or the arbitration clause and that the arbitrators must not have a conflict of interest.

For the rest, Luxembourg law does not require the arbitrators to have any specific qualifications and arbitrators do not have to meet any specific requirements.

Arbitrators can be lawyers or magistrates, or any professionals relevant for the dispute resolution.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Article 1227 of the NCPC provides a default procedure when the parties' selection fails.

In such case, the Luxembourgish text provides that the dispute shall be settled by three arbitrators.

Each party will appoint its own arbitrator and will spontaneously make the name known to the other party within eight days after a formal notice. If it does not do so, the appointment will be made by order of the President of the District Court, made upon request and not subject to appeal.

The arbitrators will then agree on the designation of the third arbitrator. Failing an agreement, these appointments will be made by the President of the District Court at the request of the most diligent party, the other parties present or duly called.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court only intervenes in the selection of arbitrators when parties did not agree on the arbitrators, when a party fails to appoint the arbitrator or when the arbitrators do not agree on the selection of the third arbitrator.

In such cases, the President of the District Court may name them according to the provisions of Article 1227 of the NCPC.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Luxembourg law does not include any provisions in this respect specifically applicable to arbitration, but arbitrators are bound by the ethical codes and professional standards applicable to their own professional associations.

The rules of procedure of the Luxembourg Bar provide that when a lawyer of the Luxembourg Bar is charged with an arbitration mission, he remains subject to the essential principles of the practice of his profession and must particularly ensure its independence.

The Arbitration Rules of the Arbitration Center of the Chamber of Commerce of the Grand-Duchy of Luxembourg provides that "*before his appointment or confirmation, the prospective arbitrator signs a declaration of impartiality and independence*".

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Article 1230 of the NCPC states that parties and arbitrators shall comply with the procedural rules provided for ordinary courts if the parties did not agree otherwise.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

A maximum of three months for the duration of the arbitration proceedings is provided as a specific provision applying to arbitration proceedings under Article 1227 of the NCPC.

Article 1237 of the NCPC also provides that each party will be required to produce its defences at least two weeks before the expiry of the deadline for the compromise.

Otherwise, there are no particular steps and the parties may always agree differently than the above-mentioned provisions.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Counsels are bound by ethical codes and professional standards applicable in their own professional associations or jurisdictions regardless of the location of the arbitration.

The arbitral tribunal may also define its own rules of conduct.

There is no difference made between rules governing the conduct of counsel from Luxembourg in arbitral proceedings sited elsewhere and rules governing the conduct of counsel from other countries than Luxembourg in arbitral proceedings sited in Luxembourg.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Article 1235 of the NCPC provides that once the arbitral proceedings have begun, the arbitrators cannot withdraw from their mission unless their mandate is revoked by the parties as provided by Article 1229 of the NCPC.

Moreover, the arbitrators have to comply with the principle of due process, independence and impartiality. They cannot directly or indirectly request or accept any offer, promise, donation, present or advantage of any sort in order to accomplish or not an act under their jurisdiction.

The relationship between arbitrators and parties is a contract. Therefore, arbitrators are required to follow the procedures, deadlines and formalities provided for by the arbitration agreement; otherwise, their contractual liability can be invoked.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are rules restricting the appearance of lawyers from other jurisdictions in legal matters in Luxembourg. Nevertheless, it is clear that such restrictions do not apply to arbitration proceedings located in Luxembourg.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Jurisdictional immunity is granted to arbitrators and carries the freedom of decision.

Except for the immunity for the content of its decision, there are no rules providing for arbitrators' immunity from suit under Luxembourg law.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

An arbitral tribunal validly established cannot be subject to the jurisdiction of a National Court.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitral tribunal in Luxembourg is allowed to order, upon request of one of the parties, interim relief that can be enforced by an order of the President of the District Court. No list of precise types of relief exists.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

A court is entitled to grant preliminary or interim relief in proceedings subject to arbitration and the President of the District Court sitting in summary proceedings may do so.

It has been decided by case law that an arbitration clause does not prevent a judge from granting such interim relief.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

National Courts are entitled to grant interim relief in proceedings subject to arbitration only for a legitimate reason, in the case of emergency or for the preservation of evidence.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions are not available under Luxembourg law.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The arbitral tribunal is allowed to order security for costs unless the parties decided otherwise in the arbitration agreement.

Article 257 of the NCPC provides that, upon request of the defendant, non-Luxembourg-based applicants may be ordered to secure payments of costs and damages; they may be ordered to deposit the corresponding amount (caution, *judicatum solvi*).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

There is no specific provision in the NCPC regarding the enforcement of preliminary relief and interim measures granted by an arbitral tribunal. National Courts handle them in the same way and follow the same procedure as for arbitral awards.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Luxembourg law does not provide for specific rules of evidence for arbitration proceedings and, consequently, the general provisions of the NCPC and Commercial Code will be applicable unless otherwise provided by the parties.

As a general principle, each party must provide the evidence of the facts alleged.

In commercial matters, "proof is free" and can be done by any means. What matters is to win the judge's firm conviction.

Where Article 1341 of the Civil Code, in principle, requires proof in writing, Article 109 of the Commercial Code admits, on the contrary, all the modes of proof whatever the value of the act.

Thus, not only formal deeds but also any writings, accounting documents, testimonies, indices or presumptions can be produced.

Private documents, accepted invoices, correspondence, balance sheets or witness statements are often submitted as evidence.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

If agreed by the parties, Article 60 and Articles 279 to 283 of the NCPC are applicable in arbitration proceedings. In accordance with these provisions, the arbitral tribunal may issue an interim decision ordering a party to disclose relevant documents held by the parties. However, the arbitral tribunal has no authority to order the disclosure of documents.

In the same way, the arbitral tribunal cannot order disclosure of documents held by third parties or force third parties to appear as a witness. Witness evidence in Luxembourg arbitration is only seldom applied and mostly includes witness examination by the arbitrators.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Article 60 of the NCPC provides that where one party has a piece of evidence, the judge may, at the request of the other party, order such party to produce the evidence with a periodic financial penalty until the evidence is produced.

National Courts may, at the request of a party, request or order the production of all documents held by third parties.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The NCPC provides no rules applying to the production of written and/or oral witness testimony.

If parties have not planned it in the arbitration agreement, general provisions which apply to National Courts are applicable.

Where general procedural provisions apply, witnesses must be sworn in before the tribunal according to Articles 405 and 411 of the NCPC.

The parties are not allowed to directly interrogate witnesses. Indeed, it is only through the intermediary of the arbitral tribunal that any question might be asked and the arbitral tribunal is authorised to reject any question pursuant to Article 414 of the NCPC.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Communications between lawyers and communications between lawyers and their clients are confidential and may not be disclosed.

In-house legal counsel not registered as lawyers are not protected by confidentiality.

Some documents can be treated as being subject to privilege in Luxembourg as documents which are under the obligation to be kept confidential by persons committed to a specific confidentiality obligation (e.g. banking secrecy, medical professionals). These documents may not be disclosed unless an investigating magistrate orders such disclosure.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

To be valid, the arbitral award shall be in writing and signed by the arbitrators according to Article 1237 of the NCPC.

The sentence also has to be rendered by the arbitral tribunal within the time limit fixed by the parties, and according to Article 1244 of the NCPC, the award must be motivated.

Parties may expressly exempt the arbitrators from giving a reasoned award. Otherwise, the same Article 1244 of the NCPC provides that parties can ask for the annulment of the award where the award does not state the reasons of its decision.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

If the arbitral tribunal omitted to decide on one or several points of the dispute and if such points can be separated from those the tribunal has decided on, Article 1248 of the NCPC provides that parties can always request the arbitral tribunal to complete the award on these points.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Parties can challenge an arbitral award made in Luxembourg by appeal to a second arbitral instance if such an appeal has been specifically provided for in the arbitration agreement or the arbitration clause agreed upon the parties.

It is quite exceptional that Luxembourg arbitration agreements provide for a possibility of an appeal and hence a re-hearing of the dispute.

In any case, Article 1244 of the NCPC provides an action in annulment in order to set aside the arbitral award on a limited list of grounds detailed in the text, as follows:

- the arbitration award infringes public order;
- the dispute should not have been subject to arbitration proceedings;
- there was no valid arbitration agreement;
- the arbitration court exceeded the limits of its jurisdiction or of its powers;
- the arbitration court omitted to rule on one or more points of the dispute and the issues omitted cannot be separated from the issues on which the court has ruled;
- the arbitration award was made by an arbitration court that was established improperly;
- the rights of the defence have been breached;
- the arbitration award does not state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given;
- the arbitration award contains contradictory statements;
- the arbitration award has been obtained by fraud;
- the arbitration award is based on evidence that has been declared false by an irrevocable judicial decision or on evidence that was recognised to be false; or
- after the arbitration award was made, a document or other piece of evidence that would have had a decisive influence on the award and that was withheld by a deliberate act of the other party was discovered.

An arbitration award can only be challenged before the courts once it is final.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

According to Article 1244 of the NCPC, parties are allowed to exempt the arbitrators from giving a reasoned award (*sentence motivée*).

All the other provisions under this Article cannot be subject to an agreement between the parties and shall therefore be respected.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

In Luxembourg, parties cannot agree to expand the scope of appeal of an arbitral award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The Luxembourgish texts do not provide for an appeal procedure on the merits before the Luxembourg Court but only for annulment on the limited list of grounds detailed in Article 1244 of the NCPC.

Therefore, to appeal an arbitral award by challenging an arbitral award before a second arbitral instance is only possible if such an appeal has been duly approved by the party in the arbitration agreement or the arbitration clause.

Otherwise, the only way to contest the award is to request its annulment before the District Court by way of annulment.

Article 1246 of the NCPC provides that the District Court is seized of the request for annulment by way of appeal to the order of execution issued by the President of the court.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed by Luxembourg on June 10, 1958 and was ratified on May 20, 1983.

No reservations were entered by Luxembourg to this Convention.

Pursuant to the Law implementing the Convention, the provisions of the New York Convention apply to any award granted by a tribunal which has a seat situated in a country that has also signed the Convention. If not, the NCPC provisions apply.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Luxembourg signed and ratified the European Convention on International Commercial Arbitration of 21 April 1961, the ICSID Convention of 1965 and the Convention on Conciliation and Arbitration within the OSCE of 1992.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The approach of the National Courts is to recognise and enforce foreign or domestic arbitral awards.

According of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 1958, Luxembourg undertook to recognise arbitration agreements and may not refuse the *exequatur* of arbitral awards made as a result of arbitration agreements only for the reasons enumerated in Articles 5 and 6 of the Convention.

An automatic refusal by the judge can only intervene for breach of the award with the national public policy or when he finds that the subject of the dispute was not liable under his law to be submitted to arbitration.

Article 1241 of the NCPC provides the steps which the parties are required to take. The arbitral award shall be rendered enforceable by an order of the President of the District Court in whose jurisdiction it was issued and the record of the award has to be filed with the registry of the court by one of the parties (or one of the arbitrators).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The decision which grants *exequatur* is covered by *res judicata* as long as the arbitral award is rendered enforceable by order of the President of the District Court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The standard for refusing enforcement of an arbitral award on the grounds of public policy is any breach of rules of public policy.

Nonetheless, case law clearly limits the requirements established by Luxembourg international public policy when the award gives effect to rights that were already recognised abroad (Court of Appeal, July 26, 2005).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

One of the most important advantages of arbitration is confidentiality. The parties often choose to confer this character on the arbitral proceeding but like the other aspects, it is a choice of the parties and confidentiality is not obligatory.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings cannot be referred to and/or relied on in subsequent proceedings before domestic courts unless the information is set out by the arbitrators in the award and the proceedings are among the same parties.

Contrariwise, decisions on questions of principle, provided they are anonymised, could be reused in other procedures by arbitrators as arguments or case law to rely on.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no specific limits on the type of remedies including damages available in arbitration as long as it is not contradictory to Luxembourg public order which provides, as a matter of principle, that a judge cannot order an in-kind remedy that goes beyond simply restoring the "*status quo ante*".

In other words, the damages awarded must be neither more or less than the repairable damage.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The rate of interest is determined by the contract or by the applicable law. When Luxembourg law applies, texts relating to interest are Articles 1146 *et seq.* of the Civil Code, which regulate the matter of interest for late payment under ordinary law in contractual matters, or the law of April 18, 2004 on payment and interest on late payments implementing Directive 2000/35/EC of the European Parliament and of the Council of June 29, 2000 against late payment in commercial transactions, as amended by the law of April 15, 2013.

Unless otherwise provided by the parties, the general provisions of the Civil Code apply only when the conditions for implementing the law of April 18, 2004 are not fulfilled.

The applicable rates according to each category are published in the official journal "*Memorial*".

Finally, interest rates would apply and would be calculated on the principal claim, never on costs.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Parties can agree on the allocation of the costs; otherwise, the arbitral tribunal decides it.

In practice, costs are often shared between the parties, unless specific circumstances justify a different way of splitting the costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award in itself is not subject to tax and no registration taxes need to be paid on the amount thereof.

However, payments ordered to a party may be subjected to tax as taxable income depending on their nature and if the party is residing in Luxembourg.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There is no specific Luxembourg legislation on third-party funding.

Regarding lawyers, contingency fees are prohibited by Luxembourg Bar rules. However, this does not prevent a lawyer and his client from entering into agreements under which, for example, the client and lawyer agree to a portion of the lawyer's fees, or a supplementary fee calculated on the basis of the results obtained or services provided.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, Luxembourg has signed the Washington Convention on the Settlement of Investment Disputes Convention on March 18, 1965 and the Law of April 8, 1970 ratified the Convention.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Luxembourg has signed 106 Bilateral Investment Treaties (BITs), including the Energy Chapter Treaty ratified by the law of January 24, 1997. The last signed was the one between Luxembourg and the Islamic Republic of Iran on February 14, 2017. More than 70 of the BITs signed have entered into force.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

All investments, whether direct or indirect, made by investors shall enjoy a fair and equitable treatment. Except for measures required to maintain public order, such investments shall enjoy continuous protection and security.

In relation to "most favoured nation" or exhaustion of local remedies provisions, the noteworthy language used by Luxembourg in its investment treaties is that "*the treatment and protection shall at least be equal to those enjoyed by domestic investors of a third State and shall in no case be less favourable than those recognized under international law*".

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The European Convention on State Immunity was signed by Luxembourg on May 16, 1972 and the Law of June 8, 1984 ratified the Convention. This Convention provides that in the event that a party is subject to proceedings related to civil and commercial matters, each party has to waive its immunity of jurisdiction.

Luxembourg does recognise the immunity of sovereign states against enforcement.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Luxembourg is currently discussing a reform for the modernisation of arbitration law to "lay the legal foundations for an environment conducive to arbitration". This demonstrates the will of Luxembourg authorities to encourage the use of arbitration as an attractive way for dispute resolution.

The types of disputes commonly being referred to arbitration in Luxembourg are those relating to financial or commercial activities.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Luxembourg Courts have decided that stating in the arbitration clause that "*the arbitrator will have sufficient time to issue his arbitration award*" does not mean that a specific term was agreed by the parties. As a consequence, the arbitration award exceeding the three-month period provided by Article 1233 (2) of the NCPC was declared null and void (District Court of Luxembourg, January 25, 2011).

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Netherlands

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BRISDET

Bo Pietersz

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Pursuant to article 1020 of the Dutch Civil Procedural Code (hereinafter: "DCPC"), parties can subject their dispute to arbitration by means of an arbitration agreement that can be entered into prior or after the occurrence of the dispute. Under an 'agreement', one includes a contract, a clause, or reference to arbitration in other texts, such as statutes or arbitration rules.

In any event, the arbitration agreement shall first be made in writing (article 1021 of the PCC) that imposes arbitration, or refers to general conditions which impose arbitration and that have been expressly or tacitly accepted by the other party.

However, these requirements are only needed to prove the existence of an arbitration agreement. As long as the parties do not dispute the existence of the arbitration agreement, the agreement can be reached pursuant to the basic rules of contract law – which also includes the possibility of a verbal agreement.

Moreover, pursuant to article 10:166 of the Dutch Civil Code (hereinafter: "DCC"), an arbitration agreement is materially valid as long as the agreement is valid under the law that the parties have chosen, or the law of the place of arbitration, or, in the event the parties have not chosen any applicable law, pursuant to the law applicable to the subject-matter of the arbitration; for example, ECLI:NL:HR:2017:3105, wherein the Supreme Court had to decide whether an arbitration agreement was materially valid on the basis of Spanish law, since in this case Spanish law applied to the – in that case important – shareholders' agreement.

Article 1053 of the DCPC separates the arbitration agreement from the main agreement. As a result thereof, if the main agreement (wherein the arbitration agreement is integrated) turns out to be null or void, the arbitration agreement has to be qualified as a separate agreement that will be reviewed under the above-mentioned criteria.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Parties ought to oblige themselves to let an arbitrator rule about any dispute between the parties (article 1020 § 1 of the DCPC).

However, even if the arbitration agreement contains the intention of the parties to let an arbitrator rule over their dispute, it does not make the arbitration agreement a "complete" agreement. Elements that need to be incorporated to get to a proper arbitration agreement are, for example: (i) which categories of disputes are open for arbitration; (ii) how to nominate the arbitrators; (iii) who qualifies for nomination; and (iv) how the proceeding needs to be conducted, etc.

One of the leading arbitration institutes in the Netherlands is the Nederlands Arbitrage Instituut Rotterdam (hereinafter: "NAI"). It was established as a foundation in 1949 and operates on a non-profit basis. The NAI is entirely independent and impartial. It offers a ready-made arbitration agreement: the NAI Arbitration Rules (hereinafter: "NAI Rules"). The most recent NAI Rules date from January 1, 2015. All the NAI Rules are incorporated just by referring to them in a clause in an arbitration agreement (article 2 of the NAI Rules). The NAI Rules are, in general, in line with the rules laid down in the arbitration law.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The Supreme Court has ruled – that has now become established case law – that the Dutch Courts shall, in general, be prudent in reviewing arbitral awards, not only because a judicial review shall not constitute a disguised appeal procedure, but also due to the importance of the effective functioning of the arbitral process.

Yet, the Dutch Courts are very thorough in reviewing the existence and validity of an arbitration agreement, taking into consideration the general rule of law of access to State justice. The Supreme Court recalled this principle in a ruling of September 26, 2014. It addressed as well in a case of April 24, 2015 the issue of battle of forms in the event two sets of general conditions apply to the main agreement and contradict themselves at to the arbitration agreement. Furthermore, in a ruling of January 20, 2006, the Supreme Court clearly ruled that an arbitral award could be partially annulled since regarding that very part, no arbitration agreement existed between the parties. And more recently, on April 20, 2016, the Court of First Instance of The Hague ruled that the Russian Federation was not bound to the VPL by an arbitration agreement, since the mere signature of the ECT by the Russian Federation did not result in the provisory application of article 26 of the ECT – arbitration – onto the Russian Federation. The Court of First Instance of The Hague annulled six arbitral awards to the benefit of the Russian Federation. Furthermore, the Supreme Court ruled on April 17, 2015 that a Dutch Court is always competent to take cognizance of a request to enforce a foreign arbitral award in the Netherlands.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The fourth book of the DCPC (articles 1020–1077 of the DCPC) governs arbitration proceedings in the Netherlands. The law was intensively modified on January 1, 2015. Please note that the new arbitrational law applies to all arbitration proceedings initiated after January 1, 2015. For arbitration proceedings initiated before January 1, 2015, the old arbitration law still applies (ECLI:NL:GHAMS:2017:461).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes, the same arbitration law governs both domestic and international arbitration proceedings. This was one of the purposes of the new arbitration law. However, the enforcement of a national arbitration award is laid down in article 1062 of the DCPC, and the enforcement of an international arbitration award is laid down in article 1076 of the DCPC.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

By amending the arbitration law on January 1, 2015, the Netherlands sought a close connection to the UNCITRAL Model Law. By using the UNCITRAL Model Law as an inspiration for its new arbitration law, the Netherlands tried to improve the competitive position of the Netherlands internationally as an arbitration jurisdiction. This modernisation of the law should give entrepreneurs the possibility of choosing a fully-fledged alternative to the national procedure.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

See question 2.2 above. Mandatory laws that apply to national arbitration proceedings also apply to international arbitration proceedings.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Future disputes as well as pending disputes are open for arbitration (article 1020 § 2 of the DCPC).

Yet, not all disputes are "arbitrable". Indeed, article 1020 § 3 of the DCPC prohibits an arbitration that ascertains legal consequences that are not freely determined by the parties. For example, an annulment of a marriage or a change of personalia are not subject to arbitration, nor are certain decisions of corporate bodies. On November 10, 2010, the Supreme Court ruled that arbitrators have no jurisdiction to review the validity of a resolution of the meeting of shareholders whereby a director is appointed or dismissed. This ruling is based on the *erga omnes* effect of such resolutions.

Furthermore, article 6:236 under n. limits the right for a professional to impose an arbitration upon a consumer. Such an arbitration clause referred to in general conditions may be declared null and void.

Besides, article 1065 § 1 under e. of the DCPC, relating to the review of arbitral awards, prohibits an arbitration on subject-matters of public order. A recent ruling of January 10, 2017 by the Court of Appeal of Arnhem-Leeuwarden rejected, however, the claim of Kuwait for the annulment of an arbitral award based on public order, i.e. infringement of Dutch environmental law.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Pursuant to article 1052 § 1 of the DCPC, an arbitral tribunal may rule on the question of its own jurisdiction ("*Kompetenz-Kompetenz*"). This includes (i) whether or not there is a valid arbitration agreement, and (ii) whether or not the arbitral tribunal has been properly constituted. However, the arbitral tribunal is bound by the subject-matters subject to arbitration as agreed upon in the arbitration agreement.

The Dutch legislator chose this approach to avoid parties challenging the jurisdiction in front of a national court, and thus stalling the arbitration procedure (*MvT, Kamerstukken II 1983/84, 18464, 3, p. 22*) [T&C Rv, commentaar op article 1052 Rv].

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Article 1022 of the DCPC (article 1074 of the DCPC for international arbitral proceedings) provides that national courts shall rule they have no jurisdiction in the event one of the parties, *in limine litis*, claims the lack of jurisdiction of the national court because of the existence of an arbitration agreement – provided that the arbitration agreement is not invalid.

If a party does not lodge its defence *in limine litis*, the national court will rule that it has jurisdiction over the case, despite the existence of an arbitration agreement.

In the event the national court rules it has no jurisdiction, the claimant has acted in breach of contract and is therefore liable.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

As mentioned in question 3.2 above, an arbitral tribunal may rule on the question of its own jurisdiction. However, prior to or after the arbitral proceedings (see question 3.3 above), national courts can, either when the arbitral tribunal rules that there is a lack of jurisdiction and competence of the arbitral tribunal, or when the defendant claims for a judicial review of the arbitral award, address the issue of the jurisdiction and competence of the arbitral tribunal (article 1052 § 5 of the DCPC).

The judicial review of a tribunal's jurisdiction is laid down in article 1065 § 1 under a. of the DCPC, i.e. the absence of an arbitration agreement. The competent national court is the court situated in the

district where the arbitral proceedings took place. A challenge must be lodged either within three months upon sending of the arbitral award to the parties, within three months upon filing the arbitral award with the national court, as may be agreed between the parties, or within three months upon authorisation by the national court of the performance of the arbitral award.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

None. In the Netherlands, an arbitral procedure can only take place if the parties have agreed upon an arbitration agreement. If not, the arbitral tribunal should reject the procedure due to the lack of jurisdiction (article 1052 § 2 of the DCPC). The Supreme Court ruled on January 20, 2006 that a party that is jointly liable yet was not party to the main agreement, including an arbitration clause, could not be bound by an arbitral award; therefore, partially annulling the award.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The laws that prescribe limitation periods for the commencement of an arbitration in the Netherlands are considered substantive, since they are not laid down in the DCPC but in the DCC (containing substantive laws).

The limitation period for the commencement of a procedure is (in general) five years upon the day the party had become aware of its claim as well as the identity of the liable party (article 3:310 of the DCC). Before the amendment to the arbitration law, a limitation period could only be interrupted via a formal interruption letter or the commencement of a procedure.

By an amendment to the arbitration law, two new articles regarding limitation periods were added: article 3:316 § 4 of the DCC and article 3:319 § 3 of the DCC. The limitation period will now also be interrupted in the case that an arbitral tribunal or a national court declared itself incompetent because of a lack of jurisdiction. In this way, the Dutch legislator protected the claimant for an unwanted expiration of a limitation period.

After a successful interruption, article 3:319 § 3 of the DCC will renew the limitation period with the same period as the original limitation period (the maximum period being five years).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

It is assumed that articles 25–29 of the Dutch Insolvency Law (hereinafter: "DIL") also apply to arbitral proceedings [T&C Insolventierecht, commentaar op article 25 Fw].

In general, it is not possible to start a (new) arbitral procedure against an insolvent party. The party must file its claims for verification in the insolvent estate (article 110 of the DIL).

If the arbitral proceedings have started prior to the insolvency of the other party, the arbitral proceedings will be suspended as soon as the other party has been declared bankrupt (article 29 of the DIL). The party should then file its claim for verification in the insolvent estate (article 110 of the DIL).

However, the receiver is still allowed to continue pending arbitral proceedings, or start new arbitral proceedings if this is on behalf of the insolvent estate (articles 27–28 of the DIL).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Pursuant to article 1054 of the DCPC, the arbitral tribunal decides on the applicable law. Should the parties have chosen an applicable law, then the arbitral tribunal is bound by this law. On the contrary, the arbitral tribunal will decide on the most relevant applicable law.

The common practice is for the parties to match the applicable law to the place of the arbitration for the sake of an efficient judicial review.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The national court will claim its competence when – despite the fact that one of the parties claims the existence of a valid arbitration agreement – the arbitral proceeding results in an untimely delivery of an award (article 1022c of the PCC for national arbitration proceedings and article 1074d of the PCC for international arbitration proceedings).

Breach of public order forms a ground for the annulment of an arbitral award under article 1065 § 1 under e. In a recent decision of March 27, 2017, the Court of Amsterdam refused to grant an *exequatur* to an arbitral award because this award was in breach of public order. Indeed, the award was not clear as to which defendant had to pay which amount to the claimant.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

In the Netherlands, the formation, validity and legality of an (arbitration) agreement are governed by (amongst others) articles 6:217–230 of the DCC. An agreement goes into effect as of the moment of acceptance by one party of the offer of the other party.

Although arbitration is excluded from the scope of the Rome Convention and Rome I Regulation, article 10:166 of the DCC applies to arbitration the same rules as in the Convention or the Regulation, unless the parties have agreed upon a choice of law.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Articles 1023–1035a of the DCPC provide rules for the selection of arbitrators.

Most of the regulations regarding the selection of arbitrators are directory law. For example, arbitrators will be appointed as mutually agreed upon by the parties. The parties can select the arbitrators themselves, but a third party can be charged with this task as well (article 1027 § 1 of the DCPC).

Every individual can be selected to become an arbitrator as long they are not legally incapacitated (article 1023 of the DCPC). Nationality may not be a ground for exclusion, unless the parties aimed at safeguarding the impartiality and independence of the arbitrators.

Article 1026 of the DCPC, however, contains a limitation to the parties' autonomy to select their arbitrators: the arbitral tribunal should exist out of an uneven number of arbitrators.

Unless otherwise agreed between the parties, the parties select the arbitrators. The selection shall occur within three months following from when the case was made pending, unless the arbitrators were appointed beforehand.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the selection of arbitrators fails and no/not enough arbitrators are selected within three months after the start of the arbitrational proceedings, the interlocutory court can be requested to select the (missing) arbitrators (article 1027 of the DCPC) at the request of the most diligent party.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

See question 5.2 above.

In addition thereto, should (i) a party challenge an arbitrator in writing pursuant to article 1035 of the DCPC, as there are doubts about his impartiality or independence, and (ii) the arbitrator does not withdraw himself from the arbitral tribunal, then the most diligent party may request the interlocutory court to decide on the challenge.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

An arbitrator needs to be independent and impartial (article 1033 § 1 of the DCPC). If a party is of the opinion that an arbitrator is not independent and impartial, it can challenge the arbitrator.

In a ruling of June 29, 2006, the Supreme Court decided that arbitrators would breach their duty of independence and impartiality by researching for themselves additional evidence that was not brought into the proceedings by the parties without the explicit consent of both parties.

Article 11 of the NAI Rules also provides for independent and impartial arbitrators. Prior to the acceptance of a mandate as an arbitrator, the arbitrator shall sign an affidavit whereby he affirms that he is independent and impartial and has no conflict of interest.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

There are not a lot of procedural rules for arbitration in the Dutch jurisdiction. This is because the arbitration procedure will be conducted following the rules the parties agreed upon in the arbitration agreement. The only exceptions are the provisions of mandatory law, these provisions apply to all arbitral proceedings in the Dutch jurisdiction (article 1036 § 1 of the DCPC).

Article 1036 § 2 of the DCPC states that the parties should be treated equally. In general, it means that both parties should have the right to be heard.

Furthermore, there are small regulations regarding the procedure; for example, the procedure by default (article 1043a of the DCPC), the hearing of witnesses and experts and the organisation of site visits (articles 1041–1042a of the DCPC), how to indemnify yourself or intervene in the proceeding (articles 1045–1045a of the DCPC), or the fact that the arbitrator may always order the personal appearance of the parties (articles 1043 of the DCPC).

Article 1036 § 1 of the DCPC states that, except regarding the provisions of mandatory law, the arbitration procedure will be conducted following the prescription of the parties, failing this, as the arbitral tribunal shall deem appropriate.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The Dutch arbitration law (article 1020–1073 of the DCPC) provides for procedural rules. However, a lot of these rules are directory law, and the parties can derogate from them in the arbitration agreement.

One prominent rule in the Dutch arbitration procedure is that the court civil procedural rules do not apply to the arbitration procedure (article 1039 of the DCPC; see question 8.1 below).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There exists no compulsory legal representation in Dutch arbitration proceedings. Parties can appear at the trial in person, through a lawyer, or by another authorised third person as a proxy holder. Article 1038 of the DCPC is a provision of mandatory law; it is not possible for parties to agree on (for example) mandatory representation by a lawyer.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitrators' task is to settle disputes. They have the power: to order the parties to file additional statements (article 1038a of the DCPC); to request to hear the parties (article 1038b of the DCPC); to decide on the burden of proof, on how to bring evidence and on the acceptance of evidence, to hear witnesses, or experts or visit any place as may be deemed necessary (article 1039 of the DCPC); to issue an award to terminate the arbitral proceedings, should the claimant or the defendant fail to file or elaborate its claim respectively its statement of defence, despite reminders to do so (article 1043a of the DCPC); to take preliminary or interim relief except for seizure (article 1034b of the DCPC); to request advice on foreign applicable law (article 1044 of the DCPC); and to accept an intervention of a third party to the arbitral proceedings (article 1045 of the DCPC).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

No; see question 6.3 above. A lawyer from a different jurisdiction can appear in front of a Dutch arbitral tribunal as an authorised third person.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The personal liability of arbitrators has been set out in Dutch case law.

On December 4, 2009, the Supreme Court ruled that arbitrators can only be held personally liable, in relation to a nullified award, in case of gross negligence or deliberate recklessness or to a serious and manifest disregard of his tasks. In a recent case of September 30, 2016 the Supreme Court ruled that the above-mentioned criteria also applies to the procedural mistakes of the arbitrator; this means that all mistakes made by the arbitrator in the performance of his judicial duty should be judged by these strict liability rules.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

No; see question 3.3. The national court is only allowed to rule after an arbitral tribunal has ruled about the dispute or the competence of the arbitral tribunal.

In case of non-cooperating witnesses in an arbitration proceeding, the court can be requested, based upon article 1041a of the DCPC, to order a hearing of witnesses. This hearing will be secured by the same legal guarantees as a "normal procedure" (see question 8.3 below).

If an arbitral tribunal needs information on the law of a foreign country, the arbitral tribunal can ask the national court to file a request for information as outlined in article 3 of the European Convention on Information on Foreign Law (article 1044 of the DCPC).

Article 1046 of the DCPC: the national court of Amsterdam can be requested – unless arranged differently in the arbitration agreement – to combine the arbitration procedure with another pending arbitration procedure within or outside the Netherlands.

Based upon article 1022a of the PCC, even during a pending arbitrational proceeding, the national court is still competent to impose provisional or protective measurements, such as seizures.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Based upon article 1043b of the DCPC, an arbitral tribunal is permitted to award preliminary or interim relief. The types of relief an arbitral tribunal can allow are those to order parties to do or refrain from doing something (which includes a provisional allocation of a claim). Provisional seizure does not, however, fall within the competence of the arbitral tribunal.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Excluded from the powers of the arbitral tribunal are protective measures like seizures; these powers belong to the national court (article 1043b of the DCPC).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

As stated in question 7.2 above, the national court is still competent to issue protective measures. Furthermore, based upon article 1022b of the DCPC, an arbitration agreement does not preclude the parties to ask the national courts for a preliminary hearing of witnesses or experts, to organise site visits, or to order the other party to allow insight into their documents.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

In the Netherlands, there is no law that prevents the national court from intervening with regards to an arbitration. It is therefore likely that the parties can ask the national court, based upon article 3:302 of the DCC, to rule about the validity of an arbitration agreement. However, the European Court of Justice ruled in its *Allianz/West Tankers* case that this is inconsistent with the Brussel I-Regulation, and that therefore a national court is not allowed to issue an anti-suit injunction towards a court (including an arbitral tribunal) of another country [T&C Rv, commentaar op article 1022 Rv].

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

See question 7.2 above.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

An arbitral award ordering preliminary relief or interim measures can be enforced in the same way as a regular arbitral award; it should therefore be qualified as a "normal" arbitral award (article 1043b § 4 of the DCPC in combination with article 1049 of the DCPC).

To enforce an arbitral award, one of the parties should ask permission from the interlocutory judge (article 1062 of the DCPC). After this permission is granted, the permission will be written down in the original arbitral award, and the national court will inform the other parties about the permission.

After this, the arbitral award is enforceable, and therefore it can be performed just as a "normal" ruling with an enforceable title of the national court.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Article 1039 § 1 of the DCPC states that the evidence, the admissibility of evidence, the burden of proof and the appraisal of evidence are at the discretion of the arbitral tribunal. However, the parties are allowed to arrange the rules of evidence differently in their arbitration agreement.

This does not apply when it comes to the proof of the arbitration agreement, as set out in question 1.1 above (article 1021 of the DCPC).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Based upon articles 1040–1041 of the DCPC, the arbitral tribunal can order the disclosure/discovery of documents and require the attendance of witnesses and experts. It is up to the arbitral tribunal to define how the parties should subsequently deliver. However, the parties are allowed to arrange the aforementioned differently in their arbitration agreement.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

In the event that a witness does not appear or refuses to testify, the arbitral tribunal may allow the party to request the interlocutory judge to appoint a judge-commissary before whom the examination of the witness shall take place (article 1041a of the DCPC). This testimony in front of a judge-commissary will follow the "normal" procedural rules of a national court, provided that the arbitrators have been given the opportunity to attend the witness hearing.

The court will send the minutes of the hearing to the arbitrators and the parties. The arbitral tribunal can suspend the arbitral proceedings until receipt of the minutes.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

If the arbitral tribunal deems necessary, it has the power to request that witnesses take the oath as laid down in the law (article 1041 of the DCPC). Should the witness refuse to take the oath, then the arbitral tribunal is free to draw all conclusions from this action.

Unless otherwise agreed between the parties, the arbitral tribunal may arrange for the rules applicable to hearing witnesses, such as cross-examination.

On June 18, 1993, the Supreme Court ruled that an arbitral tribunal had breached the principles of cross-examination by having a discussion with an accountant in the absence of the parties – a discussion on which the arbitral award was also based. The principle of cross-examination is considered under Dutch law as of public order. In a more recent case, upon cassation by the Supreme Court, the Court of Appeal of The Hague annulled on March 31, 2015 an arbitral award, since the arbitral tribunal took into consideration the report of an external commission, whose members were not objective and independent.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The rules of privilege applicable to lawyers also apply to the lawyer who is involved in an arbitral proceeding, since he is acting as a lawyer. Everything discussed between the client and his lawyer stays confidential. This also applies to every employee working under the scope of the lawyer. However, in-house counsels, accountants, legal counsels or other advisors do not have legal privilege in the Netherlands.

A lawyer is not allowed to waive his/her legal privilege. However, a client is free to disclose every document as he deems appropriate (as long as he did not sign a non-disclosure clause; see question 12.1 below).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 1057 of the DCPC sets out the legal requirements to issue an arbitral award.

The arbitral tribunal decides by a majority vote (article 1057 § 1 of the DCPC). Note that it will always be possible to reach a majority vote, since article 1026 of the DCPC requires that an arbitral tribunal consists of an uneven number of arbitrators. However, the parties can agree differently in the arbitration agreement (*Parliamentarian History: MvT, Kamerstukken II 1983/84, 18464, 3, p. 24*).

Other requirements of an arbitral award are:

- The arbitral award needs to be in writing (article 1057 § 2 of the DCPC, or article 1072b of the DCPC for an electronically-written award).
- The arbitral award needs to be signed by all arbitrators (article 1057 § 2 of the DCPC). If a minority of the arbitrators refuse to sign the award, note of it must be included in the award itself (article 1057 § 3 of the DCPC). Failing to do so, the award can be nullified (Supreme Court, January 23, 1966 and article 1065 § 1b of the DCPC).
- Based upon article 1057 § 4 of the DCPC, the award needs to contain, next to the decision:
  a) The names and place of residence of the arbitrators.
  b) The names and place of residence of the parties.
  c) The date of issue of the award.
  d) The place of issue of the award.
  e) The motivation for the award. Based upon 1065 § 1d of the PCC, an award can only be nullified in case of the non-existence of the motivation. Because of the fact that a national court is not allowed to carry out a substantive assessment of the arbitrational award, a bad motivation cannot be seen as a reason for nullification of the award. Furthermore, the Supreme Court has ruled that each part of the decision in the award needs to contain a motivation [T&C Rv, commentaar op article 1057 Rv].

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The powers of an arbitral tribunal to clarify, correct or amend an

arbitral award are limited. Based upon article 1060 § 2 of the DCPC, the only possibility is to correct an obvious error (article 1060 § 1 of the DCPC) or mistakes made in § a–d of article 1057 § 4 of the DCPC (see question 9.1 above) (article 1060 § 2 of the PCC).

The request for a correction should be made within three months, or within the period the parties agreed upon (article 1060 § 1 of the DCPC). For example, the NAI Rules give a period of two months (article 47 of the NAI Rules).

As a result of this limitation, it is not possible for the arbitral tribunals to correct a bad motivation. The absence of any motivation can – in some cases – be qualified as an obvious error [T&C Rv, commentaar op article 1060].

Article 1061 of the DCPC gives the arbitral tribunal the opportunity – at the request of one of the parties – to complete an arbitral award, in the event that the arbitral tribunal has failed to rule about one or more claims.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

If the parties have expressly agreed so, they can lodge an appeal (article 1061a of the DCPC).

Once a final or partial arbitral award has been issued, it is possible to request for an annulment thereof in front of a national court (article 1061l of the DCPC). Based upon article 10611 § 3 of the DCPC, it is only possible to challenge a final or partial award rendered in the first instance when the time limit for filing an appeal has passed, or when the parties have decided together to waive the possibility of an appeal.

The request to annul an award should be done in front of a national court of appeal of the district where the arbitration took place (article 1064a § 1 of the DCPC).

Article 1064a of the DCPC states that, in principle, the possibility for an application for annulment expires after three months after the day that the arbitral award had been sent to the parties.

The grounds to annul an arbitral award are limited, and are laid down in article 1065 of the DCPC. Annulment is only possible if:

a) There is an absence of an arbitration agreement.

b) The arbitrators are selected contrary to the rules of selection that parties have agreed upon.

c) The tribunal has failed to comply with the assignment.

d) The arbitral award has not been signed properly (see question 9.1 above).

e) The arbitral award, or its realisation, is contrary to public order.

The ground for the revision of an arbitral award is laid down in article 1068 of the PCC. An award can only be revised in cases of deception, falsification or the withholding of essential information.

For all other situations, parties should go into an appeal within the applicable time limit.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

In the Netherlands, it is only possible to go into an appeal against an arbitral award if the parties agreed to the possibility of an appeal in the arbitration agreement and this agreement complies with the requirement of an arbitration agreement (article 1061b of the DCPC). *A contrario*, as a result the parties can exclude the possibility of an appeal.

Besides, the Supreme Court has decided on May 1, 2015 that parties can agree – even in advance – that they are not allowed to ask for an annulment of the arbitral award in front of a national court. Both parties must explicitly agree to this waiver.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties are free to agree upon the scope of appeal – or in fact, just as for the first instance, the whole procedure – in the arbitration agreement. However, practice has shown that an appeal is in most cases an exception, and if the parties choose to include the possibility of an appeal, they use, for most of the time, the standard regulations of one of the "big" arbitration institutes [T&C Rv, commentaar op article 1061d].

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

See question 10.3 above.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, the New York Convention entered into force in the Netherlands on July 23, 1964. The Netherlands applies the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State.

On April 24, 1964, the Netherlands declared that the Convention should also apply to the Netherlands Antilles (the Caribbean part of the Kingdom of the Netherlands).

The Netherlands has a monistic approach towards the incorporation of treaties. From the moment a treaty went into force, the treaty is incorporated in the Dutch rules of law (articles 93–94 of the Constitution).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 entered into force in the Netherlands on November 12, 1931. For the overseas countries of the Kingdom of the Netherlands, the Geneva Convention entered into force for Aruba on January 1, 1986, and for Bonaire, Sint-Eustatius, Saba, Curaçao and Sint-Maarten on October 10, 2010.

The Kingdom of the Netherlands made no reservations for the Geneva Convention.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The general rule is that an arbitral award will be recognised and will therefore be enforceable after acquiring an *exequatur* of the national

court (article 1061k of the DCPC). Article 1075 of the DCPC states that an international arbitration award is enforceable if a recognition and enforcement treaty applies between the Netherlands and the foreign State.

However, on December 8, 2017 the Supreme Court ruled that an *exequatur* given by one country within the Kingdom of the Netherlands does not bind the other countries of the Kingdom (ECLI:NL:HR:2017:3104).

The question of whether an international arbitral award can be recognised is answered by the New York Convention (*Parliamentary History, Kamerstukken II 1983/84, 18464, 3, p. 34*); there will be no recognition of an award when one of the exceptions of article V of the New York Convention applies.

On December 24, 2017 the Supreme Court ruled in a case about the execution of a Russian arbitral award that even in the event where the competent Russian court annulled an arbitral award, a Dutch Court still has the authority to recognise the award and authorise the performance of the award if the Dutch Court considers that the annulment is not based on one of the exceptions of article V of the New York Convention (ECLI:NL:HR:2017:2992).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Yes. Article 1059 of the DCPC states that from the moment that an award has been finally determined, the force of *res judicata* applies to every other lawsuit on the matter at stake between the same parties.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Based upon article 1065 § 1e of the DCPC in relation with article 1063 of the DCPC, the interlocutory judge will refuse the enforcement of an arbitral award if, after a brief research, he deems proven that the arbitral award has been issued in violation of public order (for example, declaring someone insolvent or establishing paternity in family matters through an arbitral award is not allowed) (*Parliamentary History, Kamerstukken II 2012/13, 33 611, 3, Memorie van Toelichting, Modernisering van het arbitragerecht*).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

There is no law in the Netherlands that governs the confidentiality of an arbitral proceeding. It is generally assumed that an arbitral proceeding is non-public. However, since Dutch law does not provide for mandatory confidentiality, it is recommended for the parties to include in the arbitration agreement a non-disclosure clause. Most arbitral institutions have incorporated a non-disclosure clause in their rules (e.g., article 6 of the Arbitration Rules, NAI 2015).

Note that if parties use an arbitrational institute, most of the time the institute is allowed to publish the arbitral awards (e.g., article 51 of the Arbitration Rules, NAI 2015).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

See question 12.1 above. As a general rule, yes.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Except for the exception that an arbitration tribunal is not allowed to issue any seizures, there are no limits on the types of remedies that are available in an arbitration. Article 1056 of the DCPC declares that articles 611a–611h also apply to the arbitration procedure, which means that the arbitration tribunal is allowed to impose periodic penalties.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The legal interest for non-trading transactions (consumers) is 2%, and the legal interest for trading transactions (non-consumers) is 8% (article 6:119 of the DCC). Parties are free to agree upon a different interest rate (contractual interest).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

This is totally up to the parties to arrange in their arbitration agreement.

In the NAI Rules, there is a distinction between administration fees for the use of the arbitration institute (article 54 of the NAI Rules) and the fees of the arbitrators (article 55 of the NAI Rules). Based upon articles 56 and 57 of the NAI Rules, the arbitral tribunal can condemn one party (or both) to bear the fees.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

In 2018, it costs €124 to file an award at the court.

Other costs for the parties to bear differ per arbitral tribunal. For example, the NAI charges, next to the fees for its arbitrators:

- The fees for the hearing of witnesses, experts, site visits, etc.
- Other costs, such as those for the arbitration room, the filing of the award, the secretary, travel costs, translators, etc.
- Administration fees based on a scale of €800 for claims until €100,000, with a maximum of €25,000 for claims bigger than €30,000,000.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

A lawyer can use a fixed-fee structure or an hourly rate, combined with a success fee. A lawyer is obliged to ask – as an absolute

minimum – a reasonable fee (which means a fee that should allow the lawyer to be able to carry out his practice).

It is forbidden for a lawyer to agree to a no-cure-no-pay-fee (an exception is claims based on physical injuries).

There is a system of legal aid for financially weak participants in Dutch society.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, the ICSID entered into force in the Netherlands on October 14, 1966.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The Netherlands is party to BITs and other multi-party investments treaties with more than 95 countries (https://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/inhoud/investeringsbeschermingsovereenkomsten).

However, please be aware of a recent case of the European Court of Justice of March 6, 2018 (ECLI:EU:C:2018:158), wherein the Court of Justice decided that an arbitral clause in a BIT is in contrary with EU law. Disputes between a foreign investor and a Member State should be resolved in front of a state court: "[…] it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law. […] In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law".

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The Dutch government uses, as the basis for its negotiations, a standard BIT model in the English language. This method ensures that there are no great differences between the BITs with various countries.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Supreme Court issued a recent ruling about the defence of State immunity regarding execution. The properties of a foreign State are not subject to seizures or execution, except in the case that the properties are determined to have a non-public destination. The burden of proof is on the claimant (Supreme Court, September 30, 2016, ECLI:NL:HR:2016:2236). This has been recently confirmed by the Supreme Court on December 1, 2017 (ECLI:NL:HR:2017:3054). What is interesting is that the Supreme Court ruled that the defence of State immunity should be assessed by the Court on its own.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Since January 1, 2015, the Dutch arbitration law has been thoroughly revised; everything that is discussed in this chapter is a noteworthy trend and a current issue, which is affecting the use of arbitration in the Dutch jurisdiction.

Furthermore, on March 8, 2018, the House of Representatives passed the bill regarding the Netherlands Commercial Court (hereinafter: "NCC"). It is expected that the NCC will launch in mid-2018. The NCC will be a specialised state court, which will be fully equipped to meet the growing need in the commercial world for an efficient dispute resolution of international civil and commercial matters. The NCC will be based in Amsterdam and operate under the "normal" Dutch procedural laws of the DCC, and the working language of the NCC will be English (https://www.rechtspraak.nl/English/NCC/Paginas/default.aspx). The Dutch legislator aims for the NCC to become a fully-fledged alternative to arbitration since the procedure will give internationally-orientated parties a possibility to litigate from start to finish in the English language (*Parliamentary History, Kamerstukken II, 34761, 3*).

On March 4, 2018, The Hague Hearing Centre opened in The Hague. The centre – which is not an arbitration institute – aims to become the leading location for international arbitration within the Netherlands. Companies can use the centre for their commercial disputes, as the centre will offer every facility that is needed during an arbitration procedure. The centre will have two zones specifically equipped for hearings. Each of these zones will have an arbitrator room, a hearing room and two breakout rooms (http://www.thehaguehearingcentre.com).

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The NAI recently issued guidelines for its arbitrators on how to calculate compensation for legal costs, using as a comparison the calculation of the Dutch Courts of Appeal, as there exists no possibility to lodge an appeal against an arbitral award of the NAI.

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Article 9.1 of the Spanish Arbitration Act 60/2003, of 23 December 2003 (hereinafter "SAA"), states that an arbitration agreement may adopt the form of a clause in a contract or the form of a separate agreement. In both cases, the arbitration agreement shall express the willingness of the parties to submit to arbitration all or certain disputes arising between them in respect of a specific legal relationship, whether contractual or non-contractual.

According to article 9.3 of the SAA, to be valid, an arbitration agreement should be (i) made in writing, and (ii) in a document signed by the parties or in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that ensures that a record of the agreement is kept. This requirement is fulfilled when the arbitration agreement appears and is accessible for its subsequent consultation in an electronic, optical or any other format.

Article 9.2 of the SAA establishes that in case an arbitration agreement is included in a standard form of contract, its validity and its interpretation shall be governed by the rules applicable to such contract.

As to international arbitration, article 9.6 of the SAA specifically states that an arbitration agreement shall meet the requirements of the rules of law chosen by the parties to govern the arbitration agreement, or by the applicable substantive law, or by Spanish law in order to be reputed valid (and the dispute to be arbitrable).

1.2 What other elements ought to be incorporated in an arbitration agreement?

Spanish arbitration law contains only a few mandatory provisions. Thus, the parties have wide discretion to agree on a specific procedure or a particular framework for arbitration proceedings. Nonetheless, tailoring an arbitration agreement has significant advantages and therefore it is of the essence that the parties agree in advance on very important issues such as (i) the seat of arbitration and issuance of the award, which will give the nationality of the future award, (ii) the choice between *ad hoc* or institutional arbitration (and in this latter case, the applicable rules of the institution so chosen), (iii) the number of arbitrators, and (iv) the language used within the arbitration process.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Spanish Courts indeed enforce arbitration agreements and adopt a pro-arbitration attitude. Section 11.1 of the SAA prevents ordinary Courts from settling any dispute submitted to arbitration if the arbitration agreement is enforced by any of the parties.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Arbitration proceedings in Spain are governed by the SAA of 23 December 2003, as already discussed.

The SAA applies without prejudice to the provisions of the treaties expressly ratified by Spain or specific Spanish regulations containing provisions related to arbitration (such as intellectual property and consumer protection laws).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The SAA covers both domestic and international arbitration proceedings. The main differences between the two refer to the rules governing the arbitration agreement itself (article 9.6 of the SAA), the rules applicable to the merits of the dispute (article 34 of the SAA), and the deadlines applicable to the correction, clarification and the issue of a supplement to the award (article 39 of the SAA).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The SAA indeed follows the principles established by the UNCITRAL Model Law, but it has also established certain amendments to promote and fine-tune arbitrations in Spain, as follows:

(i) Further to an amendment of the SAA introduced in 2011, arbitral institutions are now obliged to watch over the capacity of arbitrators, the transparency in their designation and their independence throughout the arbitral proceedings. Additionally, arbitral institutions and arbitrators must subscribe to professional liability insurance.

(ii) Unless agreed otherwise by the parties, a person appointed as sole arbitrator must be a *jurist*, except if the matter is to be decided *ex aequo et bono*. In the case of a three-member panel, at least one arbitrator must be a *jurist*. The term *jurist* is used as opposed to a *practising lawyer* (the term originally used in the SAA), to include academics and other legal professionals who are not practising lawyers. In addition, the arbitrator(s) must not have acted as a mediator in the same dispute.

(iii) Issuing an arbitral award late (that is, after the expiry of the deadline) does not constitute grounds for the annulment of the award, without prejudice to the arbitrators' liability.

(iv) Arbitral awards must be reasoned (except awards on agreed terms) and parties cannot agree otherwise.

(v) The SAA allows arbitrators to state in the award if they vote for or against the final decision.

(vi) The parties may request that the arbitrators correct an arbitral award on an excess of jurisdiction, in addition to supplementing omitted petitions. This is aimed at avoiding unnecessary actions to set aside awards.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The SAA does not contain an exhaustive list of mandatory provisions. Special reference should be made to article 21.1 of the SAA, which imposes a mandatory obligation for arbitrators to obtain insurance (although the specific design of the mandatory insurance requirements is subject to a detailed legislative act still to be passed).

There are also a number of provisions considered as mandatory, such as the provisions ensuring the right to be heard, the equal treatment of the parties or ensuring due process (partially referred to under article 24 of the SAA).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The SAA is quite flexible with respect to arbitration since it specifically states that a dispute may be arbitrated not only when the Spanish law requirements are met, but also when the requirements of the rules of law chosen by the parties or the rules of law applicable to the merits of the case are met. Article 2 of the SAA provides that only disputes relating to matters within the free disposition of the parties are arbitrable. Nonetheless, it should be noted that there is no definition whatsoever determining which matters are "within the free disposition of the parties". However, it is clear that disputes regarding criminal matters and parental issues are, for instance, outside the scope of arbitration. In addition, and as discussed above, the subject matter of the particular legal relationship should be taken into account as, for instance, Spanish law is very protective of consumers and users and, in some circumstances, it declares void arbitration clauses entered into by a consumer and user.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The SAA clearly states in article 22 that arbitrators can adjudicate on their own jurisdiction. Thus, the principle of *kompetence-kompetence* is expressly recognised in Spain.

Furthermore, the decision of the arbitrators on their jurisdiction may only be challenged by means of an application to set aside the final or a separate award on jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Article 11.1 of the SAA would prevent the Court from hearing the disputes submitted to arbitration and the Court should uphold the arbitration agreement. Therefore, any claim commenced in apparent breach of the arbitration agreement should be rejected by the Court unless the defendant answers to the claim without objecting to the Court's jurisdiction (in which case the parties are deemed to have agreed to waive the arbitration agreement).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Under Spanish law, a Court can only address the question of the jurisdiction and competence of the arbitral tribunal when one of the parties commences a proceeding in apparent breach of an arbitration agreement or when the award rendered by the arbitral tribunal is being challenged, or the enforcement order is appealed, on the basis that the arbitral tribunal's decision on jurisdiction is wrong.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Spanish law does not afford a tribunal power to assume jurisdiction over individuals/entities which are not actually a party to the arbitration agreement. However, certain case law in Spain has admitted that arbitration agreements may bind non-signatories if they have had a very close and strong relationship with one of the signatories and/or has played a relevant role in the performance of the contract subject to arbitration (the so-called "tacit acceptance of the arbitration agreement"). This is an issue that has to be analysed on a case-by-case basis, given we have no specific case law in Spain (we may cite the decision of the Supreme Court of 9 July 2007 as contrary to the extension of the arbitration clause to non-signatories and the decision of the Supreme Court of 26 May 2005 as favourable to such extension).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no laws or rules prescribing limitation periods for the commencement of arbitrations in Spain, except for those specifically stated in the substantive law applicable to the merits of the case.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pursuant to article 52 of the Spanish Insolvency Act 22/2003 of

9 July 2003, the institution of insolvency proceedings of one party (i) does not affect the validity of the arbitration clause, unless the Judge ruling the insolvency deems that the arbitration may jeopardise a swift outcome of the insolvency proceedings, and (ii) does not affect an ongoing arbitration process, which has to proceed until the award is issued and it becomes final. Since June last year Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceeding applies in Spain. Article 18 of the said regulation specifically states that the effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Pursuant to article 34 of the SAA, the arbitral tribunal shall decide the dispute in accordance with such provisions of law or rules of law as chosen by the parties. Any designation of the law or legal system of a State is deemed to refer directly to the substantive laws of the respective State. In the absence of a relating agreement by the parties, the arbitral tribunal may directly – without resorting to conflict-of-law rules – apply the law it considers most appropriate. The arbitrators may decide *ex aequo et bono* if expressly authorised by the parties only.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Regardless of the substantive law chosen by the parties, when the seat of arbitration is within Spain, mandatory laws affecting Spanish Public Order should not be infringed. Otherwise the award issued by the arbitral tribunal may subsequently be declared null and void.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Pursuant to article 9.6 of the SAA, the validity of an arbitration agreement shall be assessed in accordance with the rules of law chosen by the parties to govern the arbitration agreement, or by the applicable substantive law, or by Spanish law.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There is no limit to the number of arbitrators, provided they are odd in number. If there is no agreement as to the number of arbitrators, only one arbitrator will be appointed. There are some limitations on who may serve as arbitrator. No legal entity may serve as an arbitrator, only individuals. Under article 15.1 of the SAA, unless the parties agree otherwise, the sole arbitrator must be a *jurist*; however, this is not required if the arbitrator must decide the dispute *ex aequo et bono*. In a tribunal formed by three or more arbitrators, at least one of them must be a *jurist*.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In case the method agreed by the parties fails, or absent an express agreement, article 15.2 of the SAA provides as follows:

(i) in an arbitration with a sole arbitrator, an ordinary Court will appoint the arbitrator upon the request of any of the parties;

(ii) in an arbitration with three arbitrators, each party shall nominate one arbitrator, and the two arbitrators thus appointed shall nominate the third arbitrator, who shall act as the chairman. If a party fails to nominate an arbitrator within 30 days of receipt of the demand to do so from the other party, the appointment of the arbitrator shall be made by the competent ordinary Court, upon request of any of the parties. The same procedure shall apply when the two arbitrators cannot reach an agreement on the third arbitrator within 30 days from the last acceptance;

(iii) where there are multiple claimants or respondents, the former shall nominate one arbitrator and the latter another. If the claimants or the respondents do not agree on their nomination of the arbitrator, an ordinary Court will appoint all the arbitrators upon the request of any of the parties; and

(iv) in arbitrations with more than three arbitrators, the competent ordinary Court shall appoint all of them upon the request of any of the parties.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Pursuant to article 15.3 of the SAA, in case of the failure of an express agreement or absent such an agreement, any of the parties may apply to the competent ordinary Court for the appointment of the arbitrators or, if appropriate, the adoption of the necessary measures for this purpose.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Under article 17.2 of the SAA, arbitrators, in order to be independent and impartial, and remain so, shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator shall disclose to the parties, without delay, the occurrence of any such circumstances within the arbitration.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The parties are free to determine the procedure applicable to their arbitration in their arbitration agreement, directly or by reference to the arbitration rules issued by any particular institution. However, certain general principles must always be respected, such as those applicable in benefit of a due process.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties must respect the rules agreed by them and/or those of any appointed institution governing the arbitration process, which, in any event, must always respect the principles of due process, including servings and equal treatment within the arbitration.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no particular rules here, other than those generally applicable to Spanish lawyers acting before the Courts. Counsel must always comply with the rules applicable to proper general conduct, which are mainly related to the principle of good faith towards the arbitrators and adverse party. These same rules apply to any foreign counsel acting in Spain within any arbitration process. There are no specific rules governing the conduct of Spanish counsel acting in arbitrations abroad, and this matter should be addressed under the rules applicable to the seat of the arbitration.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators have indeed certain powers and duties under the SAA, the most relevant of which are:

(A) Powers:

(i) They may withdraw from their appointment precisely when they cannot properly exercise their powers and duties.

(ii) They may decide about their own competence.

(iii) They may adopt interim measures and injunctions.

(iv) They have the power to conduct the arbitration process, deciding on hearings, means of evidence and conclusions.

(v) They may appoint experts (unless expressly agreed to the contrary by the parties).

(B) Duties:

(i) They must be independent and impartial and remain independent and impartial during the whole arbitration process.

(ii) They must respect the principle of due process, with equal treatment to all of the parties.

(iii) They must keep confidential all information received as arbitrators.

(iv) They must issue the award within the established time limits, and they have to explain the rationale behind their decision.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

As opposed to appearances before Spanish Courts, where the presence of a lawyer admitted to practice in Spain is needed, there is no specific rule restricting the appearance of lawyers from other jurisdictions in arbitration processes and, sometimes, foreign lawyers have indeed acted as counsels within arbitrations held in Spain.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators have no immunity when performing their duties. However, while article 21 of the SAA states that arbitrators may be held liable for improper performance of their duties, this same section limits potential claims of damages to wilful misconduct and bad faith, thus excluding negligence.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

As anticipated, national Courts are prevented from acting and adjudicating a dispute subject to arbitration. Pursuant to article 8 of the SAA, national Courts may only act in support of the arbitration in the following circumstances:

(i) appointment and withdrawal of arbitrators;

(ii) supporting the execution of means of evidence;

(iii) adoption of interim measures;

(iv) enforcement of national and international awards; and

(v) adjudicating appeals to set aside an award.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless otherwise agreed by the parties, an arbitral tribunal is entitled to issue interim measures connected with the subject matter of the dispute (article 23 of the SAA). Interim measures issued by an arbitral tribunal are enforceable before any Court and the same provisions relating to the setting aside and enforcement of awards apply regardless of the form of such measures.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Pursuant to articles 8.3 and 11.3 of the SAA, Courts may also grant interim measures in support of arbitrations upon the request of any party, both before and after the commencement of arbitration proceedings and the constitution of the arbitral tribunal, in particular when the requesting party intends to enforce these measures against third parties. Application of a party before a Court to grant interim relief in support of an arbitration will have no negative effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The approach is positive. Spanish Courts have repeatedly granted such interim relief in support of ongoing arbitration processes.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Spanish law does not provide for anti-suit injunctions, neither by an arbitral tribunal nor by a domestic court. As anticipated, article 11 of the SAA expressly prevents Courts acting when a matter is to be arbitrated.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Spanish law does not address the possibility of a Court or an arbitral tribunal ordering security for costs. Despite the fact that arbitrations and ordinary Courts would, in principle, be empowered to order such security for costs, this is an uncommon practice in Spain.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Article 23 of the SAA establishes that interim measures adopted by arbitral tribunals will be subject to the general regime concerning annulment and enforcement of awards. Therefore, when an arbitral tribunal grants certain specific interim measures, such decision will be subject to due enforcement by the competent Spanish Court.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The applicable rules of evidence will be chosen by the parties. If the arbitration is administrated by any particular institution, it would be the rules of such institution which would govern the evidence within the arbitration process. If it is an *ad hoc* arbitration and the parties have agreed no rules on evidence (for instance, the IBA), the arbitrators have wide powers to decide on these, always respecting the principle of equal treatment of all parties, allowing them sufficient opportunity to present their case.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Spanish procedural rules do not include discovery and Spanish Courts will not assist foreign judicial authorities in discovery requests. This is the general trend in relation to arbitration in Spain, although in some cases arbitral tribunals allow limited discovery the purpose of which has to be linked to the merits of the case and the issues to be determined.

The arbitral tribunal has indeed powers to require the attendance of witnesses.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

In practice, any arbitral tribunal may apply to the Spanish Courts for assistance in the gathering and ordering of admitted means of evidence, but only in support of a request produced by the arbitral tribunal (article 8.2 of the SAA).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The SAA does not make any reference regarding the production of written and/or oral testimony. In this regard, procedures established by the International Bar Association Rules on the Taking of Evidence have become standard practice in Spain. Cross-examination of witnesses and witness conferencing are both allowed in Spain. The former is commonly practised whereas the latter is still uncommon in Spain.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

All communications between outside counsel and its client are subject to legal privilege and no arbitrator may ask for the production of evidence. This privilege may only be waived by express consent from the counsel's client. On a general basis, communications with and/or from in-house counsel are not considered as covered by the legal privilege, and production of evidence could be requested.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 37 of the SAA sets forth the formal requirements that an award must fulfil in order to be valid:

(i) It must be made in writing and signed by the arbitrators.

(ii) It must be reasoned, unless dictated under consent of the parties.

(iii) It must contain the date and place of issuance.

(iv) It must decide on costs and expenses of the arbitration, respecting the agreement of the parties in this respect.

(v) It must be duly served on all parties to the arbitration.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Pursuant to article 39 of the SAA, arbitral tribunals do indeed have powers to clarify, correct, complement and amend an award. An amendment of any given award only entails the arbitral tribunal rectifying the award to exclude any decision by the arbitral tribunal related to any specific matter that could not be solved in arbitration or by the arbitral tribunals.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Section 41 of the SAA provides the grounds on which an award

can be challenged, stating that an award may be set aside when the applicant demonstrates:

(i) That the arbitration agreement does not exist or, if it does exist, is void.

(ii) The applicant has not been notified about the appointment of an arbitrator or about any order or when the applicant has not been able to exercise its rights.

(iii) When the arbitrators have adjudicated matters that were not subject to their decision.

(iv) When the appointment of the arbitrators and/or the proceeding is in breach of the agreement of the parties, or, failing such agreement or when such agreement is contrary to the SAA, when such appointment or the proceedings were made in breach of the SAA.

(v) When the arbitrators have decided on matters that may not be subject to arbitration.

(vi) When the award is contrary to public order.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

No, they cannot.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they cannot.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Any challenge against an award must be filed within two months as of the date of serving of the award and before the Superior Court of Justice corresponding to the seat of arbitration. Within the challenge, the applicant must provide all supporting documentation and propose any relevant means of evidence. The Court will serve the challenge to the adverse party, which will have a 20-business-day term to oppose, also providing documentation and proposing relevant means of evidence. A hearing may take place if requested by the parties and/or when any admitted means of evidence must be executed before the Court. After the hearing, or when no hearing takes place, the Court will issue its judgment, which is final and not subject to further appeal.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Spain ratified the New York Convention on 29 April 1977. Spain made no reservations to the Convention. Once ratified by Spain, the original text of the Convention formed part of the Spanish legal system.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Yes, the European Convention on International Commercial Arbitration of 21 April 1961, ratified by Spain on 5 March 1975, and the Convention on the recognition and enforcement of judicial judgments and arbitral awards concerning civil and commercial matters, between Mexico and the Kingdom of Spain of 17 April 1989.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The enforcement procedure varies depending on whether the award is domestic or foreign (an award issued outside of Spain is considered a foreign award pursuant to article 46 of the SAA).

Domestic awards may be enforced directly before the Court of first instance of the place where the award was issued, following the procedure established in the Civil Procedure Act, starting with an application filed by the party wishing to enforce the award.

A foreign award will be recognised pursuant to the New York Convention of 1958 and the general rule is that the competent authority for the recognition of a foreign award is the Superior Court of Justice of the domicile or residence of the party against whom the recognition is sought or, on a subsidiary basis, of the place where the award is to produce effects.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Article 43 of the SAA establishes that an award produces the effects of *res judicata,* with no exceptions, thus precluding the issues decided in arbitration to be heard again in a national Court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

There is no express definition of public policy or order under Spanish law, and Spanish case law has not been consistent in this respect throughout all matters adjudicated. In general terms, the enforcement of an award may be rejected based on public policy issues when it has granted petitions unknown to and/or not accepted by the Spanish legal system (for instance, punitive damages not admitted in Spain). Lately, several arbitral awards have been annulled following a purported insufficiency of the grounding of the arbitral award (considered as a matter of public policy).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Pursuant to article 24(2) of the SAA, arbitrators, parties and arbitral institutions are obliged to keep the information received in the course of the arbitral proceedings as confidential. Although this provision seems to apply only to substantive information received during the proceedings, it is extended to any kind of document and information provided during the arbitration (submissions, award, etc.).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes. The confidentiality provisions apply *vis-à-vis* third parties but not before any other competent Spanish Court to hear any matter brought by any of the parties to the arbitration.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Spanish law does not allow punitive damages. Be that as it may, when the contract contains provisions for punitive damages, arbitrators may grant them if the conditions provided for in the contract are met, carefully assessing their proportionality, based on the principle of free will of the parties. However, the enforcement of this kind of damages in Spain may prove complicated as it could give grounds to one of the arguments to challenge an award based on principles of public order. Arbitrators may award interest. Under Spanish law, the parties may have agreed to capitalise interest in order to accrue additional interest.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The general principle is that the applicable interest rate will be agreed between the parties. Failing agreement between the parties, the applicable interest rate will be the legal interest rate approved by the Spanish Government every year (3% *per annum* in 2018). In the event of commercial receivables, the interest rate of Act 3/2004 of 29 December 2004 may apply. This interest rate is equal to the interest rate applied by the CEB to its most recent financing transaction, plus 7%.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Article 37 of the Spanish Arbitration Act provides that, unless otherwise agreed by the parties, the award shall establish the costs to be borne by each party.

The arbitral costs will include arbitrators' 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.

Failing an agreement between the parties, the arbitrators are entitled to decide on the distribution of costs. Costs usually "follow the event". However, the arbitrators may also decide in the award that one of the parties shall compensate the other party for the incurred costs and expenses.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award itself is not subject to tax. This is without prejudice to any transactions approved within the award which have to be studied on a case-by-case basis and could be subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no general restrictions funding claims under the laws of Spain, except in connection with lawyers acting in the particular case. Contingency fees are legal in Spain. There are some professional funders active in the Spanish legal market but third-party funding is an institution still to be developed in Spain.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, it has.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Spain is party to 79 BITs and 76 Treaties with Investments Provisions.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

No. Spain uses the internationally accepted terms within its investment treaties.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

National Courts respect the general principles contained in the treaties to which Spain is a party. If such treaties establish that a particular judgment or award is to be enforced against Spain, Spanish Courts will grant enforcement. Spain has not ratified the 1972 European Convention on State Immunity. In 2011, it signed the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, but is not in effect as of yet.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

No, there are not.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Since 2011, many Spanish institutions have adopted within their Rules the figure of the emergency arbitrator to decide on urgent matters before the arbitration tribunal is constituted.

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

There are no form requirements for an arbitration agreement. The arbitration agreement does not need to be in writing, although in practice this is almost always the case. The agreement must contain an unambiguous reference to arbitration, and identify the legal relationship that should be covered by the arbitration agreement.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Although not necessary, it is recommended to stipulate the seat of the arbitration, the number of arbitrators, and the language of the proceedings. If institutional arbitration is preferred, the arbitration agreement should state the institutional rules to be applied.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Swedish courts take an arbitration-friendly approach and arbitration agreements are enforced.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act of 1999.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Arbitration Act governs both domestic and international arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

No, but in substance it is very similar.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

There are only a few mandatory rules. The parties must be treated equally and must be given an opportunity to present their case. If one of the parties has its domicile or place of business in Sweden, the parties may not agree to exclude or limit the application of the grounds for setting aside an award in Section 34 of the Act. The provisions concerning invalidity of awards in Section 33 are also mandatory. Under said rules, the award cannot decide an issue which is not arbitrable under Swedish law, and must not manifestly violate Swedish public policy. The award must also be made in writing and be signed.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The general rule is that any dispute is arbitrable if the matter can be settled by agreement. This means that, for example, disputes concerning family law matters cannot be settled by arbitration.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, it is.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The court will dismiss the action if a dismissal is requested by the other party the first time he files a statement with the court.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The decision on jurisdiction by the arbitral tribunal can be reviewed

after the award in challenge proceedings under Section 34 (if the arbitral tribunal found that it had jurisdiction) or Section 36 (if the arbitral tribunal declined jurisdiction). A party can also apply to a court during an arbitration to determine whether the arbitral tribunal has jurisdiction. The burden of proof lies with the challenging party, and the courts rarely set aside an award.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Unless all parties agree thereto, an arbitral tribunal may not assume jurisdiction over parties which are not parties to the arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The general limitation period is 10 years, although there are many special provisions for shorter periods; for example, in consumer legislation. Under certain situations it may be necessary to interrupt the limitation period by bringing a legal action, which could be litigation or arbitration. Issues relating to limitation periods are substantive issues.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

A bankruptcy estate is as a rule bound by an arbitration agreement if the dispute concerns an arbitrable matter. The estate will be given an opportunity to become a party to arbitration proceedings which were pending when the bankruptcy was filed. If the estate does not join, the arbitration will be separated from the estate, but the arbitration may continue with the bankrupt party (rather than the estate).

As regards company reconstruction, pending arbitration proceedings are not affected by this.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The arbitral tribunal is bound by the choice of law agreed by the parties. Absent such agreement, the tribunal will decide what substantive law is applicable. When doing so the tribunal in international arbitration commonly refers to the law with the closest connection to the agreement. If the arbitration is seated in Sweden, the tribunal may also consider other provisions and principles found in Swedish conflict of laws rules.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Mandatory rules may prevail over the law chosen by the parties in some cases; for example, when the application of the chosen law would result in a manifest violation of Swedish public policy, or if other relevant circumstances clearly would have resulted in the application of another law, or to the extent labour or consumer law protection or competition rules are affected, see, e.g., Articles 3.3, 3.4, 6.2 and 8.1 of the Rome I Regulation.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The arbitration agreement is treated separately from the main agreement when determining the validity, i.e. the doctrine of separability applies. If the parties have agreed specifically on the law applicable to the arbitration agreement, this law shall apply. A choice of law clause in the main agreement is often not deemed to cover the arbitration agreement. In the absence of an agreement on the law applicable to the arbitration agreement, the law of the seat shall be applied.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to appoint the arbitrators of their choice, provided that the arbitrator is at least 18 years old and not subject to trusteeship. However, if the appointed arbitrator is not deemed impartial, this may result in the award being set aside. Moreover, arbitration agreements giving an unfair advantage for one of the parties in the appointment of arbitrators may be adjusted under the Swedish Contracts Act.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

A party can request a court to appoint an arbitrator on behalf of the other party when the other party has failed to appoint an arbitrator within 30 days from when the first party appointed its arbitrator, or when the parties have failed to agree on an arbitrator or when the co-arbitrators have failed to appoint a chairperson.

A challenge in respect of an arbitrator's impartiality is settled by the tribunal, unless otherwise agreed by the parties; for example, by reference to institutional rules. The tribunal's decision to remove an arbitrator is final. If a challenge is rejected, a party can file a request with a district court for the removal of the arbitrator.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A court may upon request by a party be involved, as stated in the answer to question 5.2.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The arbitrator must be impartial and independent, and the arbitrator must immediately disclose any circumstances that may give rise to justifiable doubts as to his impartiality and independence. In practice, the IBA Guidelines on Conflicts of Interest in International Arbitration are often referred to.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

There are a few provisions in the Arbitration Act governing the procedure of arbitrations, but the parties may agree to handle the proceedings in any other way, including by reference to institutional rules.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

A hearing shall be held upon request of a party, unless the parties have agreed otherwise.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no such rules, although counsel may be bound to apply their respective code of conduct; for example, the Code of Conduct of the Swedish Bar Association.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitrators shall conduct the proceedings in an impartial, practical and expeditious manner. They must treat the parties equally and afford them a fair opportunity to present their case. They must also comply with the instructions of the parties if there is no impediment of doing so. The tribunal may rule on its own jurisdiction. The tribunal may appoint expert witnesses, unless the parties oppose this. The tribunal may order production of documents, and interim or protective measures.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are certain restrictions applicable to counsel before a court, but these do not apply to arbitration.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators are not granted immunity under the Act, but may be granted immunity by agreement, e.g. under institutional rules.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

A court can assist the arbitration with the appointment of arbitrators; see the answer to question 5.2 above. If requested by a party and approved by the arbitral tribunal, a court may also hear witnesses under oath, and rule on requests for the production of documents. Moreover, a party can request a court to issue interim or protective orders. During an arbitration a party may also request that the court tries the jurisdiction of the tribunal; see the answer to question 3.4 above.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitral tribunal may grant preliminary or interim relief; the tribunal does not need the assistance of a court. However, parties commonly go to court to seek such measures because a decision by arbitrators on interim measures is not enforceable in Sweden. What measures an arbitral tribunal can order are in the discretion of the arbitral tribunal and include measures to maintain or restore a situation pending the determination of a dispute, and measures to secure assets or evidence.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

A court may grant interim relief on matters to be decided in arbitration. The requesting party must show probable cause for the underlying claim and that it could be assumed that the other party might not fulfill its duties. The decision can secure assets and can also stipulate that certain actions shall be taken or that actions may not be taken. The court's order can be sanctioned with a fine. A request to a court for interim relief does not affect the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The courts' handling of such requests is swift, and requests by parties to arbitration agreements are not treated differently than requests made without a connection to an arbitration agreement.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Courts cannot issue anti-suit injunctions in aid of an arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

A court may order that a party from certain jurisdictions outside of the EU should provide security for costs to be incurred in litigation. In arbitration, the arbitrators or the arbitration institute may demand parties to provide security for the arbitrators' fees and expenses, and normally do. The arbitrators may also order security for the parties'

cost, at least if the arbitration agreement supports such an order; for example, by reference to institutional rules with a provision on this.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Preliminary relief and interim measures ordered by arbitral tribunals are not enforceable in Sweden.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The starting point is that the parties should present the evidence they wish to rely on. However, an arbitral tribunal may appoint experts, unless the parties oppose this. The parties may agree on the rules of evidence to be applied; for example, that written witness statements shall be used and how witnesses and experts should be examined. Absent an agreement between the parties, the arbitral tribunal may determine the rules of evidence in its discretion.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

An arbitral tribunal may order the production of documents, although such decision is not enforceable in Sweden. The rules for the disclosure/discovery to be applied can be agreed between the parties, and absent such agreement the arbitral tribunal can determine the rules in its discretion. Often the IBA Rules on the Taking of Evidence are referred to as guidelines, and normally the requesting party is required to identify documents or categories of documents that are relevant as evidence in the arbitration to prove disputed facts. An arbitral tribunal can invite but cannot summon witnesses to appear. It may draw inferences from the non-appearance of witnesses.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

A party may, after approval of the arbitral tribunal, request a court to order the production of documents or a witness to testify under oath before the court. Such court orders are enforceable.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

There are no such rules. The parties may agree on the rules to be applied, and absent such agreement it is in the discretion of the arbitral tribunal to determine the rules. However, the arbitral tribunal cannot hear witnesses under oath and may not impose fines or other sanctions. Unless otherwise agreed between the parties, Swedish arbitrators would allow and expect cross-examination. Written witness statements are commonly used in international arbitration, but less so in domestic proceedings. As regards expert witnesses, it is expected that written expert reports are filed.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Communications with outside counsel are privileged in the sense that it should not be subject to the production of documents. Communication with in-house counsel is as such not privileged. Documents containing trade secrets could be privileged, as well as personal notes.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The award must be in writing and signed by the tribunal. It is sufficient if the majority of the tribunal signs the award, provided that the reason for the missing signature is stated therein. The award should state the seat of the arbitration, the date when the award was made and the parties and the dispute. Dissenting opinions should be noted in the award. Reasons should be provided, unless otherwise agreed between the parties.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

If the award contains a typographical, computational, or other similar mistake, or if the arbitrators by oversight have failed to decide an issue which should have been dealt with in the award, the tribunal may, within 30 days of the date of the award, decide to correct or supplement the award. Upon request of a party, within 30 days of receipt of the award, the tribunal may also correct mistakes or supplement an award, but also interpret the decision in an award if unclear. If the tribunal decides to correct an award or interpret the decision in an award, this shall take place within 30 days from the date of receipt by the arbitrators of the party's request. If the tribunal decides to supplement the award, it shall do so within 60 days. Before a decision is made under these provisions, the parties should be afforded an opportunity to express their views with respect to the measure.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Within three months from the receipt of the award, a party can file a challenge with the court of appeal at the seat of the arbitration that the award shall be wholly or partially set aside under certain narrow grounds, namely: (i) if the award is not covered by a valid arbitration agreement between the parties; (ii) if the arbitrators have exceeded their mandate; (iii) if arbitral proceedings should not have taken place in Sweden; (iv) if an arbitrator has not been duly appointed; (v) if an arbitrator was not impartial or unauthorised for other reasons; or (vi) if, without fault of the party, there otherwise occurred an procedural irregularity which probably influenced the outcome.

A party is precluded from invoking a challenge ground if the party did not protest when it occurred. Following the expiration of the three-month time-limit for the challenge, a party may not invoke a new challenge ground.

A party can also request that the court of appeal determines that the award is invalid in whole or in part if (i) the award includes determination of an issue which is non-arbitrable under Swedish law, (ii) the award, or the manner in which the award arose, is clearly incompatible with Swedish public policy, or (iii) the award is not in writing or not signed as required.

If no seat has been stated in the award, the Svea Court of Appeal in Stockholm will be the competent court to try a challenge.

A judgment in the challenge can only be appealed to the Swedish Supreme Court if the court of appeal has determined in its judgment that there are questions of Swedish arbitration law that need to be clarified by the Supreme Court. Such permission to appeal is rarely granted.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

If all parties are domiciled outside of Sweden, and the matter concerns a commercial relationship, the parties may agree in writing to exclude the right to invoke any or all grounds for challenging the arbitral award under Section 34 of the Arbitration Act.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Yes, they can.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An award whereby the tribunal concluded the arbitration without a ruling on the merits (for example, because of lack of jurisdiction) can be amended by a court of appeal at the seat of arbitration. If no seat is stated in the award, the action should be filed with the Svea Court of Appeal in Stockholm. The action must be brought within three months from the receipt of the award.

An award with a ruling on the merits cannot be appealed, but can only be declared invalid or set aside under narrow grounds summarised above in the answer to question 10.1. If the parties have agreed to expand the scope and thus agreed that the award can be appealed on the merits, it depends on such agreement and other circumstances which court shall try such an action.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Sweden has, without any reservation, signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Arbitral awards rendered in Sweden are recognised and enforceable in Sweden in the same way as national court judgments. An application for the enforcement of an award can be made directly to the Swedish Enforcement Authority.

Awards rendered outside of Sweden are recognised and enforced in Sweden in accordance with Sections 54–55 of the Arbitration Act, incorporating the provision in Article V.1 and V.2 of the New York Convention. An application for enforcement shall be filed with the Svea Court of Appeal. The application will only be denied on the narrow ground found therein. If the Svea Court of Appeal grants an application for enforcement, the arbitral award is recognised and enforceable in the same way as judgments and domestic awards, and an application for enforcement can then be made directly to the Swedish Enforcement Authority.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award gains *res judicata* effect between the parties. This means that issues that have been finally determined by an arbitral tribunal preclude those issues from being re-heard in national courts or in arbitral proceedings between the same parties.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Enforcement can be denied if the award is in breach of the fundamental principles of Swedish law. This public policy ground is narrowly applied. The Svea Court of Appeal and, subject to appeal, the Supreme Court, may consider it *ex officio*.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitral proceedings in Sweden are private, but the parties do not have a duty of confidentiality unless otherwise agreed. The arbitrators have a duty of confidentiality.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes, it can.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Certain remedies may be in conflict with Swedish public policy to the effect that the award in such part may be declared invalid; for example, if the award is ordering a party to effectuate a *pactum turpe*. The remedies must also concern an arbitrable issue (see, e.g., the answer to question 3.1 above). Sanctions which can only be issued by public authorities, such as fines, can therefore not be awarded by an arbitral tribunal. An arbitral tribunal may award agreed penalties, but cannot issue an injunction under a penalty of a fine in accordance with statutory law. It is unclear whether awarding punitive or exemplary damages may be deemed to violate Swedish public policy. The mandate of the tribunal is also limited to the specific requests for relief stated by the parties, and certain remedies awarded may be deemed as an excess of mandate and may result in the setting aside of an award.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Interest is available unless otherwise agreed between the parties. Under the Swedish Interest Act, interest is granted for late payments at an annual rate of the Swedish reference rate plus eight percentage points counted from the due date, or if it is a claim for repayment at an annual rate of the reference rate plus two percentage points.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

At the request of a party, the tribunal may determine the allocation of costs for the arbitration as between the parties. These costs may include the fees and costs of the arbitrators, counsel fees, costs for the party's own work and costs relating to evidence. The tribunal may determine the distribution in its discretion, but normally the costs follow the event to the extent that the winning party's costs are deemed reasonable.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award itself is not subject to tax, but the awarded amount may be regarded as an income to be taxed if the winning party is subject to Swedish tax laws.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no statutory restrictions on third-party funding and there is no court practice concerning third-party funding. A member of the Swedish Bar Association may only accept contingency fees arrangements in very special circumstances. Risk agreements are, however, allowed. There are also foreign funders that have become active on the Swedish market.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, it has.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Sweden is currently a party to 66 BITs. Sweden is also party to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Since the Lisbon Treaty entered into force in 2009, the European Commission negotiates investment protection treaties on behalf of all EU Member States, including Sweden. The already existing BITs remain, however, in force. Generally, Sweden's older BITs are less detailed in their investment protection components, whereas from mid-1990s and later they became more elaborate.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

State immunity can be invoked in Swedish courts in disputes involving acts of the state, but not regarding commercial or otherwise private law matters involving a state.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

On 1 March 2018, the government proposed certain amendments to the Arbitration Act with the aim of further improving Sweden's attractiveness as a seat for international arbitration. The proposals include narrowing the provisions on the setting aside of awards, and the possibility of requesting a court, during the arbitration, to determine whether the arbitral tribunal has jurisdiction. According to the proposal, the amendments shall enter into force on 1 March 2019.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The current version of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) entered into force on 1 January 2017 introducing, among other things, provisions on summary proceedings, administrative secretaries and security for costs.

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Norburg & Scherp

Norburg & Scherp is a leading specialist firm for arbitration and litigation based in Stockholm, Sweden. It represents Swedish and international clients as counsel in commercial disputes in Swedish and international arbitration, and before Swedish courts of all instances, including the Supreme Court. The firm's senior lawyers are also frequently appointed as arbitrators in Swedish and international arbitration.

Norburg & Scherp's arbitration experience includes assignments as counsel and arbitrators under the SCC Rules, the ICC Rules, the Rules of the Finland Chamber of Commerce and *ad hoc*. Norburg & Scherp has extensive experience of disputes in numerous industries and fields, including mergers & acquisitions, joint ventures, construction, foreign investments, mining, energy, manufacturing, renting, IT and telecom, intellectual property and licensing. Norburg & Scherp also frequently acts as counsel in administrative litigation, including public procurement appeals, secrecy issues and telecom disputes.

The firm and its partners are listed as leading by among others *Chambers and Partners*, *The Legal 500*, *Who's Who Legal*, Legal Media Group's *Expert Guides*, and the *Leaders League*.

Switzerland

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

For international arbitration proceedings (*cf.* question 2.2 below), Article 178 of the Federal Act on Private International Law, 1987 (PILA) provides that the arbitration agreement must be in text form and must comply as to substance with one of three sets of potentially applicable laws.

First, as to form, the arbitration agreement must be in a form allowing it to be evidenced by a text originating from all parties to be bound by the arbitration agreement, e.g. as part of a written contract, or a telegram, telex, fax or email exchange. The arbitration agreement need not be signed by the parties. As per the recent draft proposed by the Swiss Federal Council on the revision of Chapter 12 of the PILA on January 11, 2017, an arbitration agreement would be valid even if the form is fulfilled by only one party; *i.e.*, an arbitration agreement can be validly entered into if the arbitration clause is contained in a written offer submitted to the counter party, who accepts it orally or tacitly.

As to substance, Article 178 para. 2 provides that the arbitration agreement must comply with either the law chosen by the parties, the law applicable to the subject matter of the dispute, or Swiss law. The validity of the arbitration agreement cannot be challenged on the grounds that the underlying contract is invalid or that the arbitration agreement applies to a dispute that had not yet arisen at the time of execution. At a minimum, the text of the arbitration agreement must indicate the parties' intention to submit their dispute to arbitration (in particular, by mentioning the word "arbitration") and specify the dispute, or legal relationship, to be decided by arbitration.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The arbitration agreement should determine the seat of the arbitration (preferably a specific city). It is further advisable to determine the language of the proceedings, the number of arbitrators and the procedure for their appointment.

If none of the parties have their domicile, habitual residence or business establishment in Switzerland, then the parties may also, if they so wish, agree to waive any action for annulment proceedings against the award or limit the grounds under which such an action may be brought (*cf.* question 2.4 below). While earlier the Swiss Federal Tribunal required an express and specific statement on waiver, in a recent decision, the court accepted that the statement "there shall be no appeal to any court from awards rendered hereunder" as sufficient to constitute the parties' agreement on waiver (4A_53/2017).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Swiss courts are legally required to enforce valid arbitration agreements regarding an arbitrable dispute (Article 7, PILA) and traditionally tend to be arbitration-friendly. Pathological clauses are often saved by a liberal construction, except when they are truly beyond redemption (for example, 4A_676/2014).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The New York Convention (NYC) of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards governs the enforcement of awards of arbitral tribunals having their seat outside of Switzerland (*cf.* Article 194, PILA). Swiss arbitral awards (awards of arbitral tribunals with a Swiss seat) are enforced in Switzerland in the same manner as judgments of Swiss courts.

To the extent not provided for by the NYC or the PILA, the procedure of enforcement is subject to the provisions of Articles 335 *et seqq.* of the Civil Procedure Code (CPC), in force since January 1, 2011, and, with regard to awards for payment, the provisions of the Federal Act on Debt Collection and Bankruptcy.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

International arbitration proceedings that have their seat in Switzerland are governed by the PILA. An arbitration is deemed international if at least one of the parties to the proceedings was neither domiciled in, nor a resident of, Switzerland when the arbitration agreement was concluded. In the case of assignment of an agreement, the domicile of the original signatory, not of the assignee, is relevant.

All other (domestic) Swiss arbitral proceedings are governed by Articles 353 *et seqq.* of the CPC if commenced after January 1, 2011.

The CPC provides for a modern arbitration framework which is, to a large extent, equivalent to the rules governing international arbitrations. In particular, the form of the arbitration clause is governed by the same rule that applies to international arbitration proceedings

(Article 358 para. 1, CPC). The arbitrators in domestic proceedings are also competent to order interim relief (Article 374, CPC) and have jurisdiction to hear a set-off defence, irrespective of whether the cross-claim is within the scope of the arbitration clause or subject to another agreement to arbitrate or a forum-selection clause (Article 377, CPC). Finally, a motion to set aside can be brought against the award directly to the Federal Supreme Court (Article 389 para. 1). Parties may opt out of the CPC in favour of the PILA (Article 353 para. 2, CPC and *vice versa*, *cf.* Article 176 para. 2, PILA).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Switzerland made a conscious decision not to adopt the Model Law, but rather to devise an even more liberal framework for international arbitration adapted to the already existing international arbitration practice in Switzerland. The pertinent Chapter XII of the PILA contains only 19 articles as compared to the Model Law's 36, leaving more leeway for party autonomy. Nevertheless, there are no fundamental differences between the two.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

As mentioned above, most PILA rules can be modified by the parties' agreement (or, based on that, by the arbitrators), and only very few are considered mandatory. For example, the statutory right to file a motion before the Swiss Federal Supreme Court to set aside the award (Article 190, PILA) can be waived *ex ante* if none of the parties are Swiss (Article 192, PILA *cf.* question 10.2 below). Similarly, the arbitral tribunal is not obliged to check *ex officio* whether the requirements for the form of the arbitration agreement are fulfilled.

Among the mandatory rules are those that ensure due process and equal treatment, *i.e.* the rule requiring independence and impartiality of the arbitrators (Article 180 para. 1 c, PILA) and the rule allowing the challenge of arbitrators (Article 180 para. 2, PILA). The rule at Article 182 para. 3, PILA ensuring equal treatment and the right to be heard in adversarial proceedings is also mandatory. Furthermore, the provision on arbitrability (Article 177, PILA) (*cf.* question 3.1 below) cannot be modified by the parties, and the same is true for the rule defining *lis pendens* (Article 181, PILA) and the provision giving the state court judge authority to render judicial assistance (Article 185, PILA).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

In international arbitrations with their seat in Switzerland, the issue of arbitrability is exclusively governed by Article 177, PILA, which provides that any dispute of economic interest can be the subject of an arbitration. The courts interpret the term "economic interest" in a very broad manner, favouring a finding that a matter is arbitrable. For example, competition and antitrust matters are arbitrable, as well as expropriation matters and employment law, irrespective of what the law applicable to the subject matter of the dispute says. However, under domestic arbitration, claims that arise out of the mandatory provisions of the code of obligations on employment contracts cannot be subject to arbitration (4A_515/2012).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The arbitral tribunal decides on its own jurisdiction and can do so by way of an interim award or at the time it decides on the merits of the dispute (Article 186, PILA). It may do so notwithstanding an 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.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

At the request of one of the parties, Swiss courts readily decline jurisdiction in favour of arbitration based on a *prima facie* examination of the validity of the arbitration agreement if the seat of the arbitral tribunal is in Switzerland (the subsequent decision by the tribunal on its own jurisdiction based on the concept of competence-competence (Article 186, PILA) is then subject to full review within the framework of setting-aside proceedings). Only if the summary examination clearly shows that the arbitration agreement is null and void, inoperative or incapable of being performed, or if the defendant appeared without reservation, do the state courts accept jurisdiction (Article 7, PILA). By contrast, if the seat of the tribunal is abroad, the examination of the validity by the court is thorough. This distinction has been the subject of a parliamentary motion filed in 2008 (*cf.* question 15.2 below).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The arbitral tribunal's award regarding its own jurisdiction can be appealed to the Swiss Federal Supreme Court unless the parties have waived the right to such appeal (Article 190 para. 3, PILA). The Federal Supreme Court fully reviews the application of the laws on jurisdiction by the arbitral tribunal. Conversely, the Swiss Federal Supreme Court held that the tribunal's decision of its own jurisdiction based on a factual finding of an actual meeting of the minds of the parties cannot be reviewed by the Federal Supreme Court at the appeals stage (4A_84/2015).

In addition, state courts address the issue of the jurisdiction and competence of the arbitral tribunal if a lawsuit is filed with a court regarding a matter covered by an arbitration agreement providing for arbitration in Switzerland (*cf.* question 3.3 above). State courts also make a *prima facie* review of the arbitral tribunal's jurisdiction and competence if they are asked to assist in the nomination of arbitrators, the enforcement of interim measures or the taking of evidence.

A foreign tribunal's jurisdiction and competence may be examined in enforcement proceedings under the NYC.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

According to precedent, a written agreement to arbitrate may exceptionally be extended to non-signatories if one of the laws that are potentially applicable to the substance of the arbitration agreement so provides (*cf.* question 1.1 above), or if justified, as the

case may be, by international trade usage. In cases where Swiss law applies, an extension to a non-signatory may be justified if the latter intervened in the conclusion or performance of the main contract in such a way that the party seeking the extension had legitimate reasons to assume that the non-signatory intended to become a party to the main contract. An extension is also possible in cases of the assumption of debt or by assignment, but mere affiliation to the same group of companies is generally not sufficient.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Limitation periods are considered to be substantive, not procedural, and thus subject to the law applicable to the substance of the dispute. Such law also determines whether limitation periods need to be met by the timely commencement of arbitration (or court) proceedings or any other means of suspending or interrupting the limitation periods.

In Swiss substantive law, different limitation periods exist. In contract law, the usual limitation period is 10 years. However, shorter periods may apply, such as two years in sales and five years for periodic payments and mandate fees. In tort law, the usual limitation period is one year after the creditor gained knowledge of the relevant facts and a maximum of 10 years after the tortious act, always subject to longer periods under criminal law.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

According to the jurisprudence of the Federal Supreme Court (DFT 138 III 714), the effect of insolvency proceedings on the jurisdiction of the arbitral tribunal is subject to the law at the place of incorporation of the insolvent party, as: (i) the question of capacity to participate in the arbitral proceedings is one of jurisdiction; and (ii) a company's legal capacity is to be determined according to the law at the place of its incorporation. If an insolvent party loses its legal capacity pursuant to the law at the place of its incorporation, it loses its capacity to participate in Swiss arbitration proceedings. However, contrary to previous case law, foreign insolvency law provisions that only and specifically restrict the capacity to be a party to arbitration proceedings or the validity of arbitration agreements concluded by it are irrelevant to arbitrations seated in Switzerland.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The arbitral tribunal decides the merits of the dispute according to the law chosen by the parties or, in the absence of such choice, according to the law having the closest connection with the dispute (Article 187 para. 1, PILA). It is generally held that such law does not have to be a state law, but may also be rules of law such as the UNIDROIT Principles of International Commercial Contracts or general principles of law. The general conflict of law rules of the PILA are not applicable in arbitration.

The parties may also authorise the tribunal to decide *ex aequo et bono* (Article 187 para. 2, PILA).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In exceptional cases, mandatory laws of a law other than the law chosen by the parties may be applied. This concerns matters of public policy such as, in particular, anti-trust laws that may void a contract. Such public policy rules must have a close connection with the dispute and must appear to be reasonable and appropriate from a transnational perspective.

Further, the law having the closest connection with a particular non-contractual aspect of the dispute may apply to such aspect, such as the standing to sue or be sued of a legal entity or the effect of bankruptcy on pending arbitration proceedings.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Swiss arbitration law follows the principle of *favor validitatis*. The arbitration agreement is valid if it conforms: (i) to the law chosen by the parties for the arbitration agreement; (ii) to the law applicable to the substance of the dispute; or (iii) to Swiss law as *lex arbitri* (Article 178 para. 2, PILA, *cf.* question 1.1 above).

According to the principle of separability, the arbitration clause of a contract is generally considered to be valid and binding even if the main contract is invalid or non-existent (Article 178 para. 3, PILA).

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The law expressly provides that the arbitrators shall be appointed, dismissed or replaced pursuant to the parties' agreement (Article 179, PILA). There are, in principle, no limits to the parties' autonomy, except general limits concerning the arbitrator's independence and impartiality. In particular, the parties are free to agree on the requested qualifications of the arbitrator, or on any number of arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The state courts at the place of the seat of the arbitral tribunal are competent to appoint (and dismiss or replace) arbitrators. If the parties have failed to designate the seat of arbitration, then the recent draft amendment to Chapter 12 of the PILA states that it is for the courts first seized to appoint the members of the arbitral tribunal. The state courts apply, by analogy, the domestic law on the appointment of arbitrators, *i.e.* the CPC. In particular, the state courts follow the rules of the CPC, which provide that there will be three arbitrators, that each party will nominate an arbitrator (or, if the party fails to appoint an arbitrator, the state court shall appoint an arbitrator on behalf of such party) and that the party-appointed arbitrators will nominate the chairperson. In the case of multi-party arbitration, the proposed revision to the PILA states that the state courts may appoint all the arbitrators.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The state courts can assist in the constitution of the arbitral tribunal at the request of one party (in particular, if one party fails to appoint an

arbitrator, even though the parties have agreed on such procedure, or if the party-appointed arbitrators cannot agree on the chairperson).

In addition, to the extent that the parties have not agreed otherwise, the court at the place of the seat of the arbitral tribunal decides on any challenge to an arbitrator. There is no appeal against the court's decision on such a challenge.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

In line with modern international standards, an arbitrator can be challenged if there are justifiable doubts as to his independence and/or impartiality. The mere appearance of a lack of independence suffices to render an arbitrator challengeable, but the requirements may be slightly less strict for party-appointed arbitrators. A party has to challenge an arbitrator as soon as it becomes aware of the grounds for the arbitrator's challenge.

The arbitrators have a pre-contractual and contractual duty to disclose potential conflicts of interest. In practice, the IBA Guidelines on Conflict of Interest are generally used as guidelines to ensure the impartiality and independence of arbitrators. The Swiss Federal Supreme Court expressly recognised that the guidelines are a valuable working tool and will influence the practice of arbitral institutions, as well as the courts.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The parties are free to determine the arbitration procedure (Article 182 para. 1, PILA). Regardless of the chosen procedure, the arbitral tribunal, however, must guarantee that both parties are treated equally and granted the right to be heard in adversarial proceedings (Article 182 para. 3; *cf.* question 2.4 above).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Subject to the requirements of due process (equal treatment, right to be heard), which require that the proceedings be adversarial, and the need for a request for arbitration, the parties (and the arbitral tribunal) are free to determine the procedural steps.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Counsel from Switzerland are subject to certain provisions of the Swiss Attorneys-at-Law Act (Federal Act on the Free Movement of Lawyers, 2000), the Professional Rules of the Swiss Bar Association, and the Code of Conduct for European Lawyers. These provide, *inter alia*, that Swiss lawyers have an obligation of professional secrecy (or privilege; *cf.* question 8.5 below). The Professional Rules prohibit counsel from influencing witnesses, but explicitly allow them to contact witnesses in arbitral and supranational proceedings.

These rules (i) also govern the conduct of Swiss counsel in proceedings sited elsewhere. In contrast, the Swiss Attorney-at-Law Act and the Swiss Professional Rules (ii) do not govern the conduct of counsel from countries other than Switzerland, as the rules are attached to lawyers registered in Switzerland. However, in order to avoid that different standards apply to the parties' counsel, a Swiss arbitral tribunal will usually issue supplemental procedural rules on the issue by which the parties can be guided.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

In particular, the arbitrators have the power to determine the procedure to the extent that the parties have not done so (Article 182 para. 2, PILA). They can issue procedural orders, including conservatory measures and other interim relief. If necessary, they can turn to the courts at the seat of the tribunal for the enforcement of such orders and other assistance (Articles 183–185, PILA). The arbitrators' duties include the duty of confidentiality, the duty to remain independent from and impartial to both parties and the duty to treat the parties equally.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Swiss Attorneys-at-Law Act defines under which conditions a foreign lawyer may be licensed to practise law in Switzerland and appear before the Swiss courts. Generally, nationals of the Member States of the European Union or the European Free Trade Association that are admitted to practise in an EU or EFTA State can appear before a Swiss court, possibly with the consent of a lawyer registered in Switzerland.

This act is not applicable to international arbitration proceedings sited in Switzerland. The parties are free to select lawyers from other jurisdictions as arbitrators or counsels. Hence, there are no restrictions on a party's right to be represented by a person of its choice in arbitration proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no Swiss laws or rules granting arbitrator immunity. Instead, an arbitrator may be liable for breach of his or her duties, and the parties may not waive liability for gross negligence or wilful misconduct in advance. Due to the specific nature of the arbitrator's role, it is generally stated that liability should be limited to gross negligence and wilful misconduct. This is also the rule of the Swiss Rules of International Arbitration (Article 45, Swiss Rules).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Apart from assistance proceedings (*cf.* question 8.1 below), the courts may only deal with procedural issues if the award is appealed

on the grounds that the principle of equal treatment or the right to be heard were violated during the arbitration proceeding. Certain fundamental procedural issues may also be considered during the setting-aside proceedings on the grounds of public policy.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The arbitral tribunal has jurisdiction to order interim measures unless the parties have agreed otherwise (Article 183 para. 1, PILA).

In general, the arbitral tribunal may order whatever is necessary to protect the parties' rights until a final award is issued. In particular, the arbitral tribunal may order any measures available under the procedural rules applicable to the arbitration proceedings, under the substantive law applicable to the dispute, or under the law of the country where the order will be enforced. It is the prevailing view, however, that an arbitral tribunal cannot order an attachment (*séquestre*; arrest) within the meaning of the Federal Act on Debt Collection and Bankruptcy regarding assets located in Switzerland, while it may order any other measure to secure monetary assets. An arbitral tribunal may issue an anti-suit injunction to protect the arbitration.

Although interim measures ordered by the arbitral tribunal are binding on the parties to the arbitration proceeding, an arbitral tribunal does not have the powers inherent in state courts to enforce such measures. Therefore, an arbitral tribunal cannot threaten the parties with criminal sanctions in case of non-compliance. If the party concerned does not voluntarily comply with the interim measure, the tribunal may request the assistance of the competent state court to enforce the measure. As per the proposed revision of the PILA, in addition to the arbitral tribunal, a party may now also request the assistance of the courts in case the opposing party does not comply with the orders issued by the tribunal. The Swiss Supreme Court has not yet definitely ruled on the tribunal's power to issue *astreintes*, *i.e.*, a penalty for each day of delay.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Unless the parties have explicitly agreed otherwise, a state court can grant interim relief in proceedings that are subject to arbitration. The state court will decide on a motion for the issuance of an interim order based on its own law. Since there is parallel jurisdiction of the state courts and the arbitral tribunal, the jurisdiction is deemed to lie with the body that first received a request to issue interim measures. A party's request to a court has no effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

State courts normally will not interfere with the arbitral tribunal's jurisdiction if the tribunal is already constituted and if a request for the issuance of interim measures is already pending with the tribunal. A state court will also not re-judge a request for interim relief that the tribunal has already disposed of. Otherwise, the state courts will treat a request for interim relief by a party to an arbitration agreement no differently from any other request for interim relief.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Switzerland is a Member State of the Lugano Convention on the Recognition and the Enforcement of Judgments in Civil and Commercial Matters. As such, it is bound by the decision of the European Court of Justice *in re Allianz SpA and Generali Assicurazioni Generali SpA -v- West Tankers Inc.* (Case C-185/07). Accordingly, Swiss courts will not issue anti-suit injunctions to prevent a party to an arbitration agreement from commencing or continuing with a court action which it has commenced against the other party to the arbitration agreement, at least if the intended court action is to proceed before a court of a Member State of the Lugano Convention. In one of its decisions, the Federal Supreme Court has left open whether Swiss courts may order anti-suit injunctions at all (DFT 138 III 304, c. 5.3).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Arbitral tribunals sitting in Switzerland request advances on costs to cover the costs of the arbitral proceedings (fees, expenses, etc.). In addition, Swiss law allows for an arbitral tribunal sitting in Switzerland to order a party to provide security for the parties' costs. The order for security for costs is a special type of interim relief. Accordingly, security for costs can be ordered if one party has a *prima facie* case that there is a particular risk that it will not be able to recover its costs from the other party should the arbitral tribunal award such costs. As a general rule, arbitral tribunals only order security for costs in exceptional cases.

State courts in Switzerland may, and usually will, order the plaintiff to provide security for costs of the state court proceedings, but not of arbitral proceedings.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Article 183 para. 2, PILA provides that if a party does not comply voluntarily with the order issued by the arbitral tribunal, then the tribunal (and as per the proposed revision, even a party) may request the assistance of the competent court to the extent that such interim measure is also recognised by Swiss procedural law. Thus a tribunal sitting in Switzerland could request Swiss courts to enforce the interim measures that it has ordered, if such measures shall take effect in Switzerland. This might, however, prove of little practical use if the parties to the arbitration have no connection with Switzerland other than the fact that it is the chosen seat of their arbitration.

Orders issued by arbitral tribunals seated outside Switzerland cannot benefit from court assistance provided for at Article 183 para. 2. It is also unlikely that Swiss courts would see such interim orders as foreign awards and enforce them as such, since the Swiss Federal Supreme Court has already held, in the context of a setting-aside proceeding, that an order on provisional measures issued under Article 183 PILA, does not qualify as an "award" (ATF 136 III 200,

c. 2.3.1). It may therefore be useful for the foreign-seated tribunal to approach the local courts at the seat, which can in turn approach Swiss courts under mutual assistance mechanisms.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

To the extent that the parties do not agree on the applicable rules, the arbitral tribunal determines the procedure at its own discretion, but subject to the principles of equal treatment of the parties and the right to be heard (Article 182, PILA).

The tribunal administers evidence directly (Article 184 para. 1, PILA). It may, however, request the assistance of the state court at the seat of the tribunal (Article 184 para. 2, PILA). This state court can then request the assistance of foreign courts via letters rogatory.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Within the limits of the procedure agreed to by the parties, the arbitrators have discretion to order the disclosure of documents. The arbitrators cannot directly compel the party concerned to cooperate; they may, however, draw adverse inferences concerning the content of the documents concerned if they are not produced. In practice, in the interest of the efficiency and cost-effectiveness of arbitrations, Swiss arbitral tribunals only very rarely order (extensive) document production. In particular, US-style orders to produce "any and all" documents are considered alien to arbitrations in Switzerland, and generally, are not in line with party expectations. If a person who has been ordered by the arbitral tribunal to appear as a witness refuses to do so, the tribunal may seek the assistance of the state courts or, if the witness is under the control of a party, draw adverse inferences.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

The state court at the seat of the tribunal may be asked by the arbitral tribunal or a party with the consent of the tribunal to assist in the taking of evidence (Article 184 para. 2, PILA). In particular, it may order and compel the production of documents or take the testimony of recalcitrant witnesses.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The parties may decide upon the procedure to be followed (Article 182 para. 1, PILA). Very often, the parties and the tribunal agree to submit written witness statements as evidence. The parties are also free to submit expert reports. Witnesses and experts are usually cross-examined at a hearing. They may also be questioned by the arbitrators. They are not formally sworn in, but are made aware of their duty to tell the truth, which is protected by Swiss criminal law (perjury is a criminal offence). Swiss lawyers must not influence witnesses, but are allowed to contact them (*cf.* question 6.3 above).

Rules concerning professional privilege are observed. Swiss lawyers have an obligation of professional secrecy (or privilege; *cf.* question 6.3 above and question 8.5 below). Possible conflicts between the rules applicable to the parties and their counsel are decided on a case-by-case basis.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

In arbitration proceedings, it is unclear which law applies to issues of privilege. The arbitral tribunal tends to test privilege under more than one of the possibly applicable laws, and, in particular, to apply the rules of the jurisdiction where the document is situated, and the law of the party that is requested to disclose the material.

Swiss lawyers have an obligation of professional secrecy (*cf.* question 6.3 above). Professional secrecy (or privilege) is the right of an attorney who is admitted to the Bar and who is acting as a lawyer (and not as a business person, member of the board, or otherwise) to refuse to give testimony or to produce a document. Privilege also applies to correspondence between a party and his/her attorney, provided that this correspondence concerns the professional legal representation of a party or a third party (Article 160 of the CPC; a clarification of this provision was enacted as of May 1, 2013).

It is unclear whether arbitrators have a privilege of their own. In practice, state authorities have, in certain cases, *de facto* respected a privilege of the arbitrators. Presently, privilege only applies to outside but not in-house counsel. In a recently proposed amendment to the CPC, the Swiss Federal Council has proposed to also apply legal privilege to in-house counsel.

Under Swiss law, waivers rarely occur and the intention of the party to waive privilege for specific documents must be clearly established.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The award has to be made following the procedure, and in the form agreed to by the parties (Article 189 para. 1, PILA). Whatever the procedure chosen, the award must be rendered after an adversarial procedure, guaranteeing the parties' equal treatment and right to be heard. If, and to the extent, no such agreement exists, the award has to be passed by a majority of the members of the arbitral panel. Absent a majority, the award may be rendered by the chairperson alone. The award has to be made in writing and has to be dated and signed by, at a minimum, the chairperson (it is not necessary to sign every page). In addition, the reasoning upon which the award was based also must be set forth, unless the parties agreed otherwise (although lack of reasoning does not render the award challengeable).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Interpretation, correction and amendments to the awards are issues

to be decided between the parties under their general powers to determine the arbitral proceedings. In the case of an institutional arbitration, this question may be specifically addressed by the institutional rules adopted by the parties. If no agreement has been reached between the parties, then the power of the tribunal to interpret, correct or amend the award is a question to be determined by the applicable procedural law.

For domestic arbitrations in Switzerland, Article 388 (1), CPC specifically empowers the tribunal to interpret, correct or amend the award. The proposed amendment to the PILA purports to correct a gap in this text by including a provision on the revision and correction of awards that was earlier missing.

Correction of an award must be limited to rectifying computational, clerical or typographical errors. Similarly, a party may request the arbitral tribunals to clarify the precise scope of the operative part of its award, or clarify an obvious inconsistency between the operative part and the reasons, if one were to exist.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

A final award may be set aside based on the following limited grounds (Article 190 para. 2, PILA):

a. The appointment of the sole arbitrator was incorrect, or the panel was incorrectly constituted.

b. The arbitral tribunal has wrongfully accepted, or refused jurisdiction.

c. The arbitral tribunal has ruled on an issue that was not submitted to it, or, conversely, it has failed to rule on a claim submitted.

d. The arbitral tribunal violated the principle of equal treatment of the parties or their right to be heard.

e. The award violates international public policy – understood by the Federal Supreme Court very narrowly to refer primarily to a universal public policy common to all civilised nations although with a Swiss "touch" (to date, only two sports-related awards have been set aside for violation of public policy, but no commercial arbitration award).

A preliminary or interim award may be challenged separately, based on grounds a. or b., above. The other grounds may be invoked against preliminary awards as well insofar as they directly concern the constitution (ground a.) or the jurisdiction of the arbitral tribunal (ground b.) (DFT 140 III 477). If that is not the case, the other grounds for appeal can only be raised in a challenge of the final award.

The Federal Supreme Court exercises considerable restraint in the setting aside of arbitral awards, resulting in the dismissal of the great majority of appeals. The judgment is usually rendered within a very short period of time. An empirical study has shown that the Court set aside a mere 7% of all challenges that were brought under the PILA and decided on the merits, and typically takes just about six months to decide.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties may waive the right to file an appeal in advance if they do so explicitly and in writing, and if neither of them has its seat, domicile, residence or place of business in Switzerland (Article 192). They may also limit such waiver to specific grounds of appeal.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties are free to provide for an appeal before a second arbitration tribunal. They may not, however, expand the scope of review by Swiss state courts.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An award may only be appealed on the limited grounds listed in Article 190 para. 2 (*cf.* question 10.1 above), and the appeal must be directly made before the highest Swiss court, the Federal Supreme Court. This adds an arbitration-friendly feature to Swiss arbitration law not usually found in other jurisdictions.

The appeal must be made in writing within 30 days of service of the (full, partial or interim) award to the parties and must also be answered within 30 days. As a general rule, there is no second exchange of briefs and no hearing. Concerning the award, the Federal Supreme Court will not take new or re-hear evidence. Consequently, the legal costs of an appeal are generally very limited. For example, in case of an award of about USD 1–2m, a party risks court costs and compensation for lawyers' fees of approx. 2.5% of the amount in dispute.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Switzerland ratified the NYC on March 2, 1965, and the NYC entered into force in Switzerland on August 30, 1965. It is directly applicable as Swiss law. The PILA has extended the applicability of the NYC to the recognition and enforcement of all foreign awards (Article 194, PILA) and, *per analogiam*, to the enforcement of Swiss awards if, and to the extent, the parties have agreed to a waiver of the right to file an appeal (Article 192, PILA). Switzerland has withdrawn an earlier reservation, and no reservations are currently in place.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, but Switzerland is also a party to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. In addition, there are a number of bilateral treaties (in particular with Germany, Sweden, Austria, Belgium, Italy, Liechtenstein, the Czech Republic and Slovakia) that also cover arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Arbitral awards are recognised and enforced as a matter of course. This holds true for both domestic and foreign arbitral awards. Case law indicates that the courts are very reluctant to second-guess an

arbitral tribunal's determination on the merits. In particular, there is no review on the merits unless the effect of the award manifestly violates public policy.

Monetary awards are enforced in federal debt enforcement proceedings and may be the basis for an attachment of the debtor's assets to secure enforcement. If the debtor objects to enforcement, a judge will set aside the objection in summary proceedings and will normally render a decision within a few weeks. Appeals are, however, possible against this decision, and the appeal proceedings could last several months. Non-monetary awards are enforced under the CPC in summary proceedings.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Pursuant to Swiss law, a final award that is enforceable in Switzerland is also binding on Swiss national courts and arbitral tribunals sitting in Switzerland. Only the operative part of the award is binding, but not findings of fact or a legal reasoning that is not part of the operative part of the award. The finality of the award will have to be considered under the *lex arbitri*, the enforceability under Swiss law and, therefore, under the NYC in case of a foreign award. The Federal Supreme Court has also upheld the principle of *res judicata* as part of procedural public policy and therefore set aside arbitral awards that disregarded this principle.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Enforcement of foreign arbitral awards can be refused on the grounds of public policy. As in proceedings where annulment of an award on the grounds of public policy is sought (*cf.* question 10.1 above), the courts are very reluctant to refuse enforcement of a foreign arbitral award on the basis of public policy. The violation of public policy must be obvious and clear. It can relate to procedural issues (equal treatment of the parties, right to be heard, independence of the arbitrators) and substantive issues (violation of anti-bribery or corruption laws). It is still unclear under which circumstances awards granting punitive damages can be enforced. Mandatory provisions that are part of public policy in domestic law do not automatically qualify as public policy from an international perspective. Enforcement of Swiss arbitral awards cannot be refused on the grounds of public policy, as annulment of the award on this ground could have been sought.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

There is no general provision on the confidentiality of arbitral proceedings in Swiss law. The rules of arbitral institutions, or other arbitration rules agreed to by the parties, may contain provisions relating to confidentiality.

It is generally accepted that the deliberations and the voting of the arbitral tribunal are secret. Further, the arbitrators have to keep the proceedings confidential.

As a matter of course, third parties do not have access to the files of the tribunal and cannot participate at the hearings without agreement by the parties.

Conversely, there is no explicit obligation of the parties to keep the existence, and the content of, the arbitral proceedings secret. In general, a duty of the parties to keep the proceedings confidential may not be inferred from an arbitration clause. A party may even be obliged to inform the public about the proceedings, *i.e.* under the rules of *ad hoc* publications applicable to companies listed on a stock exchange. Also, even if the parties agree on a duty of confidentiality, a party may disclose information related to the arbitration in order to preserve its legal rights.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Unless the parties have agreed otherwise, each party is free to use information disclosed in arbitral proceedings for other purposes, such as in subsequent arbitral or state court proceedings. In practice, it is not uncommon to use documents produced, or briefs filed by, the other party in other proceedings. The rule found at Article 3 para. 12 of the IBA Rules on the Taking of Evidence, however, is frequently applied based on agreement of the parties; the same is true for broader confidentiality orders of the tribunal.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The law applicable to the merits of the dispute determines which types of remedies, including types of damages, are available. In principle, Swiss arbitration law does not put limits on such types of remedies. A particular remedy that is provided for by the applicable law would therefore be unavailable only if it were in violation of public policy, but there are no precedents in that regard.

An issue discussed and not resolved is the availability of punitive (exemplary) or multiple damages. Since punitive damages are almost (although not entirely) unknown in Swiss law, Swiss courts do not apply punitive damages provided for by the applicable foreign law as a matter of Swiss public policy. It is generally acknowledged, however, that arbitral tribunals situated in Switzerland are not bound by the limits of Swiss public policy. Rather, they should, and do, apply truly international notions of public policy. As a consequence, they may apply rules on punitive damages of the law applicable to the substance of the dispute.

Another question is whether an award granting punitive or multiple damages may be set aside on appeal. Since the Swiss Federal Supreme Court refers to a universal public policy, punitive damages, being a generally acknowledged type of damages in most common law jurisdictions, should not, as such, be a reason to set aside the award.

13.2 What, if any, interest is available, and how is the rate of interest determined?

There is no restriction in Swiss arbitration law with regard to interest. Whether, and to what extent, interest is due depends upon the law applicable to the subject matter of the dispute. Swiss arbitral tribunals award interest on damages, if claimed, in line with

international practice. Consequently, there is no rule concerning the rate of interest in Swiss arbitration law.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

While the current version of the PILA is silent on this issue, the draft proposal to the PILA contains explicit statutory provisions on the arbitral tribunal's power to render a decision on the arbitration and party costs.

The criteria for the allocation of fees and/or costs are generally determined by the arbitration rules chosen by the parties. In the absence of such rules, *i.e.* mainly in *ad hoc* arbitration, or if the rules are silent on this issue, the arbitrators have discretion. It is generally accepted that the arbitrators may apply the principle of "costs follow the event" and award fees and/or costs in proportion to each party's success with its claims. However, the arbitral tribunal may use any objective criteria. It may, and normally does, take into account special circumstances, namely, the time and effort required with regard to particular claims or evidence offered by one party.

With regards to the amount of the parties' costs, the tribunal, again, has considerable discretion. Generally, the parties are invited to submit their costs to the tribunal. A party that prevails in all respects may expect to be fully compensated for its legal fees unless it appears that such party has unnecessarily inflated its fees. The costs of an in-house counsel are also compensated if properly calculated and presented, in particular where the successful party had not hired the services of external legal counsel and where the involvement exceeded the ordinary level of legal and litigation risk inherent to any business. It is not usual to compensate a party for time spent by its employees.

As a matter of course, the arbitral tribunal requests the parties to equally share the payment of advances to cover the fees and costs of the arbitral tribunal. In the award, the tribunal usually grants the successful party a right of recourse against the other party concerning the advance.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

There is no particular tax on Swiss arbitral awards. Specifically, the fees of the arbitrators are, in principle, exempt from Swiss VAT.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Restrictions on fee arrangements arise out of the Bar rules that apply to lawyers acting in arbitration proceedings. Swiss counsel are subject to the Swiss Attorneys-at-Law Act and the Professional Rules of the Swiss Bar Association. According to these rules, contingency fees *in lieu* of ordinary attorneys' fees are not permissible, but contingency fees in addition to a guaranteed base fee ("no win, less fee" agreements) are considered to be permissible to a certain extent.

Apart from the aforementioned provision, there are no specific restrictions on third-party funding in Switzerland. In 2004, the Federal Supreme Court even set aside a clause of a new law which prohibited third-party funding in the canton of Zurich. The Court held that a general ban of third-party funding violates the right of economic freedom as enshrined in the Federal Constitution (DFT 131 I 223).

There are (few) professional providers of third-party funding active in Switzerland and some have been reported to be active in funding arbitrations. However, these providers require a certain minimum amount in dispute and frequently do not accept to fund cases in complex areas of law.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, it has, with effect as of June 14, 1968.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Switzerland is a party to more than 120 BITs and various multilateral investment treaties, such as the Energy Charter Treaty and the Convention establishing the Investment Guarantee Agency.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The BITs of Switzerland tend to follow the same structure and have similar language, but there is no binding model agreement and no language is necessarily followed.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

A state that is a party to an arbitration clause cannot contest the jurisdiction of the arbitral tribunal, or the arbitrability of the dispute, by reference to its state law (Article 177 para. 2, PILA). However, an award against a state need not be enforced if this would be in violation of the rules on state immunity as applied in the enforcing state.

In contrast, Swiss courts traditionally follow the concept of a limited state immunity regarding jurisdiction and execution. A foreign state will only enjoy immunity for acts that are *jure imperii*, but not for acts *jure gestionis*, at least to the extent that there is a certain connection to Switzerland. Only the nature of the act (*jure imperii* or *gestionis*), but not its purpose, could provide immunity. At the enforcement stage, public assets that are used *jure imperii* enjoy immunity regarding execution.

In addition, certain conventions and treaties apply; in particular, the European Convention on State Immunity of May 16, 1972, and the Vienna Conventions on Diplomatic Relations of 1961 and on Consular Relations of 1963. Furthermore, Switzerland has signed and ratified the United Nations Convention on Jurisdictional Immunities of States and their Property of December 2, 2004.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Arbitration in Switzerland has a long tradition, a very flexible and proven legal framework, a fine-tuned infrastructure and a large number of specialist practitioners that are experienced counsel, arbitrators, or both.

Switzerland is a preferred venue for proceedings under the auspices of the International Chamber of Commerce. In addition, several institutions offer arbitration services, such as the Court of Arbitration for Sport (*Tribunal Arbitral du Sport*), and the well-known Zurich and Geneva Chambers of Commerce. Whereas previously various chambers of commerce of the Swiss cantons (including Zurich and Geneva) each had their own set of rules, the unified "Swiss Rules of International Arbitration" (Swiss Rules) have governed the institutional arbitration administered by the various cantonal Chambers of Commerce since January 1, 2004. The Swiss Rules are based on the UNCITRAL Arbitration Rules, and have established themselves as efficient and user-friendly (www.swissarbitration.org). An updated version entered into force in June 2012 and is now administered by the Swiss Chambers' Arbitration Institution. In addition, in 2007, the Swiss Chambers added the Swiss Rules of Commercial Mediation.

The disputes most commonly referred to arbitration in Switzerland involve M&A agreements, service agreements, purchase/sale of goods, distribution/agency, intellectual property/licence agreements, and commercial disputes with similar characteristics. In addition, the Court of Arbitration for Sport (CAS) handles an increasing workload, with 407 new arbitration cases filed in 2013 – as compared to, e.g., just 75 in 2000. Such sports-related cases have become more conspicuous recently as an increasing number of CAS awards are challenged before the Swiss Federal Supreme Court.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Due to feedback received in the consultation process conducted in the course of a possible revision of Article 7, PILA on competence-competence (*cf.* questions 3.3 and 3.4 above), the Swiss Parliament had instructed the Federal Council to conduct a comprehensive evaluation of the entire Swiss arbitration law with the aim of preserving the attractiveness of Switzerland as a place of arbitration. As mentioned above, in January 2017, the Swiss Federal Council presented a draft bill on the revision of Chapter 12 of the PILA. The consultation phase of this draft bill lasted until May 31, 2017, and the bill is expected to be submitted to Parliament in late summer 2018. The Government proposes a "light touch" revision of selective provisions by aligning the existing law with case law and clarifying certain unresolved issues. One innovative addition of the revision is the possibility for the parties to address the Federal Supreme Court in English during the appeal or revision process. In the course of this revision, the Federal Council also decided to renounce the project of revising Article 7, PILA.

Acknowledgment

The authors are grateful to Dilber Devitre, an associate at Homburger, for her assistance with updating this chapter.

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Homburger

Homburger advises and represents Swiss and international corporate clients and individual entrepreneurs on all key aspects of business law.

The Litigation and Arbitration Practice Group focuses primarily on commercial litigation, international commercial arbitration and Swiss administrative proceedings. We advise clients on dispute resolution strategies in domestic and international settings, and represent them in judicial proceedings, with the emphasis on complex, large-scale litigation or arbitration. We also offer a full range of services in alternative dispute resolution (ADR) and debt collection.

Our lawyers represent clients as counsel and serve as members and chairpersons of arbitration panels in institutional and *ad hoc* arbitration, including the ICC, UNCITRAL, Swiss Rules of International Arbitration, London Court of International Arbitration, WIPO, and others.

Other services include representation of companies in white-collar criminal and asset recovery matters, internal reviews and regulatory investigations (including in-house forensic review services), as well as expert advice and expert testimony on Swiss law.

Latin America Overview: A Long Road Travelled; A Long Road to the Journey's End

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I. Introduction

There is no doubt that Latin America has travelled a long way toward modernising the legal framework for international arbitration. As several commentators have noted, the countries that comprise Latin America have overcome many significant obstacles in this modernisation process: the lack of a regulatory framework that accepted arbitration (either in its domestic or international forms); a skepticism toward the benefits of arbitration; the lack of experience with arbitration; and a lack of understanding of the fundamental principles that underlie international arbitration and the modern trends in that field.

The fact that Latin America has been able to overcome such structural impediments is not surprising. As the region found its involvement in international commerce growing, it had to meet the needs of its commercial partners, including the vital role that arbitration plays in international commerce as a *neutral* forum to resolve disputes which also allows ease in *enforcing* its awards. There was also the promise that arbitration would be a flexible, quick and inexpensive manner in which to resolve disputes (whether this promise has been realised anywhere is a valid query). These factors gave rise to an evident change in Latin America's historically hostile attitude toward arbitration, as evinced by the almost complete abandonment of the region's acceptance of the Calvo Doctrine, the best-known symbol of the historic anti-arbitration sentiment in the region. To this end, the countries in the region have, almost universally, signed on to the major international arbitration treaties and have adopted modern arbitration statutes based on the UNCITRAL Model Law. Indeed, as the statistics of the ICC bear out, the Latin American region is now one of the most active with respect to arbitrations. In 2017, the ICC statistics show that:

- 365 parties from Latin America and the Caribbean participated in ICC cases (15.8% of all ICC parties);
- the most common nationality of the parties included: 115 Brazilian; 55 Mexican; 22 Argentinian; 17 Panamanian; 15 Uruguayan; 14 Peruvian; 17 Colombian; 12 Chilean; and 9 Costa Rican; and
- there were numerous Latin American arbitrators confirmed by the ICC in 2017 (77 Brazilian; 51 Mexican; 26 Argentinian; and 21 Colombian, among others).

Nonetheless, as this chapter documents, the region still faces several challenges in bringing the regulatory framework in line with modern international arbitration practice: judicial intervention in arbitrations, including: appeals based on constitutional arguments (*amparos*); a lack of understanding of the practice of international arbitration; a lack of understanding on the part of the judiciary of the principles underlying international arbitration; and the selection of Latin American venues as seats of arbitrations.

II. Adoption of Arbitration Framework Throughout the Region

1. Adoption of international treaties and conventions

As is to be expected, a necessary first step in the creation of a modern arbitration culture and environment is the adoption of the international arbitration treaties and conventions. Until relatively recently, there were several unsuccessful attempts to have Latin American countries adopt international conventions dealing with arbitration. Among these we can mention the *Convención sobre Derecho Procesal Internacional* (signed by six countries in Montevideo, Uruguay in 1889), the *Acuerdo Boliviano sobre Ejecución de Actos Extranjeros* (signed by five countries in Caracas, Venezuela in 1911), and the *Convención de Derecho Internacional Privado* (signed in Havana, Cuba in 1928, which gave rise to the *Código de Derecho Internacional Privado*, known as the *Código Bustamante*). Although interesting in their own right, these conventions and treaties had little impact in terms of creating a positive culture for arbitration in the region in as much as the domestic laws were still highly antagonistic to arbitration (e.g. the Calvo Doctrine was still the rule in most of Latin America).

As with the rest of the world, dramatic changes occurred in 1958 with the adoption of the New York Convention and in 1975 with its Latin American counterpart, the Panama Convention. The Panama Convention was the first signal of the region's acceptance of international commercial arbitration. Prior to 1975, few countries in the region had adopted the New York Convention. The drafting of the Panama Convention had as its primary objective to remedy the deficiencies in the internal arbitration laws of the individual Latin American countries by establishing the requirements for valid arbitration agreements, the procedure for the recognition and enforcement of arbitral awards, and other matters related to arbitral procedure. Thus, the Panama Convention can be considered the first step on the part of the Latin American nations in the journey to a modern international arbitration legal framework. Chart 1 shows the overwhelming acceptance in the region of both the New York and Panama Conventions since 1975.

Chart 1 – Acceptance of New York and Panama Conventions in Latin America

Country	New York Convention	Panama Convention	Washington Convention
Argentina	1989	1994	1991
Bolivia	1995	1998	never adopted
Brazil	2002	1995	never adopted

Country	New York Convention	Panama Convention	Washington Convention
Chile	1975	1976	1991
Colombia	1979	1986	1993
Costa Rica	1988	1978	1981
Cuba	1975	never adopted	never adopted
Ecuador	1962	1991	never adopted
El Salvador	1998	1980	1982
Guatemala	1984	1986	1995
Honduras	2001	1979	1986
Mexico	1971	1978	2018
Nicaragua	2003	2003	1994
Panama	1985	1975	1995
Paraguay	1998	1976	1981
Peru	1988	1989	1991
Dominican Republic	2002	2008	2000
Uruguay	1983	1977	1992
Venezuela	1995	1985	never adopted

As Chart 1 shows, only four of the 19 countries listed had not adopted the New York Convention by 2000. As a consequence, the countries in the region now had a positive legal framework that allowed for the efficient recognition of arbitral clauses and the enforcement of arbitral awards.

However, it is not only the New York and Panama Conventions that accelerated the region's acceptance of arbitration. By and large, the region also accepted the Washington Convention (Brazil being a notable exception) which concerns investment disputes, as well as having entered into numerous Bilateral Investment Treaties and regional agreements (e.g. NAFTA, DR-CAFTA, Mercosur and Andean Pact agreements). Although there are clear legal distinctions between investment and commercial arbitration, entering into these arrangements created a culture of acceptance of the arbitral process.

2. Adoption of modern arbitration legislation

Traditionally, the countries in the Latin American region regulated arbitration within their procedural or commercial codes and were directed toward domestic arbitrations, without any reference to international arbitration. Moreover, the legislations focused on the procedural aspects of arbitration and, as a result, did not provide the substantive law necessary for the proper understanding of international arbitration (e.g. principles of severability, *competence-competence*). Indeed, quite to the contrary, the regulatory framework contemplated extensive involvement of the judiciary in the arbitral process. Simply put, neither party autonomy, nor the capacity of an arbitral tribunal to conduct an arbitration, were respected under the traditional Latin American legal framework.

Adoption of the New York and Panama conventions notwithstanding, more was required before the region could overcome the legal obstacles facing international arbitration and allow it to become an accepted mechanism for dispute resolution. In this regard, the adoption of a modern arbitration statute in each of the countries of the region was a prerequisite to counteracting the existent legal framework and the advancement of an international arbitration culture in the region.

It can happily be reported that the countries in the region have, indeed, been passing modern laws related to international arbitration. More than 15 countries have passed new arbitration laws over the past two decades. This occurrence has its genesis in the creation of the UNCITRAL Model Law of 1985 (the "Model Law"). The country that pioneered the adoption of the Model Law was *Mexico*, which in 1993 revised its existing law with respect to both domestic and international arbitration. As reflected in Chart 2, within 15 years of Mexico's new law, a majority of countries in Latin America followed Mexico's lead in adopting new arbitration laws, and the trend continues with *Colombia* having recently amended its 1996 law in 2012 based on the 2006 version of the Model Law.

Chart 2 – New Arbitration Laws Adopted in Latin America

Country	Date
Mexico	1993, 2011
Guatemala	1995
Brazil	1996
Peru	1996, 2008
Colombia	1996, 2012
Bolivia	1997
Ecuador	1997
Costa Rica	1997, 2011
Venezuela	1998
Panama	1999, 2013
Honduras	2000
Paraguay	2002
El Salvador	2002
Chile	2004
Nicaragua	2005
Cuba	2007
Dominican Republic	2008

It is fair to say that most of these laws are based, in substantial part, on the Model Law. These laws reflect the concept of party autonomy in designing the arbitral process; the laws also reflect a desire to limit the role of the local courts to certain preliminary questions such as the naming and challenging of arbitrators, the adoption of preliminary measures, and review of arbitral awards.

The various laws enacted can be divided into two. First, countries that sought to specifically modernise arbitration, including: *Brazil*; *Colombia*; *Cuba*; *Chile*; *Guatemala*; *Paraguay*; *Mexico*; *Peru*; *the Dominican Republic*; *Panama*; and *Venezuela*. Another group of nations opted for more general legal reforms whose purpose was to implement modern procedures for alternative dispute resolution in an attempt to provide some degree of relief to the overburdened judicial system (a chronic problem throughout Latin America). These countries include: *Bolivia*; *Costa Rica*; *Ecuador*; *El Salvador*; *Honduras*; and *Nicaragua*.

Further, a review of the new laws reflects that most countries have opted for a single regulatory framework that encompasses both domestic and international arbitration simultaneously. Countries in this category include: *Bolivia*; *Brazil*; *Costa Rica*; *El Salvador*; *Guatemala*; *Mexico*; *Nicaragua*; *Panama*; *Peru*; *the Dominican Republic*; and *Venezuela.* Among the relatively few countries that treat international arbitration separately and apart from domestic arbitration are: *Chile*; *Colombia*; *Cuba*; and *Ecuador*.

3. Latin America as the seat of arbitration

The growth of arbitration in Latin America is slowly resulting in arbitrations being seated in the region. In 2018, the University of Leicester in the UK and Gentium Law in Switzerland, supported by the ICC and the OAS, published a survey of 509 arbitration practitioners in the Americas entitled "Arbitration in the Americas". An analysis of the results related to the most popular venues for seats for Latin American arbitrations reveals that, in general, practitioners still do not use Latin America as the seat for arbitration, but instead prefer the United States (specifically New York and Miami). However, the results vary a bit when the participants were limited to those from Central and South America and the Caribbean.

All Participants (509 Participants)	Participants from Central and South America and the Caribbean (250 Participants)
US (85%) England and Wales (68%) France (52%) Switzerland (38%) Canada (36%) Singapore (19%) Spain (17%) Hong Kong (16%) Germany and Chile (15%)	US (78%) France (59%) England and Wales (56.5%) Spain (29%) Chile (28%) Switzerland (28%) Peru (21%) Colombia (19%) Brazil (15%) Mexico (14%)

As the above results show, the US is far and away the most popular venue for arbitrations amongst Latin American practitioners. This fact is a significant departure from other global surveys as US seats are not typically the top-rated. For example, in the recent White & Case/ Queen Mary survey, New York (the most popular US venue) was no higher than the sixth most popular seat. However, when responses were limited to those practitioners from the region, some significant changes can be seen. Among the Latin American practitioners, the US maintains its status as the preferred venue, but Spain jumps to fourth place and Chile into fifth place. Significantly, Peru, Colombia, Brazil and Mexico make the top 10 list. Finally, when breaking down the most popular seats in the US, only two cities have a substantial traction: New York and Miami. New York is the most popular seat in the US, but Miami has gained notable support as it positions itself as a hub for Latin American arbitration. Support for Miami as a venue was particularly strong among Latin American practitioners.

ICC statistics bear out much of what was revealed in the "Arbitration in the Americas" survey. Not surprisingly, Brazil (with 28 arbitrations) and Mexico (with 18 arbitrations) lead the region as venues. These figures reflect that Brazil and Mexican parties are by far the largest users of ICC arbitration. After Brazil and Mexico, Miami and Peru each had six ICC arbitrations while Chile and Argentina had five arbitrations.

III. The Arbitral Clause

Traditionally, recognition of the arbitral clause caused significant problems in Latin America. The region recognised a distinction between the arbitral clause and the *compromiso*, an agreement after the dispute arose which permitted the dispute to be resolved by arbitration as provided for in the arbitration clause. Thus, although the arbitral clause reflected the parties' agreement to arbitrate, it was not self-executing. This dual requirement gave rise to numerous problems because if there was no express *compromiso*, there was no manner of supplying the necessary consent to arbitration. Simply put, the fact that a valid arbitral clause existed, did not in and of itself provide that the requisite authority appoint an arbitral tribunal, or compel arbitration. Instead, the judiciary deemed that it had jurisdiction over the dispute.

However, this issue no longer constitutes a real problem in the region, as the laws enacted by the Latin American nations have abolished the distinction between the arbitral clause and the *compromiso*, have simplified what is required of an arbitration clause, and the judiciary is now required to compel arbitrations where a valid arbitration clause exists.

1. Elements of a valid arbitral agreement

Historically, throughout Latin America there were many formalities required before an arbitration agreement would be recognised and enforced. The situation has changed dramatically for the better. The laws passed throughout the region follow the lead of the Model Law and recognise that a valid arbitral clause can be proved through any writing, including an exchange of letters or other written communication that establishes the existence of the arbitral agreement. Countries that follow this rule include: *Bolivia*; *Chile*; *Colombia*; *Costa Rica*; *El Salvador*; *Guatemala*; *Honduras*; *Mexico*; *Nicaragua*; *Panama*; *Paraguay*; *Peru*; *Venezuela*; and *the Dominican Republic*. Some countries even allow an arbitration agreement to be established by the filing of a demand for arbitration and an answer to the demand which does not dispute the validity of the arbitral clause: *Chile*; *Colombia*; *Guatemala*; *Honduras*; *Mexico*; *Panama*; *Paraguay*; and *Peru*. Perhaps surprisingly, the most liberal law regarding proof of the arbitral agreement is that of *Cuba*, in which a valid arbitration clause can be established merely by the parties' procedural conduct. In this regard, the demand for arbitration and the answer do not have to explicitly state the existence of an arbitral clause, but the mere procedural posture of the parties is sufficient to perfect a valid arbitral agreement.

Several of the modern statutes also recognise that an arbitral agreement can be contained in a stand-alone agreement, as well as accepting that the arbitration clause may be incorporated by reference, these include: *Bolivia*; *Brazil*; *Chile*; *Colombia*; *Ecuador*; *El Salvador*; *Guatemala*; *Mexico*; *Nicaragua*; *Peru*; *Uruguay*; *Panama*; and *Venezuela*. In addition, some laws also include an additional requirement contained in the Model Law that the principal contract (from which the arbitral clause is incorporated) must be in writing: *Bolivia*; *Chile*; *Guatemala*; *Mexico*; *Paraguay*; *Portugal*; and *Venezuela*. *Colombia* and *Ecuador* have added an additional requirement that the incorporation by reference should also include a specific reference to the parties of the principal contract.

The most recently adopted arbitration statutes, those of the *Dominican Republic* and *Peru*, have gone so far as to incorporate elements of the doctrine *in favorem validitatis*, which is a conflict of law principal that requires courts to apply the law that is most favourable to arbitration when considering the validity of an arbitration agreement. Possibly the best exemplar of the doctrine is contained in Spain's arbitration law, which says that the arbitral agreement must be found valid if it is supported by either (a) the law applicable to the clause, (b) the law applicable to the entire agreement, or (c) Spanish law.

2. Personal and subject matter jurisdiction

Most of the new laws mandate that only the parties who signed the arbitral agreement can be compelled to arbitrate. This, by necessity, limits the ability of compelling non-signatories to arbitrate (e.g. agents or their principals, alter-egos, etc.). A notable exception is *Peru*, whose legislation provides that the arbitral clause can be extended to those individuals whose agreement to arbitrate can be determined by principles of good faith. In this manner, parties who are actively part of negotiations, execution or termination of a contract may be compelled to arbitrate, although not explicitly a party to the arbitral agreement. Similarly, Colombian law allows non-signatory to be called as impleaders (*llamados en garantìa*). Those non-signatories may be called when they have warranted obligations under the agreement containing the arbitral clause. Article 36 of Law 1563 provides that the award will be binding for those impleaders.

As to subject matter jurisdiction, most of the new legislations allow both contractual and non-contractual disputes (e.g. torts) to be arbitrated: *Bolivia*; *Colombia*; *Costa Rica*; *Ecuador*; *Guatemala*;

Honduras; *Mexico*; *Panama*; *Paraguay*; *Peru*; and *Venezuela*. In contrast stands the legislation of *Brazil*, which restricts arbitration to those that are related to economic rights over which the parties have a right to dispose.

Any discussion regarding subject matter jurisdiction in arbitration in Latin America, or arbitrability as that term is used in the United States, must deal with the dual concepts of *objective arbitrability* (which limits the types of disputes that may be submitted to arbitration) and *subjective arbitrability* (which limits the types of individuals or entities that may participate in an arbitration).

With respect to *objective arbitrability*, there exists a distinction between countries that follow the French custom of allowing matters to be freely arbitrated ("*materias de libre disposición*") or those that deal simply with "economic rights" ("*derechos patrimoniales*"). Those countries that adhere more closely to the issues to be freely arbitrated include: *Bolivia*; *Colombia*; *Ecuador*; *El Salvador*; *Guatemala*; *Honduras*; *Nicaragua*; *Panama*; *Peru*; *the Dominican Republic*; and *Venezuela*. On the other hand, those that utilise the concept of "economic rights" in defining what can be arbitrated are *Brazil*, *Cuba* and *Costa Rica*. Two countries, *Chile* and *Mexico*, include a specific definition of the matters that can be subjected to arbitration.

Regarding *subjective arbitrability*, most laws allow governmental entities (those that are owned in whole, or majority, by the government) to freely enter into arbitration agreements, so long as these agreements do not violate public policy. Certain countries, however, have added certain restrictions before a governmental entity can enter into an arbitration agreement, such as obtaining prior approval from a specific ministry. *Costa Rica*, *Ecuador*, *Mexico* and *Venezuela* are among the countries that have added this type of restriction. In Brazil it was debatable whether governmental entities were allowed to resolve disputes via arbitration without express legal authorisation, albeit arbitration was authorised by law in several instances, such as concession of public services, PPP and oil and gas contracts, and the case law is favourable to arbitrations involving State-owned companies. This incertitude was addressed in the amendments to the arbitration act enacted in 2015. The revised Brazilian arbitration act now contains language expressly authorising governmental entities to resort to arbitration, quenching all doubts as regards the subjective arbitrability of disputes relating to the public administration.

At the opposing end of the spectrum, both the *Dominican Republic* and *Peru*, as well as the new *Colombian* law, have adopted legislation that prohibits a sovereign or governmental entity from using its "internal law" (*subjective arbitrability* as discussed above) in order to avoid the obligations imposed by an arbitral agreement. This is a specific aspect of the doctrine of *in favorem validitatis* discussed above. It should also be noted that international arbitral tribunals have also used the concepts of good faith and estoppel to overcome jurisdiction based defenses on the invocation by a sovereign or a governmental entity of its "internal law" and the concept of *subjective arbitrability*.

IV. Challenges to the Arbitral Award

As is to be expected, after the adoption of modern arbitration legislation and the New York Convention, the *ad hoc* and localised nature of the laws relating to challenges to arbitral awards have been minimised. Prior to the adoption of the new arbitration laws, numerous and diverse challenges to awards were recognised by the different countries. Of course, such diversity of possible objections served to impede the growth of arbitration in the region as parties had no certainty of the possible arguments that could be used to vacate an award. Although the adoption of the new arbitration laws has certainly helped this situation, regrettably it cannot be said that the desired uniformity within the region exists on this issue.

The basic principles contained in the Model Law regarding challenges to awards can be reduced to two: (i) a petition to vacate or annul an award is the exclusive means by which to challenge an award; and (ii) the basis for vacating/annulling an award are limited to those contained in article V of the New York Convention. Several countries in the region have accepted the first of these principles (petition to vacate as the exclusive method to challenge): *Chile*; *Colombia* (under its new arbitration law); *the Dominican Republic*; *El Salvador*; *Guatemala*; *Mexico*; *Nicaragua*; *Panama*; *Paraguay*; and *Peru*. However, *Bolivia*, and *Costa Rica* allow alternate means to challenge an award.

There is a lamentable lack of uniformity regarding the grounds to challenge an award. Some countries have accepted the causes contained in the Model Law as the basis for challenges to arbitral awards: *Bolivia* (with the minor addition of an additional cause: issuance of an award outside the prescribed timeframe); *Chile*; *Colombia* (under its new arbitration law); *the Dominican Republic*; *Guatemala* (although its law provides an additional prerequisite that the cause for the challenge must have been the subject to an objection during the arbitral proceeding); *Mexico*; *Nicaragua*; *Panama*; *Paraguay*; and *Peru.*

Other countries have deviated from the Model Law either by omitting specific causes contemplated by the Model Law, adding additional causes to those in the Model Law, or using local terms that deviate from the Model Law. These countries include: *Brazil*; *Costa Rica*; *Ecuador*; *El Salvador*; *Honduras*; and *Venezuela*.

V. The Rise of Latin American Arbitral Institutions

Along with the development and modernisation of the legal framework that governs arbitration, Latin America has also experienced growth with respect to local arbitral institutions. In 2011, the Institute for Transnational Arbitration (ITA) completed its *Inaugural Survey of Latin American Arbitral Institutions* and identified 165 local arbitral institutions and surveyed 35 of the most important of these. The local arbitral institutions have played a key role in the development of arbitration in their jurisdiction by organising seminars, and publications in arbitration journals, and by connecting leading international arbitration specialists with local practitioners. These local arbitration institutions continue to develop and forge alliances with the more established institutions. For example, the *Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá* already had an institutional arrangement with *ICSID*, but in 2014 added a cooperation agreement with the *Permanent Court of Arbitration*, as did the *Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá*.

In addition to the local arbitral institutions, the ICC has established national committees in 14 countries in the region and has created the *Grupo Latinoamericano de Arbitraje de la CCI*, which brings together some of the most distinguished international arbitration practitioners in Latin America to discuss arbitration issues relevant to the region. The ICDR has set up an office in Mexico and is affiliated with arbitral institutions throughout the region. Finally, local institutions from Latin America form part of the *Inter-American Commercial Arbitration Commission* (IACAC). The proliferation of arbitral institutions and the choices they offer to those in the region provides further evidence, if any is truly needed, of how extensively the legal and business environment in Latin America has accepted arbitration as a means of dispute resolution.

The *Survey* revealed five key findings. First, the majority of the arbitral institutions were established sometime after 1990; during and after the changes discussed above in the legal environment. The statistics show that over 69% of those surveyed have existed for over 10 years; 23% have existed for between five and 10 years; while 8% have only existed for between two and five years. In Brazil, the majority of the leading arbitral institutions were established after 2000, owing to the delay in the development of the legal framework discussed below.

Second, although most disputes involve domestic parties (including subsidiaries of international companies), a significant and increasing percentage also involve foreign parties. Moreover, some local arbitral institutions handle a significant amount of international cases. For example, the *Survey* highlights that 60% of the cases administered by the *Câmara de Arbitragem do Mercado*, Brazil, involved foreign parties; 40% of the cases administered by CICA, Costa Rica, involved foreign parties; and 29% of the cases administered by AmCham, Peru, involved foreign parties. Overall, the *Survey* found that the cases handled by Latin American arbitral institutions involved 88% local parties and 12% foreign parties.

Third, while most cases involve private entities, an increasing percentage of cases involve public entities. The statistics show that currently 95% of the parties that utilise the local arbitral institutions are private parties, while only 5% are public parties. However, there is a clear trend in which public institutions are increasing their utilisation of arbitration. For example, 40% of the cases administered by the *Câmara de Arbitragem do Mercado, Brazil*, involve public entities. In addition, 19% of cases administered by both the Arbitration and Mediation Center of the Ecuadorian American Chamber of Commerce and the CAC-CCB Colombia involved public entities.

Fourth, the majority of the arbitrations involve only two parties. However, as disputes become more complex, more cases involve multiple parties. Already 22% of cases administered by the institutions surveyed involved more than two parties. Some institutions have a significant portion of their case-load involving cases with multiple parties. For instance, at the *Câmara de Arbitragem do Mercado*, *Brazil*, 80% of the cases involve more than two parties; 42% of the cases administered by CAM-Mexico involve more than two parties; while 40% of the cases administered by both the CAC-CCB, Colombia, and the CCA-CCCR, Costa Rica, involved more than two parties.

Fifth, the vast majority of jurisdictions apply one or fewer requirements for choosing an arbitrator, such as: requiring the arbitrator to be a national of the country where the institution is located; be a certified, licensed attorney in that jurisdiction; or be chosen from a roster vetted by the arbitral institution. The statistics show that: 77% of institutions have one or no requirements for selecting an arbitrator; 42% of institutions follow requirements that arbitrators be on a roster; 27% of institutions require that arbitrators be nationals of the country of the local institution; and 24% of institutions follow requirements that arbitrators be licensed attorneys. This issue is of great importance as it reflects party autonomy which is the foundation upon which international arbitration has been built.

VI. Trends in 10 Latin American Countries

1. Argentina

Argentina recently entered into what it seems to be a promising starting point towards the enactment of modern arbitration law, contemplating international arbitration. For many years, Argentina did not have federal legislation specifically dealing with general regulations about international arbitration. Instead, domestic arbitration has been regulated by the country's civil procedure codes. The National Code of Civil and Commercial Procedure ("CPCCN") applies to the City of Buenos Aires, and in each federal court across the country. As a general comment, the arbitration chapter of the CPCCN provides for an antiquated procedure, which in many ways contradicts the modern trends in areas such as the default provision in the absence of a party's consent as regards to arbitration "*de iure*" or by "*amiable compositeurs*" (being the default provision arbitration by "*amiable compositeurs*"), that the parties maintain all legal remedies to challenge the award that were not expressly waived in the arbitration agreement and the need for the parties to ratify the arbitration agreement once the dispute arose (the "*compromise arbitral*").

Despite the above, Argentina is a party to several treaties that recognise the validity and enforceability of international arbitration agreements, e.g. the Panama Convention, New York Convention and the *Acuerdo sobre Arbitraje Comercial Internacional del Mercosur* issued in Buenos Aires on July 23, 1998 ("Buenos Aires Convention"), to which Brazil, Uruguay, Paraguay, Bolivia and Chile are also parties.

The Buenos Aires Convention applies to disputes between parties that, at the time of the execution of their agreement: (i) have their domiciles in signatory countries to the convention; (ii) have contact with at least one signatory party of the convention; or (iii) have chosen the seat of the arbitration in one signatory party to the convention. Contrary to the CPCCN, the Buenos Aires Convention is in line with most of the relevant international arbitration statutes. However, it will only apply to the specific situations set forth therein, and not to any other arbitration agreement not covered by such Convention.

However, Argentina has recently enacted a joint Civil and Commercial Code ("CCC"), which came into force on August 2015. The CCC constitutes federal legislation and applies throughout the country. Further, as this code constitutes substantive rather than procedural legislation, the CCC will supersede the provisions of the CPCCN and/or any other provincial code regarding arbitration, in all matters specifically covered by the CCC. The CCC has a specific chapter regulating arbitration contracts (Sections 1649 to 1665). Such qualification emphasises the contractual aspect of arbitration (thus relativising its jurisdictional side). Nevertheless, while this initiative provides for several well-known and useful arbitration principles, it also includes at least two potentially major problematic provisions.

Among the favourable notions, the CCC includes: (i) the principles of *Kompetenz-Kompetenz*; (ii) separability of arbitration agreements; (iii) the tribunal's power to render interim measures; (iv) exclusion of judiciary jurisdiction when an arbitration agreement exists; (v) presumption in favour of arbitrability in the event doubt exists as to its scope; and (vi) the obligations of arbitrators to be available and to disclose any matter that might affect their impartiality and independence. Even though several of these principles were already being applied by the local judiciary, the explicit inclusion into the Argentine legal system is a welcome development.

However, there are other provisions which are of concern. Particularly, the vague and ambiguous wording of the provisions that deal with (i) the non-arbitrability of disputes where public policy is compromised (article 1649), and (ii) the specific mention that parties cannot waive their right to challenge an award in court ("*impugnación judicial*") when such award is contrary to the Argentine legal provisions ("*ordenamiento jurídico*") (article 1656).

As to the former, a proper interpretation should require construing very narrowly what constitutes public policy for purposes of

arbitrability. Otherwise, it will provide an easy avenue for defendants wishing to challenge the tribunal's jurisdiction, by simply contending that the dispute is not arbitrable for public policy reasons.

Furthermore, the Congress has explained that the addition of the non-arbitrability of disputes, where public policy is compromised, is aimed at forbidding the State or any State entity from arbitrating their disputes. Thus, where a mandatory rule of law does not relate to public policy, or its purpose is the protection of private rights and interests, there would be no justification to conclude that the subject matter of the dispute is not arbitrable.

However, in connection with this point it is important to mention that Argentina has recently submitted the approval of a new legal framework for Public-Private Partnerships (PPP). In this regard, this law provides the possibility that the national State, in his capacity as contractor, can execute arbitration agreements with private companies. Therefore, all the disputes that may arise as a result of the execution, application and/or interpretation of contracts celebrated under the regime established by this law, may determine the possibility of establishing arbitration as an alternative method of conflict resolution.

Regarding the latter (article 1656), this provision precluding parties from waiving their right "to appeal" awards, would go against (i) the CPCCN, which allows parties to waive their right to appeal awards, and (ii) the international principle of finality of arbitral awards. The last sentence of this provision should be understood as only referring to the parties' right to (a) challenge the validity of the award, or (b) ask for clarifications concerning awards; but not to revising the merits of those decisions.

Otherwise, allowing courts to revise every arbitration award on the grounds that it goes against Argentine legislation, would lead to the absurd result that every dispute would eventually be subject to the scrutiny of the Court of Appeals. Furthermore, it would go against federal legislation currently in force ("*Acuerdo de Arbitraje Comercial Internacional del Mercosur*"), which provides that unless agreed otherwise, the only available remedy would be the annulment request in an international arbitration award where such legislation is applicable. A potential interpretation of this provision might be that an award would be subject to judiciary review in Argentina only when it goes against the basic fundamental principles of Argentine law (due process, right to defend and/or present the case, etc.).

Overall, the CCC incorporates many useful and well-accepted international principles of arbitration. However, to the extent that the above problematic provisions are not interpreted correctly in future judiciary decisions, the new federal legislation could impede the future development of arbitration in Argentina, the exact opposite of its intended effect.

Finally, another important point to highlight in connection with arbitration in Argentina, is that on November 2016 the Federal Executive Branch submitted to Congress a draft bill regulating International Commercial Arbitration, based on the UNCITRAL Model Law on International Commercial Arbitration (CNUDMI). This project was passed by the Senate on September 7, 2017 and is currently under parliamentary debate in the Chamber of Representatives; it is foreseen that the bill will be passed in the following months.

The project to adopt the UNCITRAL Model Law is aimed to cover international arbitration issues only, and will not affect Argentina's internal legal framework. However, there is another bill under consideration, related to the modification of the heavily criticised articles of the CCC mentioned above, that would indeed impact domestic arbitration as well.

Regarding recent case law, on March 28, 2018, the Commercial Chamber of Appeals decided that an arbitration agreement contained in what it seemed a consumers contract was null and void according to article 1651 (b) of the CCC in the case "*Altalef, Hugo Victor c/ Hope Funds S.A.*"

At last, it is remarkable that in the last two years under the administration of President Macri, Argentina has settled several ICSID and UNCITRAL claims with foreign investors, such as "BG Group", "El Paso Energy Company", "Total S.A.", the "Abaclat" case, "Électricité de France" and "Suez". The new administration has been very interested in settling the arbitration disputes to promote a sense of legal certainty amongst investors.

2. Bolivia

On June 2015, Congress passed the second Arbitration Law ("***Law Nº 708***") in Bolivian history. The new Arbitration Law Nº 708, following the path of the preceding Arbitration Law, is based on the UNCITRAL Model Law's general principles and guidelines on Arbitration.

From a general perspective, Law Nº 708 is a modern piece of legislation that allows the adequate development of arbitration in Bolivia. It provides well-organised proceeding rules and equitable treatment to private parties, providing them security and protection of their rights and interests.

The former Arbitration Law was enacted thinking ahead and as Law Nº 708, the former regulation abided to the doctrines of international arbitration; consequently, it permitted the execution of efficient and effective arbitration proceedings.

One of the main controversial subjects in Law Nº 708 is the exclusion from arbitration of "administrative contracts", which are understood as those executed by private parties with the Bolivian State, its entities and companies. As background to this broad restriction, due to provisions contained in the 2009 Bolivian Constitution, foreign companies engaged in hydrocarbon activities cannot solve nor submit their controversies to international arbitration or diplomatic instances. At present, expanding such constitutional restriction to new fields, Law Nº 708 expressly excludes from its application range labour controversies, commercial and integration agreements between States, external financing contracts in favour of the Bolivian State executed with international organisations and administrative contracts, among others.

In practice, the exclusion of administrative contracts from arbitration implies that the Bolivian State entities are no longer authorised to enter into arbitration clauses, making it unviable that a private party could reach for arbitration arising from contractual claims.

Notwithstanding the aforementioned, Law Nº 708 has authorised, on a transitory basis, some public companies to continue including arbitration clauses in their administrative contracts while these finalise their adaptation process to the Public Company Law ("***Law Nº 466***") enacted on December 26, 2013. The arbitration in these cases would be conditioned to having the seat in Bolivia and being subject to Bolivian laws.

Furthermore, Bolivian current arbitration law has established particular regimes for controversies related to investments (local and foreign), testaments and amicable resolutions related to the Inter-American Human Rights System. Arbitration for foreign investments must be subject to Bolivian legislation; whilst arbitration for testaments should abide to the particular previsions contained in the testament, if not included, the proceeding must comply with the characteristics described in Law Nº 708.

A further issue to consider regarding investment arbitration is that between 2006 and 2013, Bolivia denounced a total of 22 Bilateral Investment Treaties that were subscribed between the Bolivian State

and Belgium, Luxembourg, Ecuador, Peru, Chile, France, Romania, Germany, Argentina, China, Denmark, Great Britain, Mexico, United States, the Netherlands and others.

Despite the arbitration regime for foreign investments established in Law Nº 708, the action of denouncing the treaties and excluding administrative contracts from the new Arbitration Law has converged in an unbalanced controversy resolution practice in cases where one of the parties is the Bolivian State, for controversies can only be solved by local laws in local judicial courts. In a nutshell, under the current arbitration legal regime, Bolivian courts have the final word in investments and administrative contractual disputes involving the Bolivian State and its entities.

With regards to the procedural matters provided under Law Nº 708, which as previously established is based on UNCITRAL Arbitration Model Law, language is not particularly restrictive; the parties are able to choose the applicable language and if they fail to do so, the language would be Spanish.

Moreover, the current law recognises institutional and *ad hoc* arbitration proceedings, dividing it in arbitration in law, which compels arbitrators to solve a controversy strictly based on positive legislation, and arbitration in equity, which centres the resolution of a controversy on the arbitrators' general knowledge and their natural sense of justice. If the parties do not choose arbitration in law or in equity, the first would be applicable by default.

From a procedural perspective, in accordance to the aforementioned law, the stages of arbitration are the following: initial stage; merits; drafting and issuance of the Arbitration Award; and appeal stage. The proceeding can have seat in Bolivia or abroad, the parties are allowed to choose the seat of the arbitration as well as the place where the meetings or hearings are to be held and the number of arbitrators, which by default should be three.

One new feature of Law Nº 708 is the inclusion of an Emergency Arbitrator, whose participation is enabled through agreement between the parties (opt-in). The Emergency Arbitrator can take decisions before the appointment of the Sole Arbitrator or the Arbitration Tribunal, so as to arrange for precautionary or preparatory measures.

Law Nº 708 follows very simple criteria to distinguish local from international arbitration. Arbitration with the seat in Bolivia is considered to be local arbitration subject to Bolivian laws and regulations; however, the parties are also permitted to agree to hold meetings and hearings abroad. On the other hand, international arbitration is also contemplated by Law Nº 708, which, as established above, allows the parties to determine a seat for the arbitration abroad and choose a different law to be subject to, as long as it does not infringe the Bolivian Constitution.

Another aspect worth mentioning is that, taking into account the interest of the parties in brief and efficient arbitration proceedings, the former Bolivian Arbitration Law established a six-month total term for the issuance of an Arbitration Award since the appointment acceptance date by the arbitrator; said term could be extended for a maximum of 60 days.

However, at present, the local arbitration terms considered by Law Nº 708 have been extended with no explicit justification or logic; as a result, each arbitration stage has a different term allowing the probability of longer arbitration proceedings. The merits' stage alone could last 270 working days, a term that could be extended to 365 working days; the drafting and issuance of the Arbitration Award stage has an additional term of 30 working days extendable to another 30 working days. Nevertheless, again, due to the parties' interest in shorter proceedings, nowadays, arbitrations could last an average of six calendar months.

Despite the maximum terms authorised under Law Nº 708, most arbitrations administered by Bolivian arbitration centres, privileging the interest of private parties involved in arbitration, usually last around six months from the installation of the arbitration tribunal.

Finally, as a final consideration, Bolivia has recently updated its arbitration law, which, in general terms, is a modern piece of legislation that abides to current international practices and principles. However, arbitration related to administrative contracts entered into with State-owned companies as well as investment arbitration are pending tasks that need to be addressed, in order to reestablish the balance between the State and private parties, ensuring real and effective protection of the interests of the latter.

3. Brazil

During the 20th century, Brazil was known as the "Black Sheep" of Latin America as it lagged behind the rest of the region in relation to advances in international arbitration. Indeed, Brazil's institutional hostility towards international arbitration was not overcome until 2002 when it adopted the New York Convention and its Supreme Court ("STF") issued a ruling that declared its arbitration law constitutional. Since 2002, Brazil has created a very favourable environment for international arbitration, and has become a shining star in the arbitration constellation, being the third-largest user of ICC arbitrations.

On September 23, 1996, Brazil enacted the Brazilian Arbitration Act (Federal Law No. 9,307 of 1996 – "BAA") which was inspired by the Model Law, Spanish legislation on arbitration and the New York Convention, but also retained specific elements of Brazilian legal culture. It was expected that the adoption of the BAA would make arbitration a viable dispute resolution alternative, but constitutional challenges delayed this outcome. Although article 7 of the law called for national courts to compel specific performance of an arbitration clause, it was questionable whether or not this provision violated the Brazilian Federal Constitution's guaranteed right of access to State courts. Finally, in December 2001, the STF issued its ruling in *MBV Commercial and Export Management Establishment v. Resil Industria e Comercial Ltda.* in which it found the Brazilian Arbitration Law constitutional.

Almost immediately thereafter, the Brazilian Congress ratified the New York Convention which became effective on July 24, 2002. Brazil had already adopted the Panama Convention in 1995 and in 1997 the Montevideo Convention.

Brazil is no longer hostile to arbitration. With respect to arbitrability, article 1 of the BAA states that persons capable of entering into contracts can avail themselves of arbitration in order to resolve disputes relating to freely transferable economic rights. Under article 2, parties have the autonomy to agree on the substantive and procedural rules that govern the arbitration, the only limitation being that the law chosen cannot violate public policy or accepted customs. As to the role of the courts, the BAA prescribes three stages in which the courts could intervene: at the beginning of the arbitral process to enforce the arbitration clause; during the arbitral process if the courts were called upon to compel witnesses to testify or to provide any similar assistance, such as the enforcement of an injunctive relief granted by the arbitrators; and, finally, at the conclusion of the process where a party seeks to set aside an arbitral award.

In recent months, there has been some development in terms of statutory modifications.

On May 26, 2015, the Brazilian Congress amended the BAA. Although there were some vetoes preventing consumer and employment relations disputes to be resolved by arbitration, the

modifications brought to the BAA include significant improvements and an expansion of the current legal framework regarding the arbitrability of disputes relating to public entities in addition to some "fine tuning" in other elements such as injunctions and interim measures, selection of arbitrators, and most noticeably, the arbitrability of corporate matters, subject to certain provisions.

Maybe the most important development among the amendments to the BAA was the inclusion of a broad authorisation for public entities to resort to arbitration, since there was considerable argument relating to the need of statutory approval for a public entity to participate in an arbitral proceeding. In accordance with article 37 of the Federal Constitution of Brazil, which is the basis of the principle of strict legality that pervades the organisation of the public administration, many commentators posited that the public administration was only allowed to resort to arbitration in case there was a specific statutory authorisation allowing that party to enter into an arbitration agreement. Even if, in the previous context, several laws expressly authorised arbitration, such as: the Public Services Permission and Concession Law 1995; the Telecommunication Law 1997; Petroleum Law 1997; the Water and Land Transport Law 2001; and the Brazilian Private-Public Partnership Law 2004, there were still many grey areas where the validity of public bodies' reference to arbitration without authorisation could have been challenged. The new First Paragraph added to article 1 of the BAA states that "the direct and indirect public administration may resort to arbitration to resolve disputes relating to waivable economic rights", and this wording is considered as a broad statutory authorisation for public bodies to arbitrate their disputes. As a matter of consequence, the subjective arbitrability of disputes relating to the public administration is clearly admitted in the BAA, and this confines the discussions only to issues of objective arbitrability, which may still give rise to controversy insofar as the definition of those "waivable economic rights" that can be arbitrated by public bodies under Brazilian law.

In addition, a new Civil Procedure Code ("NCPC") entered into force on March 18, 2016, with considerable improvements for arbitration. Besides providing for new methods of international cooperation among courts and bolstering the policy support for alternative dispute resolution mechanisms (including arbitration and mediation), the NCPC supplies a dire demand for a reliable medium of cooperation between arbitrators and State courts by creating the "arbitral letter". In a procedure akin to the compliance with a rogatory letter, the arbitrators are henceforth entitled to relay arbitral letters requesting court assistance, such as the calling of witnesses and the enforcement of injunctions granted by the arbitral tribunal.

4. Chile

Since the 1990s, Chilean model of progress has been founded in the principles of steady democracy and open markets. This sound path of progress has enabled the country to become a member of the OECD in 2010 and create a broad network of economic partnership and complementation agreements with several other countries and regions in the world.

The cornerstone of this longstanding confidence in the country is legal certainty. In this regard, it is important to highlight that Chile has a vast tradition in commercial arbitration, and that some of the most relevant commercial disputes in the country have been settled through arbitration.

Chile has a dual arbitration system. Domestic commercial arbitration is governed by the provisions contained in the Organic Code of the Judiciary, of 1943, and in the Code of Civil Procedure, of 1903. Despite the antiquity of those rules, domestic arbitration in Chile works remarkably well. Local courts have recognised internationally agreed principles, such as the principle of autonomy of the arbitration provision, the principle of *Kompetenz-Kompetenz*, among others.

On the other hand, international arbitration is governed by the International Commercial Arbitration Act enacted in 2004 (hereinafter referred to as the "ICA Act"), which is mostly a replica of the UNCITRAL Model Law.

The most significant difference between domestic and international commercial arbitration is the extent of the challenges available against an arbitral award, which are far more significant against domestic arbitration awards, since they are treated as judgments issued by a Chilean court of justice, and thus reviewable on their merits. The extent of challenges against domestic arbitral awards may be significantly restricted by the parties waiving the right to challenge the domestic arbitral award, which is common practice in Chile. Besides, Chilean courts are quite deferential to local arbitrators and rarely change the decisions contained in domestic arbitral awards.

By contrast, the only recourse available to challenge an International Commercial Award is the Petition for Nullification set forth in the ICA Act. Thus far, the ICA Act has been applied in a sound manner and local courts have been very supportive of international commercial arbitration. As a matter of fact, Chilean higher courts have constantly dismissed all recourses filed against such awards.

Some of the recent trends observed in international commercial arbitration are: (i) that the ICA Act applies *in actum* when its application requirements are met, regardless of the date on which the arbitration agreement was entered into by the parties; (ii) that local courts compel arbitration when the agreement contains an arbitration provision that has not been challenged by the parties (except in those cases where the same arbitration clause provides for particular exceptions); (iii) that local courts may grant injunctive relief in support of an international arbitration seated abroad; (iv) that the extremely limited challenges against the arbitral awards contained in the ICA Act are the only ones that may be brought against them, and that the courts have rejected all recourses against international arbitral awards since the ICA Act was enacted; (v) that the only grounds to set aside an arbitral award are the ones contained in the ICA Act, of strict construction, thereby not allowing the local courts to enter into the merits of the case; (vi) that it is possible to enforce an arbitral award in Chile regardless of the existence of a pending challenge to set aside the arbitral award at the seat of the arbitration (the latter does not include sentences that have been provisionally suspended); (vii) the recognition of the principle of separability to challenge an arbitral clause; and that (viii) the signature of the ICC's Secretary-General provides sufficient authenticity for the arbitral award to be enforced in Chile.

The development of an international arbitration culture in Chile is also related with the rise of institutional arbitration. The most relevant actor in this regard is the Arbitration and Mediation Center of the Chamber of Commerce of Santiago (the "AMC"), a non-profit institution founded in 1992 with the support of the Bar Association of Chile and various branches of the Confederation of Production and Trade in Chile. Since its creation, the AMC has handled more than 2,000 cases, including several international disputes of relevance. The AMC has its own Rules of Procedure applicable to International Commercial Arbitration, and most of their arbitrators are remarkable law professors.

As an attractive seat of arbitration, Chile also provides quick air connectivity, modern public premises and some of the finest accommodation facilities in Latin America.

It is also important to note that in 2016, the Apostille Convention (commonly known as the "Hague Apostille"), has entered into force. As a result of this, legalisation of foreign documents is now faster and less expensive.

In light of the above, Chile should be considered as a reputable, reliable and comfortable seat for international commercial arbitration.

5. Colombia

In July 2012, the Colombian Congress approved a new *Ley de Arbitraje Nacional e Internacional, Law 1563 of 2012* (the "Law"). The Law will apply only to arbitrations commenced after its effective date, which is October 2012. The Law clearly places Colombia at the forefront of Latin America with one of the most modern international arbitration statutes in the region, alongside Peru and the Dominican Republic.

The new law separately regulates domestic and international arbitration. This dual system was viewed as necessary by local practitioners because there was significant resistance to subjecting domestic arbitration to modern international arbitration practice. As a result, domestic arbitration retains certain norms that are considered unusual to the practice of arbitration in the international context. For example, arbitrators in domestic arbitrations are required to fulfil several of the same requirements as judges; they must be Colombian born and lawyers, while in international arbitrations there are no such requirements (thus allowing non-lawyers to act as arbitrators). Likewise, arbitrators in domestic arbitrations are limited to participation in a maximum of five arbitrations in which a governmental entity is a party, a limitation that does not exist for international arbitrations.

The Law is an important advance over the 1996 law as it relates to international arbitration. The Law incorporates, almost in its totality, the Model Law (of 2006), as well as certain aspects of the Peruvian arbitration law, thus bringing Colombia in line with the most modern of legal frameworks as it relates to matters such as challenges to arbitrators, the ability to issue preliminary measures, and the role of the judiciary in supporting international arbitral tribunals.

The Law specifies when a dispute can be the subject of an international arbitration. The elements of such a dispute are: (a) the parties reside in different countries at the time of signing the arbitration agreement; (b) the place of performance of a substantial part of the obligation or the place where the subject matter of the dispute has the greatest relationship is in a country that differs from the residence of the parties; or (c) the dispute submitted to arbitration affects the interests of international commerce.

Among the very modern elements contained in the Law borrowed from Peru is the fact that it prohibits a sovereign or a governmental entity from using its "internal law" in order to avoid the obligations imposed by an arbitral agreement to which it is a party. Also, the Law adopted, as criteria for interpretation, its international nature and the need to promote a uniform application in accordance with such an international nature, which includes the concept of good faith as a guiding principle. In this regard, the Law does not prohibit Colombian State entities from entering into international arbitration agreements, as long as the agreements fulfil the requirement of being "international". Further, the Law allows for electronic notification and allows judges to execute provisional measures issued by arbitral tribunals that are seated outside of Colombia.

The Law also explicitly states that challenges to arbitral awards can only be brought as petitions for annulment and the basis for annulment are those contained in article V of the New York Convention. Further, the Law expressly states that in reviewing arbitral awards, the judiciary is prohibited from reviewing the merits of the dispute or the motivations of the arbitral tribunal in issuing its award. Finally, borrowing from Swiss law, the Law contemplates the possibility of waiving the ability to seek an annulment from the Colombian courts, when neither of the parties are residents of Colombia. The Law expressly provides that, in such circumstances, an award by an international arbitral tribunal whose seat is in Colombia has the character of a national award, so it is not necessary to use the recognition procedure in order to execute on the award, unless the party has renounced the action for annulment.

Recently, Colombia has seen an increase in the number of arbitration proceedings related to important infrastructure projects in the country. In 2013, the Colombian Congress passed Bill 1682 by which the contracts for infrastructure projects in the transportation sector were regulated. Regarding arbitration, the law provides that disputes arising from such contracts may be submitted to arbitration only when the case is going to be decided under the rule of law and not *ex aequo et bono.*

Law 1682 establishes that the process to appoint arbitrators should be governed by Law 1563 and that State entities should establish in the contract the profile of the arbitrators to make sure that the personal and professional conditions of the arbitrators that are going to be appointed correlate with the object of the contract and the activities to be executed by the parties. Law 1682 also establishes that an arbitrator cannot be appointed in more than three arbitration proceedings where a State entity is a party. State entities shall establish in the arbitration agreement a cap on arbitrators' fees but, in any case, contracts may contain a formula to readjust such fees. Due to the public nature of State entities, the arbitrators' fees and the costs of arbitration must be included in the budget of the State-owned company.

Law 1682 also echoes previous jurisprudence by establishing that the arbitral tribunal does not have jurisdiction to decide upon the legality of any administrative act issued by a State-owned company or a public entity when exercising exceptional powers (e.g. unilateral termination, interpretation or modification of the contract). Therefore, the arbitration tribunal may only decide upon the economic effects of such administrative acts. Additionally, having recourse to arbitration does not immediately impede the State-owned company or public entity from performing exceptional powers inherent to such type of legal entities unless interim relief has been granted.

The Colombian National Agency of Infrastructure (*Agencia Nacional de Infraestructura* – ANI) has a few model concession contracts that contain a clause to regulate the dispute resolution mechanisms applicable to such contracts. Although the model dispute resolution clause is not identical in every model concession contract, there are certain common features to highlight. Regarding international arbitration cases, the concession contracts provide that the proceedings could be administered either by the ICDR or the ICC. The arbitral tribunal will be seated in Bogotá and the merits of the case will be decided under Colombian law.

6. Costa Rica

In 2011, Costa Rica enacted its International Commercial Arbitration Law (Law 8937 of 2011, "*Ley sobre Arbitraje Comercial Internacional*" (hereinafter the "LACI")) based on the UNCITRAL Model Law, becoming the 12th country in the world to adopt the UNCITRAL Model Law including its 2006 amendments.

Enacting the LACI was an indispensable element toward bringing Costa Rica into the modern international arbitration legal framework. Prior to its enactment, international arbitrations suffered from significant limitations, including: arbitrations had to be in Spanish; the law of Costa Rica would apply to the arbitration

automatically in the event the parties failed to select the applicable law; and arbitrators had to be members of the Costa Rican Bar in arbitrations based on law (as opposed to equitable arbitrations, or where the tribunal is expressly granted the powers of an *amiable compositeur* or to decide *ex aequo et bono*).

Differences with the Model Law. Costa Rica chose to implement a dual system whereby Law 7727 of December 1997 ("*Ley de Resolución Alterna de Conflictos y Promoción de la Paz Social*", hereinafter "Law RAC") applies to domestic arbitrations while the LACI applies to international arbitration cases. Although the LACI is closely based on the 2006 UNCITRAL Model Law, it is important to note the following differences with the Model Law:

1. Article 1(5) establishes that the LACI does not apply to investor-State disputes regulated in international agreements.
2. Footnote 2 of the Model Law regarding the definition of the term "commercial" is included as part of the text of article 2(g).
3. The LACI adopts Option I of article 7 in the 2006 Model Law. Thus, Costa Rica's new law requires that all arbitration agreements shall be in writing, although this requirement can be met in a flexible manner, provided that the content of the arbitration agreement is recorded in any form, including electronic.
4. In article 10(2), in contrast to the Model Law, where there is no agreement between the parties, the default rule opts for three arbitrators instead of one.
5. The LACI deviates from the text of 17 of the Model Law (one of UNCITRAL's main 2006 amendments) with respect to the form of the interim measure, which is not required to take the form of an award, but is required to be reasoned.
6. Two additional articles are included in the LACI regarding: matters that can be subject to arbitration (matters that under Costa Rica's civil and commercial law the parties are free to agree); and the confidentiality of the arbitral proceedings.

The LACI selected the First Chamber of the Supreme Court of Justice to resolve issues regarding arbitration, enhancing predictability in the resolution of issues. This court will decide issues regarding: the selection of arbitrators (in the absence of party agreement or designation); disputes relating to challenges to arbitrators; jurisdictional disputes; as well as actions to set aside arbitral award.

Significantly, the courts in Costa Rica have limited the ability of parties to use *amparos* (appeals based on rights established in the Constitution that are directed to the Constitutional Chamber of the court) in order to attack arbitral decisions. However, the Constitutional Chamber has ruled that parties may not use an *amparo* as a vehicle to review the actions of arbitrators and arbitrations.

As a result of the passing of the LACI, Costa Rica is positioned as an arbitration-friendly forum for international arbitration and ends – in the case of an international arbitration – the legal obstacle that banned foreign arbitrators and legal counsel from acting in international commercial arbitration cases seated in Costa Rica. The new legislation also provides a clearer legal framework for the recognition and enforcement of foreign awards and the application of the 1958 New York and Panama Conventions.

7. Mexico

With the adoption in 1993 of the UNCITRAL Model Law, Mexico started a gradual and progressive move towards becoming an arbitration-friendly jurisdiction. Moreover, during the years after the enactment of the UNCITRAL Model Law in Mexico, a growing number of judicial precedents have made the judiciary's position in support of arbitration clear and predictable.

In 2011, the Mexican arbitration law was modified and supplemented to clarify the role Mexican courts should have in its relationship with arbitration proceedings, providing the principle of minimal judicial intervention in support of arbitral proceedings. In very few words, new rules and guidance were introduced in order to rule the participation of Mexican courts before, during and after an arbitration proceeding (i.e., clarify the moment when referrals to arbitration must be requested and the effects of said requests; allow judicial enforcement of interim measures, as well as to clarify the procedural route to obtain court assistance in the constitution of the arbitral tribunal, the taking of evidence; determine the arbitral tribunal fee in *ad hoc* cases, and to expedite the enforcement of commercial awards.

Since the major January 2011 reform, two modifications were introduced in the law. First, in June 2011 article 1424 of the Commercial Code (equivalent to 8 of the UNCITRAL Model Law) was added with a last paragraph to clarify that, in case a Mexican court refuses to recognise and enforce an award, the parties will be free to exercise its rights, either in arbitration again or before the courts, as the case may be. Second, article 1467 of the Commercial Code was modified to state that, in cases where Mexican courts must appoint an arbitrator, they should consult with the relevant commercial chambers or arbitral institutions in regards to the candidates.

The amendment to the Mexican Constitution that was approved in 2011 brought the enactment of a new Amparo Law that widened the scope of constitutional protection in Mexico. The effect of this change took some time to become apparent, particularly in the context of commercial arbitrations. And despite the fact that judicial interpretation of the new regulation is still ongoing, one aspect that caused controversy was that, under the new Amparo Law, actions by individuals or private corporations performing an activity that is "equivalent" to that of a governmental authority may be subject to judicial review via *amparo* proceedings. Until April 2012, only the actions of actual governmental authorities (invested with imperium) were challengeable through an *amparo* lawsuit. This new feature of the amended Amparo Law has been used by parties to challenge arbitration awards on the grounds that the arbitral award affected fundamental human rights protected by the Constitution. Arbitrators were sued as if they were governmental authorities. Importantly, judges handling *amparo* proceedings do not have the procedural constraints of an ordinary judge hearing annulment or enforcement proceedings, making it possible, at least in principle, among other things, to review the merits of the case. Fortunately, in 2015, there were a couple of judicial resolutions that confirmed the private nature of commercial arbitration and that arbitrators are not to be regarded as authorities of the State for the purposes of the Amparo Law.

The recent criteria confirm the principle of minimal judicial intervention in support of arbitration and the longstanding position of the Mexican law and judiciary that the only remedies against the acts of the arbitrators are those established in the arbitration law, which in Mexico are simply those of the UNCITRAL Model Law. These precedents have proven that Mexico continues to develop a solid legal framework and judicial precedent that favours arbitration.

Another recent and important development is Mexico's accession to the Washington Convention ("**ICSID**"), given that on January 11, 2018, Mexico became country number 162 to sign the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

The ICSID Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank), and it facilitates the resolution of legal disputes arising directly out of an investment between a Contracting State

and a National of another Contracting State, which the parties to the dispute consent in writing to submit to the International Centre for Settlement of Investment Dispute (the "**Centre**"), which administers the same.

Under the ICSID Convention, the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in such Convention. Arbitral awards constitute final judgments in the domestic courts of all ICSID Member States; hence, the recognition or enforcement of an ICSID award is not subject to the rules under the New York Convention nor have to be reviewed by national courts, since ICSID awards are subject to limited review by *ad hoc* annulment Committees of three independent persons, established under the ICSID Convention rules.

Mexico has participated in several investment disputes under the rules of bilateral investment treaties or other international agreements containing investment provisions (i.e. the North American Free Trade Agreement, "**NAFTA**"), containing an arbitration clause designating arbitration under the ICSID Convention or the UNCITRAL Arbitration Rules, but due to the fact that Mexico was not a party to the ICSID Convention, investment disputes involving Mexico could not be arbitrated under the ICSID Convention, thus arbitration cases against Mexico were subject to review and enforcement before national courts and could be challenged in the courts of the seat of arbitration, on the same grounds as would have applied to commercial arbitration awards venued in those places. Now, being a signatory of the ICSID Convention, Mexico's federal courts have the obligation to recognise an award rendered pursuant to the 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.

Mexico's accession to the ICSID Convention allows investors to settle their investment disputes with Mexico (and for Mexican investors to exercise their own investment rights), under the legal and procedural framework of the ICSID Convention and the ICSID Arbitration Rules. The foregoing is consistent with Mexican trade policy and its efforts to attract foreign investment. Finally, it also happens within the context of NAFTA's renegotiations with the USA and Canada, and the economic/political uncertainty generated by the upcoming elections in Mexico, which require sending clear signals to provide certainty to the markets regarding foreign investment protection in Mexico.

On the other hand, it is worth mentioning that the amendment to the Mexican Constitution that was approved in 2013 brought the enactment of a new Energy Legal System in Mexico (the "**Energy Reform**"). Article 27 of the Mexican Constitution provides that the Mexican Nation is the owner of the hydrocarbons in the subsoil and it is forbidden to grant concessions for the exploration and extraction of hydrocarbons. Article 28 provides that the exploration and extraction of oil and gas, as well as the service of transmission and distribution of electric energy are strategic activities of the Mexican State.

In virtue of the foregoing, nine new laws were enacted and other 12 laws were amended to complete the Energy Reform. In the new laws of PEMEX and CFE (Federal Electricity Commission), the possibility to use alternative dispute resolution mechanisms (such as, arbitration, mediation, conciliation and dispute boards) was, amongst other things, included.

The Hydrocarbons Law provides that the parties are entitled to take their disputes before Federal Administrative Courts **or arbitration** (an exception is made with regards to the exploration and extraction of hydrocarbons matters, when the agreement is rescinded or terminated in advance by the Mexican authority, where the parties cannot agree to arbitration).

The arbitration clause (25.5) of the model contract for public bids in Round One provides that disputes arising from or in connection with such agreement (after a three-month conciliation period amongst the parties has elapsed), must be resolved by arbitration under UNCITRAL's Rules. The General Secretariat of the Permanent Arbitration Court in La Haya will be the nominating authority of the arbitral procedure. Applicable law: Mexican Law. The arbitral tribunal is composed by three members, one appointed by the National Hydrocarbons Commission, another by the Operator and the participating entities and the third arbitrator (President of the arbitral tribunal) shall be appointed according to UNCITRAL's Rules. The arbitral procedure shall be conducted in Spanish and will be based in La Haya, in the Netherlands.

8. Panama

As part of the amendments to the Panamanian Constitution in 2004, article 202 was modified to include arbitration as a means to administer justice. Furthermore, arbitration panels were granted the constitutional prerogative to rule over their own jurisdiction, a prerogative which is known as *Kompetenz-Kompetenz*. Article 202 states: "*The Judicial Branch is made up of the Supreme Court of Justice, the tribunals and the courts which the Law may establish.* ***The administration of justice may also be exercised by the arbitral jurisdiction*** *as the Law may determine. The* ***arbitral tribunals may hear and decide on their own regarding their own jurisdiction***." (Emphasis added.)

In this regard, in a ruling dated February 14, 2005 involving private parties styled *Greenhow Associates v. Refinería Panamá*, the Supreme Court of Panama interpreted article 202 as follows:

"*Accordingly,* ***arbitrators are turned into judges*** *at law and their decisions have coercive force in front of the rest of the judicial and administrative community, giving the parties increased security that their claims, recognized in the arbitral awards shall be respected.*" (Emphasis added.)

Thus, under the current state of the law and doctrine, not only are arbitral proceedings granted the status of a court of law, including the constitutional right to rule on their own jurisdiction, but arbitrators are considered, at least by the Supreme Court, as equals to judges. Notwithstanding the above, in a series of rulings by the Supreme Court, it was held that Commercial Courts with jurisdiction over consumer protection matters may exercise their own jurisdiction even in cases where the specific contract has an arbitration clause. The reasoning is that consumers are afforded special protections by the Constitution and the status as consumers allows the Commercial Court to preempt the exercise of the arbitral forum's *Kompetenz-Kompetenz* prerogative.

Law Decree N°5 (July 8, 1999) was the first comprehensive alternative dispute resolution regime put in place in Panama. It "*was enacted to promote the private resolution of disputes without the need to resort to the overburdened judicial system*". *Id.* The arbitration provisions found in Title I of Law Decree N° 5 were recently superseded by Law N° 131 (December 31, 2013) which: "*regulates national and international commercial arbitration in Panama…*". Law N° 131 closely follows the UNCITRAL rules as well as the arbitration rules of the International Chamber of Commerce.

Law N° 131 follows the most modern trend in international commercial arbitration and aims to make Panama an important centre for the resolution of international commercial disputes.

An important aspect of Law N° 131 is found in the provisions of its articles 38 through 45 dealing with protective provisional measures.

The law grants arbitrators wide powers to preserve the *status quo*, which to some extent exceed the measures which can be granted by ordinary courts of law. The law recognises, however, that ordinary courts of law have concurrent jurisdiction with that of the arbitration panels with regards to such measures.

The full Supreme Court of Panama recently undertook a thorough analysis of Law N° 131 in a ruling dated September 30, 2015. In that ruling, the Court unanimously refused to hear a constitutional challenge ("*amparo*") to a ruling by an arbitration panel and stated that the only way to judicially review such rulings was via the "*recurso de anulación*" or nullity action which is filed in front of the Fourth Chamber of the Court as provided for in Law N° 131.

In a ruling dated September 20, 2017, the Court of Administrative Appeals, which is not part of the Judiciary and rules mostly on government contract disputes held as follows:

"*[The above] Notwithstanding, having seen that the arbitral jurisdiction is recognized by the Constitution and by the Law; and that the State may submit its controversies with private or third parties to such jurisdiction, it results in the obligatory compliance of the arbitration clause found in the Agreement which is integrated into the contract signed between the challenged entity and the claimant company; and that there is a clear mandate of the law to all state entities to decide controversy[ies], to withdraw from taking jurisdiction over a matter when confronted with an arbitration agreement, this administrative tribunal invested with jurisdiction and competence to decide conflicts arising due to public contracting, must proceed accordingly.*"

According to the cited ruling, this Court (or at least the Panel involved) would stand for the principle that the administrative adjudicatory authorities lack jurisdiction to resolve disputes arising from public contracts which contain an arbitration clause. This appears to be a departure from prior situations where the administrative authorities asserted their jurisdiction concurrently with the arbitral jurisdictions in cases where the public contracts incorporated arbitration clauses.

9. Peru

The Peruvian Arbitration Law (Legislative Decree N° 1071) enacted in 2008 follows the same set of principles as the 2006 UNCITRAL Model Law, accepted in most of the world as the trusted international standards. The Peruvian Arbitration Act unifies the regulations for local and international arbitration, both ruled by the same legal dispositions that, as we said, follow the principles of the UNCITRAL Model Law; of course, there are some very specific issues that only apply for international arbitration.

According to the Peruvian Arbitration Act, the Chambers of Commerce of the seat of the arbitration have assumed an important role – that, in the past, was reserved to the Judiciary – which is the appointment of arbitrators if any party refuses to do so, or if the arbitrators appointed by the parties cannot agree on the appointment of the President (Chairman) of the Arbitration Panel. In this case, also the recusal of the arbitrator will also be decided by the Chambers of Commerce, until the Panel is duly conformed. In addition, the arbitrators can grant and enforce precautionary measures (unless it is necessary to use public force) and can modify precautionary measures granted by the Judiciary before the arbitrators are appointed. Also, an arbitration award can be executed directly by the arbitrator if both parties agree, unless public force is necessary. A challenge of the arbitration award claiming its annulment does not suspend its enforcement, unless a guarantee (letter of credit) is provided covering the amount ordered in the arbitral decision.

According to the Peruvian Arbitration Act, the parties can decide between an institutional or an *ad hoc* arbitration. However, institutional arbitration brings more confidence and predictability. The most important arbitrations institutions in Peru are: (i) Arbitration Center of the Lima Chamber of Commerce (ACL), which has handled more than 3,000 cases since its creation; (ii) Center for Analysis and Resolution of Conflicts of the Pontifical Catholic University of Peru (PUCP), which has handled more than 2000 cases since its creation; and (iii) Arbitration Center of the American Chamber of Commerce of Peru (AMCHAM) which has handled more than 60 cases since its creation.

In Peru, arbitration is now the preferred method for conflict resolution. Some aspects that contribute to consolidate arbitration in Peru are:

(i) one of the most important reasons is that, according to the Peruvian Procurement Act, an arbitration clause is mandatory in all contracts (goods, services and construction) executed with the State, and all controversies in connection to public procurement agreements must be resolved in arbitration;

(ii) in arbitrations where the Peruvian State is a party, it has no privileges and will be considered as a particular with the same rights and duties;

(iii) the role of the Judiciary in relation with arbitration has changed. According to the Arbitration Law, the participation of the Judiciary is absolutely limited to specific cases set forth in the Law: the enforcement of precautionary measures; enforcement of awards, to rule about the validity of the arbitration award when a party challenges the decision claiming its annulment. It is important to bear in mind that the award could only be annulled for very specific reasons connected to formal issues: Due Process of Law; the existence of an arbitration agreement; the appointment of an arbitrator; or formal issues in general. The Judiciary is prohibited from analysing the main decision, its grounds or justice. Our Judicial Branch – after a long training process – has finally assumed its role as a facilitator of arbitration, to make it efficient; and

(iv) for the recognition and enforcement of foreign arbitration awards, the New York Convention, the Panama Convention, and any other treaty connected to this matter will apply. According to Peruvian Law the trend must be in favour of recognising and enforcing the foreign awards.

As a result of the growth of Peruvian parties in ICC arbitrations, Peru has already conformed to the ICC National Committee. In this regard, in September 2017, the first ICC Peruvian Arbitration Day was organised. The Peruvian ICC Commission on Arbitration is comprised by the most distinguished lawyers in the field, and it has the goal of promoting international arbitration standards in national arbitration. Currently, the Commission on Arbitration is working on the second ICC Peruvian Arbitration Day, which will take place in October of this year.

With regards to international investment arbitration, Law N° 28933, adopted on December 2006, created the State's System for Coordination and Response on International Investment Disputes, which functions through a Special Commission conformed by different State entities. This Special Commission has the role of representing the State in these types of cases. The Special Commission is the one in charge of, among other things, hiring the law firms that will represent the State. Peru as a Member State of the ICSID Convention since 1993, has been involved in various ICSID arbitrations involving different industries, such as highways, electricity, ports, mining, banking, hydrocarbons, among others. At the moment, Peru has achieved victories in almost all of the 14 concluded ICSID cases so far, with the exception of three cases. Although, in these three cases, the tribunal awarded only a small part of the amount claimed by the investor. Also, Peru has already been able to solve some investment disputes through the Direct

Negotiation Phase avoiding the initiation of arbitration. In addition, Peru currently has three ICSID pending cases.

10. Venezuela

On April 7, 1998, Venezuela enacted the Commercial Arbitration Law (*Ley de Arbitraje Comercial* – "LAC"), which is based on the UNCITRAL Model Law. The LAC governs domestic commercial arbitration and the recognition and enforcement in the country of foreign awards without the need for an *exequatur*. Article 3 of the LAC, however, does not allow arbitration for disputes on matters contrary to public policy (a restriction that case law has relaxed), nor related to crimes or offences and matters concerning sovereign activities or functions of the State or public entities.

For arbitration clauses included in agreements in which one of the parties is a public entity controlled by the Republic, the States, Municipalities or Autonomous Institutes with a participation equal to or higher than fifty per cent (50%), article 4 of the LAC requires the approval of the corresponding corporate body as well as the written authorisation of the Minister in the area of such public entity.

The 1999 Constitution includes the alternative means of dispute resolution as part of the justice system (article 253). The Constitution ordered the Law to promote arbitration, conciliation, mediation and other alternative means of dispute resolution (article 258).

Now, 18 years after the LAC came into effect in Venezuela and with several judicial precedents from the Constitutional Chamber of the Supreme Court, arbitration has become an effective means to resolve commercial disputes in Venezuela. In spite of such support from the Constitutional Chamber, there is still a trend from the government to exclude some other matters from commercial arbitration with the argument that public policy issues are involved. Examples of this are the commercial lease agreements on real estate in which the government prohibited to resort to arbitration (Decree No. 929. Decree with the Rank Value and Force of Law to Govern Real Estate Leasing for Commercial Use, Published in Official Gazette No. 40.418, of May 23, 2014). However, a recent award has considered this prohibition to resort to arbitration as a violation of the constitutional provision (article 258) which orders the promotion of arbitration and other ADR mechanisms by law.

Venezuela is a party to the following treaties relating to arbitration: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"); the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (the "Montevideo Convention"); and the Inter-American Convention on International Commercial Arbitration (the "Panama Convention").

On August 12, 2012, Venezuela became a member of Mercosur. On July 30, 2012, the National Assembly passed the Law Approving the Amendment of the Los Olivos Protocol for the Settlement of Disputes signed in Brasilia on January 19, 2007 (the "Protocol"). According to the provisions of the Protocol, Venezuela and its citizens, through the procedures established, can access this mechanism for the settlement of disputes arising with other signatories of the Protocol in connection with the interpretation and application of the Mercosur rules.

Concerning investment arbitration, Venezuela was a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Washington Convention"), but withdrew from such convention effective on July 24, 2012. ICSID arbitration (under the Rules of the additional facility) is still applicable for: (a) those contracts in which the parties expressly agreed to that remedy; and (b) specific cases protected by BITs that establish the additional facility for the resolution of the corresponding investment disputes. Venezuela is still a party to 26 BITs. Some of them establish ICSID as an arbitration remedy to resolve investment disputes and others establish other international arbitration rules such as those of UNCITRAL.

Notwithstanding the above, there is a trend from the Venezuelan government to reconsider international legislation adopted by the country for resolving investment disputes and to consider new rules or different arbitration centres for resolving disputes when Venezuela is involved (see, for example, article 6 of the Constitutional Law on Productive Foreign Investment, Published in Official Gazette No. 41.310, of December 29, 2017). In this regard, the government promotes that only when domestic remedies have been exhausted and if previously agreed upon, Venezuela may resort to other ADR mechanisms created within the framework of the integration of Latin American countries, especially those of *Alianza Bolivariana para los Pueblos de Nuestra América – Tratado de Comercio de los Pueblos* ("ALBA") and Union of South American Countries ("UNASUR"), and consider the creation of such regional centres with their own rules. ALBA is composed of Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Grenada, Nicaragua, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Venezuela. The members of UNASUR are Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

VII. Challenges Facing International Arbitration in Latin America

The advances described above by no means constitute the end of the journey. To the contrary, Latin America must continue on this same path and improve the legal culture that surrounds arbitration if it is to fulfil the promise of international arbitration as an effective and efficient method of dispute resolution which provides greater certainty for those entering into economic and business arrangements in the region and, thus, fostering economic growth of the region. In this regard, the region's judiciary must learn to resist the temptation to interfere in the arbitral process and must guard against the current trend of focusing on the *constitutionalisation* of arbitration.

1. The lingering judicial interference in arbitration

As discussed, the legislations of the majority of the countries in Latin America have accepted the basic principles of the Model Law. One of the significant principles of the Model Law is embodied in article 5, which provides that "*In matters governed by this Law, no court shall intervene except where so provided in this Law*". Legislatures were thus encouraged to specify exactly when the judiciary should intervene (e.g. the appointment of arbitrators), thereby providing parties predictability as to when they could expect judicial intervention. Ideally then, the judiciary should intervene in the arbitral process only in limited and very circumscribed circumstances.

Despite the importance of the principle of limited interference by the judiciary, not all countries in Latin America have adopted article 5 in its entirety. Those that have adopted the principles of article 5 include: *Bolivia*; *Chile*; *Colombia* (in its new arbitration law); *the Dominican Republic*; *Guatemala*; *Honduras*; *Mexico*; *Paraguay*; and *Peru.* Other counties have specifically not recognised this limiting principle: *Brazil*; *Costa Rica*; *Ecuador*; *Panama*; and *Venezuela.*

Given the historical antagonism to arbitration in the region, the failure to expressly adopt such a measure is counterproductive to the advancement of a positive arbitration culture. As a result, there

have been instances where the judiciary continues to intervene in arbitral proceedings in circumstances where the judiciary has not been specifically authorised to do so. For example, in the case of *Companhia Paranense de Energia (Copel) v. UEG Araucaria Ltda*, the trial court in Brazil ordered an anti-arbitration injunction based on the concept that because one of the parties was a Brazilian State entity, the matter was not one susceptible to arbitration. In other cases, the judiciary has annulled final awards by taking a very expansive view of the grounds for annulment, such as in the case of *Venezolana de Televisión CA v. Electrónica Industriales SPA* which annulled an award based on the theory that the contract at issue was one of public interest and that the Venezuelan judiciary had exclusive jurisdiction over such disputes. Thus, these cases demonstrate the disregard for the fundamental principle of *Kompetenz-Kompetenz*.

In another series of cases, arbitrators are subject to the same types of limitations imposed on judges. For example, in Argentina the judiciary has sought to enjoin arbitrators from presiding over arbitrations due to prescriptions attributable to judges. *Chile*, one of the best exemplars of arbitral practice in the region, allows disciplinary action against arbitrators that could result in the annulment of an award based on the concept that the arbitrator has committed gross negligence in rendering the award ("*una falta o culpa grave*"). In this regard, arbitrators are considered part of the "judicial branch" and, as such, subject to disciplinary measures to be taken by the Supreme Court. Thus, even though Chile's new arbitration law adopted in 2004 provided that an annulment proceeding was the sole basis to attack an arbitral award, the law made a specific reservation of the disciplinary proceedings provided to the Supreme Court under the Chilean Constitution, which is interpreted as allowing disciplinary proceedings against arbitrators as members of a tribunal established by law. More recently, a court in Venezuela decided to vacate an award rendered in an international arbitration held in Miami under the auspices of the International Centre for Dispute Resolution arguing public policy violations. This decision calls into question the stability of the arbitration culture in the country and in the region, where we have often witnessed international arbitral awards being vacated under the argument of local public policy, thus in complete disregard of International Conventions such as the New York Convention and the Panama Convention. In particular, and more surprisingly, the Venezuelan Court vacated the award following a *writ of amparo* or constitutional emergency recourse, diverting from the recent trends found in other Latin American countries and even other decisions by the Venezuelan Supreme Court.

2. The *constitutionalisation* of arbitration in Latin America

In recent years there has been an academic inquiry into the constitutional aspects of arbitration. This academic inquiry may be traced to a conference on the "Constitutionalisation of Private Law" ("*La Constitucionalización del Derecho Privado*") that occurred in September 2006 at the *III Congreso Internacional de la Asociación Andrés Bello de juristas franco-latino-americanos* where the impact of constitutional law on private commercial law was discussed. The conference addressed both the benefits of the *constitutionalisation* of arbitration, and the obstacles that such a process created. This issue of *constitutionalisation* has been continuously addressed since that time.

The issue of the *constitutionalisation* of arbitration does not refer to the supposed resurgence of the Calvo Doctrine in Latin America. That issue is limited mostly to the area of investment disputes and not commercial international arbitration. What is here referred to as the *constitutionalisation* of arbitration relates to a cultural and philosophical clash arising from Latin American legal scholars analysing the source of an arbitral tribunal's authority. The issue could be analysed through the following questions:

- Does the authority/power of arbitrators in international commercial arbitration flow from a specific constitutional delegation or does it emanate solely from the will of the parties?
- Is international commercial arbitration a creation of the State or is it simply the creation of a community of international businesses?
- Is international commercial arbitration a creature of the judicial powers conferred by constitutions, or is it a transnational judicial order specific to international commercial interests?

These issues of the *constitutionalisation* of arbitration have a special resonance in Latin America both in what regards the application of the law on the merits of the case and the conduct of the arbitration proceeding.

The *constitutionalisation* of private law first affects the application of the law on the merits of the cases. There is a trend in Latin America to interpret the blackletter provisions of agreements and statutes in light of constitutional principles and provisions. That is particularly relevant in Brazil, where judges and arbitrators tend to construe contract and statute provisions in accordance with broad principles and general clauses, both constitutional and legal. This may affect the predictability of the outcome of a case decided by local arbitrators and upon such laws, and is certainly a relevant issue to consider when drafting arbitration clauses and contracts in general.

Second, in what regards the procedure, several Latin American constitutions explicitly refer to arbitration. Some constitutions, particularly those in South America, refer to arbitration within the "judicial power" conferred by the constitution: *Colombia*; *Ecuador*; and *Paraguay*. Other countries, predominantly from Central America, provide for arbitration as a fundamental right: *Costa Rica*; *El Salvador*; and *Honduras*.

It has been argued by some commentators that the *constitutionalisation* of arbitration has resulted from a lack of familiarity with the fundamental principles that form arbitration. When local practitioners attempt to regulate the arbitral process, but lack an understanding of international commercial arbitration principles, such practitioners reach for that which is most know to them, the law of the forum and, within that law, the supreme law of the land, the constitution. It is from here that one sees "constitutional injunctions" ("*amparos*") which interfere with proper arbitral process. There is a growing concern among practitioners that the use of these "constitutional injunctions" or "*amparos*" will undermine the existing culture of international arbitration in the region. It is common to see in different countries in the region, how local practitioners use these judicial recourses to vacate international arbitration awards, creating two noticeable problems. First, by upholding the "constitutional injunctions" against arbitral awards, courts are overreaching with respect to the intended effects of the "*amparo*", designed to protect individuals from violations of constitutional rights, by using the argument that access to arbitration as a means to dispute resolution is a fundamental constitutional right. "*Amparos*" are typically emergency measures and cannot be viewed as a means to set aside an award. A case in point of this issue is the recent decision adopted by a Venezuelan court vacating an award rendered in an international arbitration procedure held in Miami, by means of a "*writ of amparo*", and not by means of the mechanisms included in local laws and the New York Convention. Luckily, local courts in other countries such as *Peru*, *Mexico*, and *Costa Rica* have ruled against the use of a "*writ of amparo*" to vacate arbitral awards, basically stating that there are no constitutional elements at issue that would require an "*amparo*" to determine the annulment of an international arbitration award. Second, the use of

"*amparos*" against, and towards arbitrators reveals a confusion as to the authority of arbitrators. Arbitrators are not public servants, and thus not subject to "*amparos*".

As the commentators have noted, the use of constitutional rights and protections applied to the arbitral process has the effect of undermining a certain constitutional principle: specifically, the right of parties to freely enter into arbitral agreements of their own choosing. As a consequence, the issue of the *constitutionalisation* of arbitration is something that must be viewed with a degree of scepticism within the framework of the advances of international arbitration in Latin America.

Acknowledgment

This chapter could not have been written without the help of several individuals. Within Baker McKenzie, We thank Luis Dates (Argentina); Joaquim Muniz and Luis Peretti (Brazil); Rodrigo Diaz de Valdes (Chile); Claudia Benavides and Catalina Brando (Colombia); Javier Navarro Velasco and Juan Francisco Vázquez Lavista (Mexico); Ana Maria Arrarte and Maria del Carmen Tovar (Peru); and Eugenio Hernández-Bretón (Venezuela). In addition to these individuals, we must acknowledge the invaluable help of: Ana Serra e Moura and Juan Pablo Argentato of the ICC; Andres Moreno from Moreno Baldivieso in Bolivia; and David Mizrachi from Mizrachi, Davarro & Urriola in Panama.

We acknowledge the following materials as being critical to this chapter: any overview of Latin American arbitration must take into account Cristian Conejero Roos' introductory chapter "*El arbitraje comercial internacional en Iberoamérica: un panorama general*", which is included in *El arbitraje comercial internacional en Iberoamérica*, this chapter relied extensively on Cristian Conejero's chapter; Jonathan C. Hamilton's article "*Three Decades of Latin American Commercial Arbitration*", in Volume 30 of the University of Pennsylvania's Journal of International Law; Alfredo de Jesús O's article "*La autonomía del arbitraje comercial internacional en la hora de la constitucionalización del arbitraje en América Latina*", published in *Estudios de Derecho Privado en homenaje a Christian Larroumet* (Universidad del Rosario, Bogotá, 2008); finally, with respect to a survey of Brazilian arbitration law, one can do no better than read Renata Brazil-David's "*An Examination of the Law and Practice of International Commercial Arbitration in Brazil*" published in Volume 27 of *Arbitration International*.

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Chapter 42

Bolivia

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The arbitration agreement must be written.

1.2 What other elements ought to be incorporated in an arbitration agreement?

It is recommended that the arbitration agreement contains a reference to the preferred type of arbitration, that is arbitration in equity or arbitration in law, the language to be used (if it is an international arbitration), the place of arbitration, the arbitration centre and the rules adopted for the arbitration.

It is also important to include the express manifestation of the parties to accept and participate in an emergency arbitration and the precautionary measures or provisional measures that the emergency arbitrator could adopt, in case they are needed.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

National courts, in general, and the Plurinational Constitutional Tribunal have rendered judgments in favour of arbitration.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Law Nº 708 of Conciliation and Arbitration (*Ley N° 708 de Conciliación y Arbitraje*) governs the procedures of execution of arbitral awards and, additionally, Bolivia is a member of the New York Convention of 1958.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Currently, Law Nº 708 governs both domestic and international arbitration proceedings, but it has a special section concerning investment arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Law Nº 708, even though it has a basis on the UNCITRAL Model Law, has great differences with it.

Firstly, it governs both domestic and international arbitration proceedings; also, it includes a section dedicated to the arbitrator and the procedure for emergency arbitration, including in this the need to agree on the type of precautionary measures or provisional measures that could be adopted.

Also, it expressly excludes contracts that cannot be submitted to arbitration because one of the parties to the contract is the State. It also introduces the concept of the appointing authority for the designation of arbitrators.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Both in domestic and the international arbitration, arbitrators are committed to comply with the rules adopted by the parties, with the agreement reached by the parties and due process. In the absence of an agreement by the parties or of express rules, the arbitrators can conduct the process in a manner that they consider most appropriate.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

According to our Political Constitution, contracts that involve all of the productive chain of hydrocarbons cannot be submitted to international arbitration. Also, the property of natural resources, titles granted over national reserves, tax and royalties cannot be submitted to arbitration. Administrative contracts (unless created abroad), the access to public services, licences, registries and authorisations over natural resources in all of their states, matters that affect the public order, matters which have a firm and definitive judicial resolution, matters that refer to the civil status and the capacity of persons, matters over property and the rights of incapable persons, matters related to the functions of the Estate and matters that are not the object of transaction cannot be submitted to arbitration.

In general, it could be said that Bolivian legislation does not allow the submission to arbitration of matters that are not of free disposal of the parties.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The arbitral tribunal under the principle of competence-competence can decide over its own jurisdiction, but this decision is essentially revisable at the termination of the arbitration through an action of annulment, since the law establishes as a ground of annulment decisions related to non-arbitrable matters, or that the arbitral tribunal has been composed irregularly and even that there is nullity of the arbitration agreement.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Bolivian legislation allows that the party that is affected by the breach of an arbitration agreement, in which a party files a lawsuit rather than requesting arbitration, to present an exception of arbitration to the court, with which the judge should suspend the judicial procedure and derive the cause to the arbitrators. This is a usual practice in Bolivian courts.

Notwithstanding, in exceptional cases, the judge can rule on the nullity or impossible execution of the arbitration agreement and reject the arbitration exception.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

According to current Bolivian legislation, the matters of jurisdiction and competence can only be revised by a judge, when the arbitral procedure is concluded and when one of the parties presents an annulment recourse under the ground of irregular composition of the arbitral tribunal, not arbitrable matters or nullity of the arbitration agreement.

However, if a judge receives a claim subject to arbitration and finds that the arbitration agreement is null and void, he may proceed with the case and dismiss an arbitration exception.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There is no express provision in Bolivian legislation that allows an arbitration tribunal to assume jurisdiction over individuals or entities which are not part of an agreement to arbitrate.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There is no law or rule in Bolivian legislation that limits the time in which an arbitration can be initiated; however, it must be taken into account that the rules of the Bolivian Civil Code do limit, via statute of limitations, the right of the parties to claim over property rights. In these cases, it is usual that the property rights lapse in five years, but there are shorter periods of time such as compensation of damages as a result of illicit events that lapse in three years.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

The legislation on insolvency proceedings is not specific in relation to the paralysation of arbitration proceedings. Nevertheless, and considering that constitutional jurisprudence regards arbitration as a jurisdictional procedure, it is understood that insolvency proceedings should suspend the arbitration proceedings and bankruptcy proceedings should allow the accrual in the insolvency proceedings of the arbitration proceedings. This is not a common practice, since there is no judicial precedent in this respect in Bolivia.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Usually, the law is determined by the agreement of the parties and, otherwise, it is usual that the law of the place where the arbitration agreement was created is used.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Only when the choice of said law is contrary to the public order.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Bolivian law governs all of these aspects.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The selection of arbitrators is unrestricted to the parties; however, said nomination must be bestowed on a person with full legal capacity, who has not been sentenced for criminal or civil matters for his labour as an arbitrator or in another process, or that has been sanctioned for faults in his professional ethics.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the chosen method by the parties fails, the selection of the arbitrator would be completed by the methods of the arbitration centre that applies or, as a default, the selection method as foreseen by the law; in the latter case, Bolivian legislation has provided for the existence of an appointing authority that may equally be chosen by the parties, and in case of disagreement this authority is a judge.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Bolivian courts can only intervene in the selection of arbitrators when the parties omit to designate them and there is no other nominating authority that may fulfil this function.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

At the moment of accepting the designation as arbitrator, the person must provide a Statement of Acceptance, Availability and Independence, including the possible causes of grounds of objection; once notified with this statement, the parties have five days to challenge the arbitrator.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Yes, Law Nº 708 of Conciliation and Arbitration (*Ley Nº 708 de Conciliación y Arbitraje*) regulates all types of procedures of arbitration, except for labour arbitration that has its own rules.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

No particular steps are required by law at all.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

No particular rules govern this at all.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The powers and duties of the arbitrator in the arbitral procedure are the same as the ones provided for judges; however, they do not have powers of execution of their resolutions, for which they have to resort to mutual judicial assistance in cases where resolutions are not complied with voluntarily.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Yes, such restrictions exist, since in order to exercise the profession of lawyer in Bolivia it is required to be registered before Governmental instances. Said restriction is not clear with regards to arbitration; however, in international arbitrations located in Bolivia, it is common that foreign lawyers intervene.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

In Bolivian legislation, immunity does not exist for the arbitrator and he is responsible, civil and criminally, for the correct exercise of his functions.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Bolivian legislation does not contemplate any jurisdiction conferred to the court to resolve procedural matters during the arbitration and, therefore, it will be the arbitrators who have to determine procedural issues not regulated by the arbitration agreement, the rules of the arbitration centre, or the law.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The arbitrators and/or arbitral tribunals are permitted to adopt preliminary or interim measures, for this the law has adopted two paths. The first is that of the emergency arbitrator, a figure that is reserved for institutional arbitrations and that has to be expressly agreed by the parties. The second is related to the possibility that the definitive arbitral tribunal adopts the measures that it sees fit, always upon request of one of the parties. In the emergency arbitration, the measurers that the arbitrator can adopt must be expressly agreed by the parties. In both cases, if the measures are not complied with voluntarily, judicial assistance can be accessed to obtain their compliance.

The arbitrators may assume all types of measures without restrictions, with the most common being the Preventive Embargo, the Precautionary Annotation and the Ban of Contracting.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes, local courts can adopt preliminary or interim relief. The parties can refer to the courts before the initiation of the arbitration, including the emergency arbitration, in order to request preliminary or interim relief; the measures will have to be informed by the Arbitration Centre, if this has been designated. The request of measures by the judicial authority does not affect the jurisdiction of the arbitration tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In general, local courts process the requested measures and grant them in the majority of the cases.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions are not issued under Bolivian law.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

There is no express legal stipulation on this particular subject; however, national law empowers arbitrators to do so.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

National courts generally accept the execution of preliminary relief and interim measurers dictated in local jurisdiction. In relation to the measures adopted abroad, there is very little experience in relation to these types of requests and, therefore, there is no practice that allows one to determine a pattern of conduct.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

In Bolivia, there are basically no rules of evidence, and it is inferred that all licit evidence is allowed.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The arbitrators can order the parties to exhibit the documents, as long as these are in the possession of the party that requests them or can be directly obtained from a third party. The lack of compliance with an arbitrators' order will allow them to infer against the party that denies the exhibition.

With regards to the disclosure directed to third parties, no regulation exists that allows or prohibits it. In this case, however, it is usual for the arbitrators to issue orders for the exhibition of documents and that these are complied with voluntarily. If necessary, it is possible to refer to a judge to obtain the exhibition.

With regard to witnesses, the law has no provision empowering the arbitral tribunal to call witnesses or force their presence before the tribunal and, therefore, it is usual that the witnesses who are proposed by the parties are brought to testify, by the same party that proposes them.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Before or during the procedure, it is possible to refer to a judge to request an order for the exhibition of documents that could not be obtained by other means.

At the same time, it is equally possible to request a judge, through judicial assistance, to order the presence of a witness before the arbitral tribunal; however, this is an unusual procedure.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The arbitration law expressly allows the testimonies of witnesses in written form and, particularly in international procedures, it is usual to find these types of testimonies, with the condition that such testimony is duly signed. In relation to oral testimony, this is allowed under oath and powers to cross-examine do exist. These testimonies can be proposed by the parties and need to be ordered by the arbitration tribunal.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

All communications with internal lawyers, as well as external lawyers, is protected by professional secrecy, though such privilege could be waived by the order of a competent authority, including an arbitrator, as long as the circumstances justify this.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Arbitral awards, naturally, have to be issued in writing and must be properly sustained, taking into consideration all evidence contributed by the parties, with an indication of what is being taken into account and what is being disregarded. Likewise, arbitrators must indicate the place, the date, and summary of the controversy, penalties and the form and term of compliance of the imposed obligations.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

When one of the parties requests it, within three days of being notified with the arbitral award, the arbitral tribunal can clarify, correct or amend the arbitral award. Also, the arbitral tribunal can correct only material errors.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The rules in Bolivia provide that arbitral awards can be annulled for the following reasons: a) the matter was non-arbitral; b) the arbitral award is contrary to the public order; c) there are grounds for nullity or revocability of the arbitration clause or arbitration agreement; d) affectation to the right of defence of one of the parties; and e) manifest excess of the arbitrators in their powers in the arbitral award with reference to a controversy not provided in the arbitral clause or agreement.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

It is not possible; however, it is usual that an exclusion to the action of annulment is included in the arbitral agreement. This is generally not accepted by judges, though, as the grounds of annulment are part of the public order.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No appeal exists in the arbitral procedure and it is not possible to increase the grounds of annulment of the arbitral award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The annulment must be presented to the same arbitration tribunal, which, after listening to the other party, has the authority to accept or reject it. The rejection will only proceed if the annulment was presented outside of the term or if it is not based on one of the causes of annulment established by law. Once the annulment has been accepted, all of the files must be remitted to a judge so he can decide in relation to the essence of the same. Said judge will have thirty (30) days to issue a resolution, which is not open to appeal. If necessary, the judge can open an evidential term of eight (8) days.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Bolivia has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards without any reservations. The relevant national legislation is Law Nº 708 of Conciliation and Arbitration (*Ley Nº 708 de Conciliación y Arbitraje*) and suppletorily the Civil Procedural Code.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Yes, Bolivia has signed and ratified the *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,* the *Inter-American Convention on International Commercial Arbitration,* and the *Agreement on International Commercial Arbitration between Mercosur, the Republic of Bolivia and the Republic of Chile*.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

To date, there are no precedents on the recognition and enforcement of arbitration awards of Foreign Arbitral Awards.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Arbitral awards that are not impugned in a timely manner, acquire final judgment and are of obligatory compliance. The same occurs with arbitral awards which are impugned but for which the objection is not upheld. In both cases, it is no longer possible to submit the controversy to another arbitral tribunal or local courts.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Refusal of enforcement of an arbitral award can only occur when these are contrary to the public order or deal with non-arbitral matters.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Confidentiality is provided by law for procedures between private parties. In procedures where the interests of the State are compromised, it is possible to lift the confidentiality, and, exceptionally, having to surrender the information to the Procurator-General of the State (*Procuraduría General del Estado*). In the cases where there is indication of the commission of a criminal offence, it is also possible to lift the confidentiality.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

No; information disclosed in arbitral proceedings cannot be referred to in subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Bolivian legislation does not admit punitive damages.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The rate of interest may be determined by the parties in the agreement, if this does not occur, the annual legal interest of six per cent (6%) must be applied.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The parties can recuperate fees and/or costs as long as this is agreed

between them, otherwise each party has to cover its own fees and costs will be divided in equal parts.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

No; an award is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

No restrictions exist, but there are no "professional" funders active in our jurisdiction.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Bolivia has ratified *the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965*; however, it denounced it in 2007.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Bolivia has denounced all Protection Investment Treaties it was part of.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The language in the different treaties varies.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Currently, in Bolivia, there are no known cases of defence of State immunity regarding jurisdiction and execution.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

There are no noteworthy trends in our jurisdiction.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

No recent steps have been taken.

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Salazar & Asociados (S&A), founded in 1982, is one of the leading Bolivian law firms and provides a full range of services to its clients.

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Chapter 43

Brazil

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The Brazilian Arbitration Law (Federal Law No. 9.307/1996 – "BAL") distinguishes two different types of arbitration agreement depending on whether the dispute has already arisen or not: the submission agreement and the arbitration clause.

The BAL provides that the arbitration clause shall be in writing, contained in the contract or in a separate document referring thereto (Article 4, First Paragraph).

Nevertheless, the BAL does not specify whether the arbitration agreement must be signed by the parties in order to be effective. Faced with this issue, on 26 April 2016, the Federal Court of Appeals (*Superior Tribunal de Justiça – STJ*), deciding on REsp 1.569.422, ruled that a tacit acceptance of the arbitration clause is sufficient, and that the signature on the clause or on the contract in which it is contained is not required, so long as consent by both parties to submit the dispute to arbitration is evidenced by other circumstances.

The BAL provides, however, additional requirements to enforce arbitration agreements in contracts of adhesion and standard form contracts (Article 4, Second Paragraph), where the signature of the subscribing party is required.

1.2 What other elements ought to be incorporated in an arbitration agreement?

When drafting and tailoring an arbitration clause, the parties should also agree on: (i) the choice between *ad hoc* and institutional arbitration; (ii) the number of arbitrators and the rules regarding the constitution of the arbitral tribunal; (iii) the seat of the arbitration; (iv) the language of the proceedings; and (v) the laws applicable to the merits of the dispute (likewise, should the parties agree on an arbitration in equity, it ought to be expressly indicated).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

After the enactment of the BAL in 1996, the confirmation of its constitutionality by the Brazilian Supreme Court in 2001, and the ratification of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in 2002, Brazilian courts have become more willing to enforce arbitration agreements and awards. Currently, Brazilian courts have consistently enforced arbitration agreements and consolidated a pro-arbitration scenario supported by case law from the higher courts.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The laws that govern the enforcement of arbitration proceedings in Brazil are: (i) the Brazilian Arbitration Law, enacted under No. 9.307, dated 23 September 1996, and amended by the Federal Law No. 13.129, dated 26 May 2015; (ii) the Brazilian Code of Civil Procedure, enacted under No. 13.105, dated 16 March 2015; (iii) the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, internalised through Decree No. 4.311, dated 23 July 2002; (iv) the Internal Rules of the Federal Court of Appeals (Superior Court of Justice – STJ); and (v) Resolution No. 9, issued by the Federal Court of Appeals, dated May 2005.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Brazilian law does not distinguish domestic arbitration from international arbitration. Nevertheless, for the purpose of enforcement of arbitral awards, Brazilian law makes a distinction between domestic and foreign awards. A foreign award is an award issued outside of the Brazilian territory (Article 34 of the BAL) and is subject to homologation/ratification by the Federal Court of Appeals (Article 35 of the BAL). On the other hand, a domestic award is an award issued within the Brazilian territory and may be enforced in a straightforward manner by Brazilian courts without the need to go through a homologation/ratification process (Article 31 of the BAL).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The BAL was inspired by the UNCITRAL Model Law, but also by the Spanish Arbitration Act of 1988, and the New York Convention and the Inter-American Convention on International Commercial Arbitration ("Panamá Convention") (internalised through Decree No. 1.902, dated 9 May 1996).

Probably, one of the most significant differences between the BAL and the UNCITRAL Model Law concerns the indistinct treatment given by the former to both domestic and international arbitration. We note that the latter does not provide any legal consequences arising from the place of issuance of an award, whereas the former grants immediate enforceability to awards rendered within the Brazilian territory, and demands a prior *exequatur* proceeding for awards rendered abroad.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Brazilian law does not make a distinction between national and international arbitration except for the purposes of homologation/ratification of the latter before the Federal Court of Appeals. That being said, Brazilian law has very few mandatory rules regarding arbitral proceedings, which shall, however, respect some major procedural principles, such as the equal treatment of the parties and the impartiality of the arbitrators.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

As a general rule, a dispute may be referred to arbitration when it is related to disposable rights. Administrative and judicial claims arising from the activities carried out by private parties under the rules of public departments and/or public agencies (that are of public interest) may not be referred to arbitration, such as environmental matters, anti-trust and competition matters. Although there are exceptions within the aforementioned matters, leading to a case-by-case analysis, the law is broad and therefore any dispute that is related to disposable rights may be arbitrated.

Recent amendments to the BAL clarified certain matters that have always been controversial under the local legal landscape and provide for: (i) the possibility that government-controlled entities refer to arbitration their disputes that are related to disposable rights; (ii) the possibility to establish arbitration clauses in employment agreements when the employees are directors or statutory managers (therefore, sophisticated senior level employees); and (iii) rules for arbitration involving a consumer relationship. Amendments were made also to the Brazilian Corporation Law (Law No. 6.404/1976) in order to define whether or not shareholders are bound to arbitration clauses included in a company's by-laws, providing also for the possibility that the dissenting shareholder leave the company. More recently, amendments to Brazilian labour laws have also allowed, under certain conditions, arbitration clauses to be inserted in labour contracts.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The BAL provides, in the Sole Paragraph of Article 8, that the arbitral tribunal has jurisdiction to decide the issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as of the contract containing the arbitration clause, embracing, thus, the competence-competence principle.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Brazilian courts have been very positive towards arbitration and, in general, have dismissed, without ruling on the merits, court proceedings initiated in breach of arbitration agreements.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

National courts are not allowed to review an arbitral tribunal's decision as to its own jurisdiction based on the competence-competence principle. However, Brazilian courts may assess the jurisdiction and competence of the arbitral tribunal if the award is challenged by the parties. The standard of review, however, is highly deferential.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Brazilian law does not address the issue as to the extension of the arbitration agreement to non-signatory parties. Nevertheless, Brazilian courts have already recognised the possibility of extending the arbitration agreement when there is evidence that a party has participated in the negotiations or enforcement of the agreement in which the arbitration clause is contained, or was represented in the legal business or in arbitration by the non-signatory party (i.e. *Trelleborg v. Aneel* [State Appellate Court of São Paulo, Appeal No. 267.450-4/6, 7th Chamber, Reporting Judge Constança Gonzaga, judged 24 May 2006]; *Comverse Inc. v. American Telecommunication* [Federal Court of Appeals, SEC No. 3.709/US, Special Panel, Reporting Judge Teori Albino Zavascki, judged 14 June 2012]; and *L'aiglon S/A v. Têxtil União S/A* [Federal Court of Appeals, SEC No. 856/EX, Special Panel, Reporting Judge Carlos Alberto Menezes Direito, judged 18 May 2005]). We note, however, that the case law is not always consistent in this matter and courts have mostly proceeded to a case-by-case analysis.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Brazilian Civil Code provides for statute of limitation periods (Article 206) that vary from one (1) to ten (10) years depending on the substantive issue under discussion. Limitation periods are considered a substantive rule and are mandatory.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Brazilian courts have already recognised the survival of ongoing arbitral proceedings seeking the declaration of a debt when bankruptcy of a party to such arbitration is declared (*Saúde ABC v. Interclínicas* [Federal Court of Appeals, Provisional Measure

No. 14.295/SP, Reporting Justice Nancy Andrighi, judged 13 June 2008]). In this case, the amounts assigned by the award will be included in the schedule of creditors in the insolvency proceedings.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The parties to an arbitration proceeding are entitled to choose the law applicable to the dispute and also agree that the arbitration be conducted under the general principles of law, customs, usages and international rules of trade (Article 2 of the BAL). In case the parties are silent, Law No. 4.657/1942, which provides for conflict of law rules, will apply.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Mandatory rules will apply when the chosen law violates good morals and/or public policy/order (Article 2 of the BAL).

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The BAL applies to arbitration agreements whenever the award is issued in Brazil.

Regarding awards issued abroad, the recognition and enforcement of such awards will consider the validity of the arbitration agreement under the parties' chosen law to govern the arbitration agreement or, in case the parties are silent, under the law of the seat of the arbitration (the law of the State where the award was issued). Moreover, the arbitration agreement ought to respect the objective arbitrability according to Brazilian law standards.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Brazilian law does not impose limits in terms of the selection of the arbitrators, but they must meet the requirements of independence and impartiality (Article 14 of the BAL and 144 *et seq*. of the Brazilian Code of Civil Procedure). The rules of an Arbitration Centre in which a particular arbitration is under development, however, may impose limits to the parties' autonomy to select arbitrators, such as mandating that arbitrators be selected from a pool of professionals indicated by such entity.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The default procedure is provided in Article 7, Fourth Paragraph, of the BAL, which provides that a court judge will appoint the arbitrator to settle the dispute in case the arbitration agreement does not indicate the method for selection of arbitrators and/or the parties disagree as to such selection. This article does not apply where the parties chose the rules of an Arbitration Centre that already provides for a default procedure.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A judge is allowed to appoint a sole arbitrator or one or more members of the arbitral tribunal (as provided by the arbitration clause, should it be the case) after hearing the parties in cases where there is resistance from one of the parties as to the commencement of the arbitration proceedings, or the arbitration agreement fails to provide for the appointment of arbitrators (Article 7, Fourth Paragraph, of the BAL).

Nevertheless, should the respondent party fail to reply to the court proceedings relating to the appointment of arbitrators, the judge must appoint a sole arbitrator to decide on the matter, irrespective of whether the arbitration clause provided for an arbitral tribunal composed by three arbitrators (Article 7, Sixth Paragraph, of the BAL).

The BAL also entitles a national court to intervene in the selection of arbitrators if there is disagreement between the arbitrators as to the appointment of the president of the arbitral tribunal (Article 13, Second Paragraph).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Articles 13 and 14 of the BAL provide that arbitrators must be independent and impartial and must disclose, before the acceptance of the appointment to act as arbitrators, any facts likely to give rise to justified doubts as to their independence and impartiality. The BAL also provides that the circumstances under which the judges are barred from hearing a case are applicable to the individuals functioning as arbitrators.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Unless the parties have agreed otherwise, the BAL and the Brazilian Code of Civil Procedure apply to all arbitral proceedings sited in Brazil.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Chapter IV of the BAL provides for the procedural steps for the arbitrations in Brazil, which will apply only if the parties have not agreed otherwise.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The Code of Ethics of the Brazilian Bar Association applies to all Brazilian counsel irrespective of the place they are conducting proceedings. The rules do not apply to foreign counsel, unless they are licensed to practise in Brazil. Often, arbitrators will hold foreign lawyers to the same standards of Brazilian counsel in connection with arbitrations that take place in Brazil.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

In performing his duty, the arbitrator must behave in an independent, impartial, diligent, discreet and competent manner (Article 13, Sixth Paragraph of the BAL).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Code of Ethics of the Brazilian Bar Association does not allow foreign lawyers to act in legal matters in Brazil. Such restriction, however, does not apply to arbitration proceedings. The BAL does not require that counsels in arbitration proceedings (Article 21, Third Paragraph) be qualified to practise in Brazil or abroad. As indicated above, however, often arbitrators will hold foreign lawyers to the same standards of Brazilian counsel in connection with arbitrations that take place in Brazil.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Although there are no specific provisions as to an arbitrator's immunity, arbitrators are liable for their acts when they have acted with intent or gross negligence.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The arbitral tribunal will settle procedural issues.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitrator is entitled to award any kind of preliminary or interim relief. However, arbitrators might seek the assistance of national courts to enforce reliefs if necessary.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The parties are only entitled to request relief from a national court before the arbitral tribunal is constituted. In this case, the arbitral tribunal, after its constitution, will take on the matter that was being handled by the courts and will decide on whether to uphold or overturn the court's decision regarding such relief.

During the arbitral proceedings, the parties must request relief directly from the arbitral tribunal, which is the only court with jurisdiction to grant such relief. Any measure requested to national courts during the course of arbitral proceedings will be ineffective. There are, however, two situations where the courts may have jurisdiction to grant interim and preliminary reliefs during an arbitral proceeding. The parties may have expressly agreed to limit the jurisdiction of the arbitral tribunal, preventing it from awarding preliminary relief or interim measures. The other exception (rarely seen) concerns the situation where the circumstances demand urgent relief and the arbitral tribunal is not available to award such measure in time.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Since there is a pro-arbitration approach in Brazil, it is most likely that Brazilian courts will deny any request of interim relief where there is an ongoing arbitral proceeding.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Whenever there is an arbitration agreement between the parties and one of them seeks to circumvent such agreement by filing its grievances in court.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The Brazilian Code of Civil Procedure provides that a claimant that is domiciled abroad or has no headquarters or affiliates within the Brazilian territory is required to make a security deposit for costs and lawyers' fees (Article 83). The security for costs will not be required should the claimant have a real estate property within the Brazilian territory or should the relevant lawsuit be an enforcement proceeding. Also, courts may order security before it enters an interim relief that may harm the respondent (Article 300).

Nevertheless, the abovementioned provisions are not mandatory for arbitral tribunals. Furthermore, while national courts and arbitral tribunals are seldom faced with such request, there is no provision barring orders concerning security for costs, which may be allowed under a broad power to grant interim reliefs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The arbitral tribunal may seek the assistance of national courts in order to enforce preliminary reliefs and interim measures in case parties do not voluntarily comply with them. Article 22-C of the BAL and Article 237, IV, of the Code of Civil Procedure, provide that, under the request of the arbitral tribunal, a court may perform, or order the parties to perform, a relief issued by the arbitrators.

In such case, the courts may only proceed to a formal analysis of its own jurisdiction and the existence of the minimum required documents to enforce interim and preliminary reliefs, as well as to a *prima facie* examination regarding the existence, validity and effectiveness of an arbitration agreement.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The parties may choose the rules of evidence that will apply to the arbitral proceedings. If Brazilian law is chosen, the rules of evidence contained in the Brazilian Code of Civil Procedure will apply to the dispute.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Discovery – as the term is used in common law countries and which involves a broad-scope, lawyer-controlled search for physical or electronic evidence – is not contemplated by Brazilian law. Nevertheless, local laws do provide for a variety of evidence that may be produced in the course of an arbitration as well as a court proceeding, but there is never the possibility of a "fishing expedition" that is often permitted under Anglo-Saxon laws regulating the matter. In Brazil, parties are not obligated to present evidence that might harm their defence. Nevertheless, if the parties have agreed otherwise, the arbitral tribunal may order such disclosure, including third-party disclosure, such as access to privileged banking information.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

As mentioned above, discovery is not contemplated by Brazilian law. Nevertheless, the arbitrator may request the parties to present any document they deem necessary for the understanding of the dispute, as well as request an expert examination (Article 22 of the BAL). If a party ordered to present a document (or e-file) fails to do so, an arbitral tribunal may seek assistance from a national court in enforcing the decision it rendered in favour of the delivery of such document.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The rules that apply to the hearing of witnesses in civil procedures also apply to oral testimonies in local arbitrations. The Brazilian Code of Civil Procedure sets forth that individuals providing oral witness testimonies must swear to speak the truth under the penalty of criminal sanctions (Article 458).

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Communications with outside counsel and/or in-house counsel attract privilege. However, the concept of "privilege" is not as developed, and case-law protected, as in certain Anglo-Saxon countries.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 24 of the BAL provides that the award be prepared in writing and signed by the arbitrators. Article 26 provides that the award must contain: (i) a report, including the qualification of the parties, and a summary of the dispute; (ii) the grounds for the decision, with due analysis of factual and legal issues; (iii) the actual decision; and (iv) the date of the award and the place where it was rendered.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Article 30 of the BAL provides that the parties may submit a request for clarification of the award within five days of the receipt of the award in order to correct clerical, typographical and minor errors or clarify any dimness, doubt or contradiction of the award. Arbitrators may also be requested to decide on an issue that should have been covered by the award but was not.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Article 32 of the BAL provides the grounds for declaration of nullity of an award: (i) the arbitration agreement is null and void; (ii) the persons who rendered the award could not have acted as arbitrators; (iii) the award does not comply with the requirements set forth in Article 26 (see the answer to question 9.1 above); (iv) the award exceeded the limits imposed by the arbitration agreement; (v) the award does not address all of the issues submitted in the arbitration; (vi) the award was made through unfaithfulness, extortion or corruption; (vii) the making of the award exceeded the time limit stipulated by the parties; or (viii) the award violated the principles of due process, equal treatment of the parties, impartiality of the arbitrator and autonomy of the decision.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

No. The list provided by law is mandatory.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

In Brazil, there is no appeal against an arbitral award, except if a challenge to it before the courts is so considered. In any case, an award may only be challenged on the grounds provided in Article 32 of the BAL or if it violates public policy. The parties may neither expand the scope of appeal nor agree on new methods for judicial revision of the award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

As stated in question 10.3, appeals against an arbitration award are not allowed in Brazil. With respect to the procedure for challenging an award, the interested party may challenge an arbitral award rendered in Brazil by addressing its claim to the Brazilian courts within 90 (ninety) days as of the date when it was notified of the award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The New York Convention was internalised through Decree No. 4.311, dated 23 July 2002 and ratified with no reservations.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Brazil is party to the Inter-American Convention on International Commercial Arbitration (internalised through Decree No. 1.902, dated 9 May 1996).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In order to be recognised and enforced in Brazil, a foreign arbitral award must be homologated/ratified by the Federal Court of Appeals (STJ), following the rules provided in the Code of Civil Procedure; Resolution No. 09 of the Federal Court of Appeals; and the New York Convention. The rules include, for example, the need for the party requesting the recognition of the award to present the originals or certified and notarised copies of the arbitration agreement and the final award, both translated into Portuguese by a local Official Public Translator.

The Federal Court of Appeals has demonstrated a positive and proactive position towards the recognition of foreign arbitral awards and in the past years has correctly applied the New York Convention, especially concerning grounds for denial of the recognition and enforcement of foreign awards.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Issues decided in arbitration cannot be re-heard by national courts.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Enforcement may be refused on the grounds of public policy; for example, if there was a violation of due process (including failure to properly notify a party), absence of an arbitration agreement, lack of proper acceptance of arbitration by a party, and questions as to the nature of the dispute, such as the kind of right subjected to arbitration (certain rights may not be arbitrated in Brazil).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The BAL does not provide for confidentiality. However, the parties or the rules of the institution to which the parties have referred their dispute may expressly provide for confidentiality, and therefore be binding upon the participants of the procedure. It is common to have arbitrations in Brazil treated with confidentiality.

Article 2 of the BAL provides, nevertheless, that arbitral procedures to which a State entity is party to must respect the principle of publicity and therefore cannot be confidential.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

This will depend on the agreement of confidentiality entered into by the parties. However, it is not a common practice, unless the subsequent arbitration involves the very same parties as the preceding one.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Punitive and consequential damages are generally not allowed under Brazilian Law. There is a trend, albeit still at the outset, to allow for a certain level of "*punitive*" damages in particular cases, but this trend has yet to find its way into arbitration proceedings. The actual definition of consequential damages needs to be made clear in the arbitration agreement, as there may be an overlap with damages deemed lawful under Brazilian Law.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The arbitral tribunal may award pre-award and post-award interests. Brazilian law provides for a default interest of 1% per month (not compounded).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

According to Article 27 of the BAL, the arbitral award will embody a decision as to the parties' responsibility regarding the costs and expenses of the arbitration, as well as on any costs resulting from any possible bad faith/frivolous litigation. The rules of the chosen institution usually provide for recovery of fees and costs and the parties are entitled to determine how they want to regulate their affairs in this instance by inserting the appropriate guidelines in the submission agreement. Arbitration awards rendered in Brazil often follow the "loser-pays" concept that is adopted in most judicial proceedings, therefore imposing on the defeated party the payment of the fees and costs incurred in the proceedings.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award itself is not subject to taxation, but the benefits of such award may result in taxation to the party, depending, for example, on whether amounts received have an indemnification nature or are of a compensatory nature. Gains by the victorious party will be taxed just as much as they would be in the case of a court decision in its favour.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Brazilian law does not address the issue of funding claims; the concept is new in Brazil. There are individuals and entities (funds, investment houses, etc.) that offer these services on and off, but this is not a widespread market yet. Nevertheless, there has been a surge in interest by local parties in this "product" and the interest has been met by supply mostly from abroad. Contingency fees are legal and provided in Article 82 *et seq*. of the Brazilian Code of Civil Procedure.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Brazil has not signed the Washington Convention.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Although Brazil has signed certain bilateral investment treaties, none have been ratified or entered into force. Recently, Brazil has entered into Treaties for Investment Cooperation and Facilitation with Angola, Chile, Colombia, Malawi, Mexico, Mozambique and Peru; nevertheless, none of these treaties provide for Investor-State Arbitration.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

No, it does not.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Although Brazilian courts ensure, as a rule, sovereign immunity to foreign States, it is not applied unrestrictedly. Defence based on State immunity regarding jurisdiction might be pleaded only in regards to issues in connection with an act of State. On the other hand, a foreign State might be subject to enforcement proceedings in Brazil solely in two situations: where it waived its execution immunity; or where the enforcement measures concern assets with no connection to State prerogatives or assets that are not linked to diplomatic corps' activities or property.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Two major laws affecting arbitration have come into force quite recently. On the one hand, the BAL was amended by Law No. 13.129, with the purpose of stabilising certain advances made possible by the development of case law and practice concerning, especially, the scope of application of arbitration, the choice of arbitrators, statute of limitations, relief measures and arbitral awards. On the other hand, the new Code of Civil Procedure (Federal Law No. 13.105) has become effective and has optimised the assistance of national courts to arbitral tribunals and the communication between domestic and foreign jurisdictions.

Brazilian courts and practitioners are likely to react positively to these innovations in the legal framework of arbitration in Brazil, with a heightened defence and support for the process on the part of local courts, and a more vigorous push for new arbitrations locally.

Arbitration proceedings regarding disputes involving State entities have faced a relevant development over the past years – we have seen a great number of public-private contracts, especially concerning

infrastructure investments, setting forth an arbitration clause, and local laws encouraging the use of arbitration and improving the regulations of this matter – similar developments are expected in the next few years.

In 2017, there were major amendments to Brazilian labour laws, which allowed arbitration clauses in certain labour contracts. Although several labour contracts already provide for arbitration as the dispute resolution mechanism, the success of this legal innovation is still to be confirmed by labour courts when asked to decide on requests for challenge and enforcement of arbitral awards.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The International Chamber of Commerce established the court presence in Brazil through the opening of an office in São Paulo and the setting of a case management team in 2017. In 2018, a hearing centre was also inaugurated in São Paulo by the ICC in a partnership with the Industry National Confederation. The new office and hearing centre mark an important milestone for the expansion of the ICC in Brazil as well as evidence the growing relevance of arbitration in Brazil. Arbitral institutions in Brazil, alongside the Brazilian Arbitration Committee (CBAr), have sponsored lectures, conferences/seminars, and arbitration moots in order to disseminate the use of arbitration in Brazil and to encourage discussions with specialists on current issues in arbitration.

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CTP COSTA TAVARES PAES ADVOGADOS

Costa e Tavares Paes Advogados is a Brazilian law firm with its head office in São Paulo and offices in Rio de Janeiro and Brasília. The Firm represents clients from various parts of the world in their global investment and operational activities and disputes. Over time, the Firm has developed and continuously broadened its areas of practice by bringing together professionals of high calibre and experience, consolidating its presence in sophisticated business arbitration and litigation (administrative and judicial, domestic and cross-border). The Firm also provides services in connection with its preventive and advisory practice in several areas of activity.

Chapter 44

Ecuador

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Arbitration in Ecuador is regulated by the Arbitration and Mediation Law issued in 1997 ("the Arbitration Act"). The Arbitration Act, in its article 5, states that the arbitration agreement must be written with the statement that the parties decide to subject to arbitration all disputes or certain disputes that have arisen or might arise between them regarding a given legal, contractual or non-contractual relationship. In all other cases, such as arbitration agreements on civil compensation actions for damages derived from civil infringements, quasi-delicts or torts, the arbitration agreement must refer to the facts on which the arbitration will be based. The Arbitration Act allows the existence of an arbitration agreement not only when the agreement appears in a single document signed by the parties, but also when it results of the exchange of letters or any other means of written communication that leaves documented evidence of the will of the parties to subject themselves to arbitration. Furthermore, the submission to arbitration may result from filing an arbitration petition that is accepted without objection by the other party. Public entities may only arbitrate litigations based on contracts.

1.2 What other elements ought to be incorporated in an arbitration agreement?

In the case of international arbitration, the Arbitration Act provides that in order for public sector entities to be able to subject themselves to international arbitration, express authorisation from the highest authority of the respective institution will be required after a favourable report from the Attorney General of the State, unless the arbitration is provided for in current international instruments.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Local courts should refuse to hear a case when there is an arbitration clause, unless the parties waive the right to arbitrate. If the case, in spite of the objection of either party to the competence of the courts, continues, the proceedings will be declared as null and void. Normally, courts decide not to hear a case when there is an arbitration clause unless the parties agree that the arbitration clause should not be applied, which is implied when the plaintiff files an action before a court and the defendant does not oppose as a defence the existence of an arbitration clause. If such defence is presented, the court should refuse to hear the case.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The enforcement of arbitration proceedings is governed by the Arbitration Act and the enforcement of the awards by both the Arbitration Act and the General Organic Procedural Code ("the procedural code").

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes. However, enforcement of the awards differs, since recognition or homologation of foreign awards is previously required as a consequence of the enactment of the procedural code in force since May 22, 2016.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Arbitration Act, which also governs international arbitration, is not totally based on the Model Law; it contains simpler language and eliminates unnecessary definitions and rules on arbitration on the basis of the agreement of the parties. It contains, in general, the definition or concept of international arbitration, similar to the Model Law, but provides that the same procedural rules of domestic arbitration are applicable to international arbitration conducted in Ecuador. Currently, some groups of jurists seek to propose an arbitration bill following extensively the text of the Model Law, but other practitioners support maintaining the existing law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The Arbitration Act defines international arbitration and also provides that such law governs international arbitration conducted in Ecuador. International treaties on international arbitration ratified by Ecuador prevail over domestic laws. The parties, without any

restriction, may agree to submit an arbitration to any rules contained in the arbitration agreement or referring to regulations on the matter. Only governmental entities require the prior approval of the Attorney General to agree to submit contractual controversies to international arbitration. These rules are mandatory. International arbitration is also regulated by the treaties, covenants, protocols and other acts of international law signed and ratified by Ecuador.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The Arbitration Act defines international arbitration and provides that such law governs also international arbitration conducted in Ecuador. International treaties on international arbitration ratified by Ecuador prevail over domestic laws. The parties, without any restriction, may agree to submit an arbitration to any rules contained in the arbitration agreement or referring to regulations on the matter. Only governmental entities require the prior approval of the Attorney General to agree to submit contractual controversies to international arbitration. These rules are mandatory. International arbitration is also regulated by the treaties, covenants, protocols and other acts of international law signed and ratified by Ecuador.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. The principle of competence-competence is applicable. The decision should be taken in the first hearing of the arbitral proceedings.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Unless the other party also agrees to waive to the right to arbitrate, the courts are under the duty to reject to hear a case when an arbitration clause exists. It is understood that waiver to arbitration exists whenever a claim is filed by either party before a court and the defendant does not oppose, in the answer to the complaint, the defence of lack of jurisdiction of the court due to the existence of the arbitral agreement. In the event that said defence is filed, the respective judge must abstain to hear the case.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

If one of the parties decides to file a claim before a judge and the other party opposes arguing the existence of an arbitral agreement, the judge may rule favourably on the existence of the arbitral tribunal's jurisdiction and competence. Through an action before the president of the Provincial Court of the seat of the arbitration, a final award may be contested on the basis of lack of competence or jurisdiction. Such action of nullity of the award should be brought within 10 working days from the date the award became final and enforceable. In case of doubt on the competence or jurisdiction, the court should decide in favour of the arbitration.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The Arbitration Act does not have a specific way to order the inclusion of third parties into arbitration. Provisions of the procedural code have been invoked and accepted in order to include interested third parties in certain arbitrations. However, there have been other cases where certain arbitrators have refused to accept such third parties into the arbitration and have decided that they do not have competence to arbitrate when such parties have not signed the arbitration clause. Certain arbitration tribunals even ruled that a joint guarantor of a commercial contract was not entitled to bring arbitration against the main debtor and the creditor to collect what he was forced to pay under the main contract. Furthermore, a decision of the courts in another case declared null and void an award against the real interested party of a distribution contract.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

General periods of limitations are those provided in the applicable substantive laws, mainly the 10 years of the general limitations period for contractual obligations under the Civil Code.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Insolvency of one of the parties does not violate the effectiveness of the arbitration agreement. If the award is issued and the party that must comply with it is undergoing insolvency proceedings, the execution of the award must be conducted before a judge, who will order the mandatory payment and all other provisions pertinent to the insolvency process.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

In light of the principle of autonomy of the parties' will, the law applicable to the merits of the dispute will be established by them. If the parties do not establish the applicable law clearly, the arbitral tribunal will establish what will be the applicable law, after hearing the parties.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Only matters of public law of the seat of the arbitration, or of the place where the effects of the award or its enforcement will take place, should prevail over the applicable law chosen by the parties. Article V, 2 of the New York Convention is the applicable rule on the matter.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Normally, the law of the seat of the arbitration rules such matters.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties may appoint the arbitrators they desire, without limitation. The parties must verify that the arbitrators do not incur the grounds for inability.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The Arbitration Act provides that if the parties do not reach an agreement about the appointment of arbitrators, either party my request to the director of the closer institution of arbitration to appoint them or any of them. If the parties have agreed to conduct the arbitration under the rules of certain arbitration institution, the arbitrators or any of them are selected by lottery among the list of arbitrators registered in such institution, *in lieu* of agreement between the parties.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The parties may agree that a specific court may appoint the arbitrators. The Arbitration Act does not provide for such intervention.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

In arbitrations conducted and to be decided under the law, the arbitrators should be lawyers, with independence, neutrality and impartiality with respect to the parties, which should be declared before accepting to take part in the arbitration. In arbitrations to be conducted and decided in equity, the arbitrator does not need to be a lawyer. The arbitrator who becomes aware of an incapacity to carry out the appointment should give such notice to the parties and, if applicable, to the director of the arbitration institution. Parties have the right to challenge or recuse arbitrators before non-challenged arbitrators or, if all are recused, before the director of the arbitral institution or, in the case of independent arbitration, before the director of the closer arbitration institution.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The Constitution and the Arbitration Acts govern arbitral proceedings sited in Ecuador. The procedural code may be applicable if the parties so agree, or the tribunal so decides. However, it is not mandatory to apply such procedural rules.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Yes. There are requirements to be included in the statement of claim and in the statement of defence. Evidence should be provided with such statements, except means of evidence that are not in possession of each party, but the request for the practice of such evidence should be mentioned in each statement. Once such statements are complete, the tribunal should call for the first hearing; after taking an oath to the appointed secretary of the tribunal, the arbitrators should decide clearly on their competence and state and express the subject matter of the litigation to be decided in the award.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Legal counsels are subject to the code of ethics of the National Bar Association and, in institutional arbitration, to the code of ethics, if any, of such institution.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The arbitrators should conduct the arbitration according to the arbitral agreement and those aspects agreed with the parties during the arbitration, as well as to their own decisions in order to reach the award. Arbitrators may not decide on aspects that were not expressed in the statements of claim and defence as described in the decision on competence taken in the first hearing. If the arbitrators deem it is necessary, additional evidence may be ordered *ex officio*. The Arbitration Act provides that arbitrators have the mandatory duty of fulfilling powers to conduct the arbitration and are liable for damages caused to the parties for any act or omission that resulted in harm to either of them. If so accorded by the parties, the arbitrators may impose provisional measures.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

This is a controversial matter not dealt with in the Arbitration Act. The National Bar Association Act provides that only lawyers registered in any provincial bar may appear in judicial cases. No mention is made to arbitrations. The Organic Law of the Judicial Power (that does not rule and is not applicable to arbitration) created a registration of lawyers controlled by the Council of the Judiciary, allowing them to appear in courts. The trend of arbitral institutions is to allow lawyers not registered with domestic bars or with the Council of the Judiciary to appear, representing parties in the arbitration together with a registered lawyer. If the applicable law to the arbitration is a foreign law, lawyers not admitted in Ecuador may represent parties.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

In Ecuador, there is no express treatment about arbitrator immunity. The Arbitration Act establishes civil liability for the arbitrators in case of lack of compliance with their duties, for the damages that their actions or omissions may cause. They may also be subject to criminal sanctions in case of prevarication, extortion or corruption.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

All procedural issues that arise during arbitration will be resolved by the arbitral tribunal. National courts only hear nullity actions against the awards.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes, arbitrators may award preliminary relief to secure the assets subject of the process or to guarantee its outcome. Arbitrators, under the law, cannot execute the preliminary relief by themselves, but through the courts, except by agreement of the parties.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Before the arbitration starts, the parties may obtain provisional measures from the courts, without such steps being considered as a waiver of the arbitral agreement. Once the arbitration has started, the arbitrators may only order such measures.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Ordinary judges do issue preliminary relief if the applicant meets all the requirements contained in the law to justify their request. However, once the arbitration has started, it is deemed that the arbitrators should confirm such measures.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Ecuadorian ordinary judges merely do what the law permits. The request of an anti-suit injunction in aid of arbitration normally would not be accepted, because the judges normally do not understand legal concepts not listed in the law. Judges appointed in the last 10 years regularly dismiss actions they believe (even without reasoning) are not permitted by the law.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Courts are not empowered to order security for costs since access to the judicial system is free. However, in the case of cassation appeal, the courts may request a bond in order to suspend the enforcement of a final decision in order to secure damages that the delay of such enforcement may cause to the other party. Arbitrators are entitled to issue provisional measures that may cover security costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Courts are bound to enforce preliminary relief and interim measures ordered by arbitral tribunals.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Available evidence or evidence that may be prepared before the first hearing should be presented with the statement of claim and the statement of defence, including experts' reports and witnesses' affidavits. Evidence from different sources should be requested in the same pleadings in order to be disposed by the arbitral tribunal.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Upon requests contained in the statement of claim or statement of defence, the arbitral tribunal should order the production of specific documents or other objects in possession of the counterpart as well as to inspect the subject matter of the arbitration, such as real property and constriction works. Witnesses mentioned by the parties in their pleadings will be called to declare in person or, if absent, through a video-conference. The parties have the duty to assure their presence or attendance.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

A national judge may not be involved in the collection of evidence for arbitration, because arbitrators have all the powers to demand the evidence requested.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Normally, witnesses' affidavits should be presented with the pleadings requiring also the testimony to be rendered orally in the corresponding hearing. Cross-examination on the same facts is a right of the counterparty. All witnesses will render testimony under oath after being informed that they might be subject to criminal actions in case of perjury.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

All communications from counsels enjoy privilege and may not be subject of disclosure.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The award must be grounded and must contain the analysis of the relationship between the facts proven and the application of law. Dissenting opining is allowed. The award must be signed by the arbitrators including the one that dissents. If any of the arbitrators is absent from the place of the arbitration, a certificate of the secretary of the tribunal should attest that the absent arbitrator confirmed the text of the award or dissented from it. The award should be read in its entirety in a hearing for such purpose. At that time, the text will be served to the attending parties. If any of them does not attend, it will be served through the approved means.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The arbitral tribunal *ex officio* or by request of any of the parties may clarify, correct or amend an arbitral award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Actions to nullify the award may only be based on the following reasons: a) failure to serve the statement of defence, affecting the right of defence of the respondent if he has not appeared in the arbitration; b) if either of the parties did not receive notices of the tribunal's orders; c) if one of the parties was not called for the first hearing where the evidence was ordered or if called, the production of evidence was not ordered; d) if the award decides on issues not submitted to the arbitration or it granted more than what was requested and claimed; or e) if the procedures established by the parties or, *in lieu* of agreement, by the law for the appointment of the arbitrators were omitted.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties may not agree, beforehand, to exclude any of the bases for the nullity action, but either of them, during the proceedings, may waive the possibility of bringing such action on specific reasons, if they took place.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they cannot.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The nullity action must be filed within 10 working days after the award became final, before the arbitration tribunal, and, if timely presented, the record should be sent to the president of the Provincial Court of the province of the place of the arbitration. The president of such Court, if the action was timely filed, will serve to the other party, who has to answer in five working days, after which a hearing is called by such judge to be conducted within 30 working days, where evidence may be accepted and the decision will be taken verbally, and later issued in writing. Such decision is not subject to any kind of appeal, but may be broadened or clarified, if so requested within three working days.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Ecuador signed the New York Convention on September 9, 1958 and ratified it on October 23, 1961. Ecuador ratified the New York Convention, with the reservation that for determining what should be considered as commercial matters, the national laws of Ecuador should be applicable.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Ecuador has signed and ratified the following conventions dealing partially or totally with international arbitration: a) the Convention on Private International Law (Sánchez de Bustamante Code) of La Habana (1928); b) the Convention of Panamá on International Commercial Arbitration (1975); and c) the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of Montevideo (1979).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Until May 22, 2015, the enforcement of awards issued in international arbitration as well as foreign awards were enforced in the same way as domestic arbitration awards and, therefore, no special proceedings for recognition or homologation were needed. Objections to enforcement based on the New York Convention or the Montevideo Convention or on the public order of Ecuador had to be posed as defences before the trial court where enforcement was requested. The new procedural code published on May 22,

2015 ordered that prior to enforcement, foreign awards need to be subject to a special procedure before one of the chambers of the Provincial Court of the domicile of the person (either physical or juristic) against whom enforcement was to be brought. Thereunder, prior to bringing the enforcement, the following requirements need to be proven: a) the fact that the award is authentic under the laws of the country of the arbitration; b) that under the same laws the award has become *res judicata*; c) that it has been translated into Spanish, if the original is in another language; d) that the statement of claim was legally served to the respondent who was granted adequate means for the defence, which should be evidenced with copies of the corresponding arbitration pieces; and e) any mention of the physical address where the respondent against whom the enforcement will be brought should be served. If all of these requirements are considered as having been met, the three judges of the Chamber of the Court of Appeals will order to serve to the defendant, who within five working days may oppose the recognition. The judges, if they deem it is necessary, may call for a hearing in order to decide on the matter. If the award is recognised or homologated, enforcement may be brought before a trial judge. A decision of three judges of the Provincial Court of Pichincha (Quito) has rejected recognition, alleging the translation of the award should be made exclusively by a translator registered with the Council of the Judiciary and expressing that they do not have competence to rule on defences on the merits based on the New York Convention, such as violation of the public order of Ecuador, implying that this defence should be brought against the enforcement of the award.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Unless the award is declared as null and void, no new case either in arbitration or before the judges may be brought on the same facts and legal basis.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Domestic awards are not subject to any action if they violate the public order, unless constitutional rights have been infringed, since it has been considered by a few decisions of the Constitutional Court that an action for extraordinary protection is available to set aside awards that contravene constitutional rights. However, foreign awards violating Ecuadorian public order should not be enforced under Article V, number 2, paragraph b) of the New York Convention.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitration proceedings are confidential when the parties so agree in the arbitral agreement, otherwise they are public. The Arbitration Act governs confidentiality. It is deemed that confidentiality ends when the award becomes final, since at that time it might be subject to nullity action and to enforcement through the judges.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

If the information was disclosed in a confidential arbitration proceeding, it may not be used in another proceeding, unless an action for nullity of the award is filed or for purposes of enforcement.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The limit is established by the statements of claim and defence and by the rule of competence agreed in the first hearing where the tribunal decides of its competence and the subject matter of the controversy that will be decided in the award. No punitive damages exist under Ecuadorian law. In contractual cases, which are most of the cases brought to arbitration, under Ecuadorian law, damages may only be claimed in cases where resolution or termination of the contract or its compliance is firstly claimed, except in the case of unilateral contracts (those where only one of the parties has obligations). In tort cases subject to arbitration, the compensation usually looked for consists of damages.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Interests in domestic arbitration are calculated according to the legal rate established from time to time by resolution of the Board of Directors of the Central Bank of Ecuador, unless the parties have agreed on another rate for the case of the delay, which may not be higher than the maximum delay rate established from time to time by such board. In international arbitration, the applicable interest rate is subject to international standards, such as "prime" or "libor", or according to the law applicable to decide the case.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The parties, in domestic arbitration, are entitled to recover the costs incurred if they request it to the tribunal. The successful party usually recovers the cost of the arbitration, consisting of the arbitrator fees, the expert fees, if applicable, the costs of administration established by the arbitral institution, and the lawyers' fees as evidence before the tribunal or calculated according to the schedule contained in the National Bar Association Act. If the parties have agreed differently, the arbitration panel will follow such agreement.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award, as such, is not subject to tax. Fees of the arbitrators and experts are subject to income tax and value-added tax. Costs of administration of the institutional arbitration are also subject to value-added tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

No restriction or prohibition exists on third parties or lawyers funding or contingency fees agreements. In the Ecuadorian market, there are no professional funders active for litigation or arbitration. This type of funder may be found in other Latin American countries.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The Government of the Republic of Ecuador ratified the ICSID Convention on January 15, 1986 and deposited its ratification instrument on that same date. The Convention became effective for Ecuador on February 14, 1986. On July 7, 2009, Ecuador gave written notice of its denouncement of the Convention. Pursuant to Article 71 of the Convention, the denunciation became effective six months after the receipt of such notice, which was on January 7, 2010.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

From January 15, 2007 to May 23, 2017, Ecuador denounced most of the BITs. Others were denounced during March 2018. At present, none are in force.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

In some treaties there were clauses eliminating the possibility of arbitration concerning taxes. The suggestion made by the Ministry of Foreign Affairs for possible new bilateral investment treaties is to subject the controversies derived therefrom to institutional arbitration established by South American countries. Old bilateral investment treaties provided a "most favoured nation clause" but regularly not the exhaustion of the local remedies clause.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

There have not been cases where enforcement of international awards or international investment arbitration awards brought against the Republic of Ecuador or any other state in Ecuador. Therefore, there are no precedents of a defence based on state immunity. Up to now, Ecuador has fulfilled or settled international awards rendered in investment arbitration.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The recognition of foreign awards and the defence of violation of public order under Article V, 2, b) of the New York Convention is under scrutiny and discussion in the forum. The possibility of new legislation based on the Model Law of UNCITRAL has started to be analysed. However, the Council of the Judiciary has issued regulations affecting institutional arbitration in an effort to gain effective control on the matter. This position might change if the members of such Council are dismissed and replaced by pro-arbitration members.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Some lawyers devoted to arbitration have prepared a draft for a new arbitration law, based on the UNCITRAL Model Law, but there are worries with regards to introducing it in the National Assembly because it may end in a controversial text affecting arbitration adversely, because politically the majority of the members of such legislative body are linked to ideologies based on the supremacy of the state for deciding on litigation.

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ESTUDIO JURÍDICO

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Mexico

Von Wobeser y Sierra, S.C.

Adrián Magallanes

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Under Article 1423 of the Mexican Commerce Code (the "Commerce Code"), an arbitration agreement must be in writing and be included in a document signed by the parties. Also, an arbitration agreement may be validly executed: (i) through an exchange of letters, telex, telegram, fax or any other means of electronic communication that properly records the existence of the agreement; (ii) by reference to a document containing an arbitration agreement, as long as such agreement is in writing and from the reference it can be concluded that such clause is indeed part of the agreement; or (iii) through an exchange of a written communication and a written answer in which the agreement is affirmed by one party without being denied by the other.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Arbitration agreements must be careful not to incur in any situation that could cause the arbitration agreement to not be enforceable. Under Mexican law, an arbitration agreement will no longer be enforceable if, for example: (i) one of the parties did not have legal capacity during the execution of the agreement (Article 1798 of the Mexican Federal Civil Code); (ii) consent to the agreement was granted by mistake or under duress (Article 1812 of the Mexican Federal Civil Code); or (iii) the subject matter of the agreement is not arbitrable. Additionally, the following reasons have been considered by national courts as grounds for refusing enforcement of such agreement under Article 1424 of the Commerce Code: (i) withdrawal from the agreement to arbitrate by both parties; and (ii) death of one or more arbitrators specifically chosen by the parties in the contract, with no possibility of substituting them.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Mexico is generally considered an "arbitration-friendly" jurisdiction, since its constant and general approach enshrines the principle of "non-intervention" found in Article 1421 of the Commerce Code, whose purpose is to make arbitration agreements effective and to fulfil the intention of the parties when executing them.

Considering this, if court proceedings have been initiated in violation of an arbitration agreement and enforcement of the said agreement is required, the judge must, according to Article 1424 of the Commerce Code and at the request of one party, refer them to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Article 1464 of the said Code provides that such request shall be made in the first written motion on the merits of the dispute submitted by the requesting party.

Despite the commencement of proceedings before national courts and observing the *Kompetenz-Kompetenz* principle, in order to avoid dilatory tactics, arbitration may still be initiated or continued, and an award can be issued while the decision of the national court regarding the validity of the arbitration agreement is pending.

When assessing the validity of the arbitration agreement under Mexican law, consideration must be given to the separability principle found in Article 1432 of the Commerce Code, by the national courts. According to the said principle, any arbitration agreement included in a contract shall be considered as a separate, independent agreement, and, thus, a ruling stating that a contract is null and void does not entail the invalidity of the arbitration clause.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

In Mexico, commercial arbitration proceedings are governed by the Commerce Code; specifically, by the Fourth Title, "Commercial Arbitration", of the Fifth Book, "Commercial Trials", of the Commerce Code. Unlike other matters reserved to the local congresses, the Mexican Constitution grants the faculty to issue commercial law to the Federal Congress. This means that there is a unique set of rules regarding commercial arbitration applicable in all of the country, preventing interpretation and applicability problems often seen in other Federal states, where each district has a different applicable law.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Commerce Code applies to both domestic and international arbitrations with a seat in Mexico.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Commerce Code's special chapter on arbitration is applicable at a Federal level and mirrors the 1985 UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and its 2006 amendment, which was incorporated into the Commerce Code in 2011 with minor modifications. These modifications were the following: (i) the Model Law states that in the event there is no agreement between the parties on the number of arbitrators, the number of arbitrators shall be three, while the Commerce Code requires one; (ii) under the Commerce Code, the power of national courts to grant interim measures is explicitly recognised by means of a complete bench trial; and (iii) under the Commerce Code, arbitration agreements shall always be in writing.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The Commerce Code applies to both domestic and international arbitrations with a seat in Mexico. In addition, Mexico is a party to the following international treaties related to commercial arbitration: the New York Convention of 1958, which was ratified in 1971; the Inter-American Convention on International Commercial Arbitration (Panama Convention), which was ratified on October 1977; and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), which was ratified in 1987. Mexico has also recently signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). This treaty is still not in force, since it is currently in the process of ratification.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

There are several subject matters that, according to different statutes of the Mexican legal system, may not be referred to commercial arbitration. Examples of these subject matters are the following:

(i) Land and water resources located within national territory and resources within the exclusive economic zone, or resources related to any of the sovereign rights regarding such zone.

(ii) Acts of authority or acts related to the internal regime of the state and of Federal entities.

(iii) Internal regimes of Mexican embassies and consulates and their official proceedings (Article 568 of the Federal Code of Civil Procedure).

(iv) Disputes related to the administrative termination of contracts executed by the National Hydrocarbons Commission (Articles 20 and 21 of the Hydrocarbons Law).

(v) Disputes regarding the lawfulness of administrative rescissions or the early termination of contracts executed between public entities and private parties (Article 80 of the Law of Acquisitions, Leases, and Services of the Public Sector, and Article 98 of the Law of Public Sector and Related Services).

(vi) Personal and commercial bankruptcy proceedings (Article 1 of the Bankruptcy Law).

(vii) Criminal liability (Article 1 of the National Code of Criminal Procedure).

(viii) Issues related to family law and civil status (these must be decided by national courts) (Article 52 of the Superior Court of the Federal District Organizational Act).

(ix) Tax matters (Article 1 of the Administrative Federal Court Organizational Law).

(x) Labor disputes (Article 123, Section XXXI of the Mexican Constitution).

(xi) Agrarian disputes (Article 27, Section XIX of the Mexican Constitution).

(xii) Under Article 27 of the Industrial Property Law, only disputes affecting private rights exclusively can be subject to arbitration. If they concern the public interest, they are not arbitrable.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. Mexico follows the *Kompetenz-Kompetenz* principle found in Article 1432 of the Commerce Code.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Under Articles 1424 and 1465 of the Commerce Code, judges are required, at the request of one of the parties, to immediately refer the parties to arbitration if court proceedings have been initiated in violation of an arbitration agreement. However, judges can deny this request if they find that the arbitration agreement is null and void, inoperative or incapable of being performed. Article 1464 of the Commerce Code provides that such request shall be made in the first written motion on the merits of the dispute submitted by the requesting party.

The judge's decision on this regard is not subject to appeal.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

According to Article 1432 of the Commerce Code, if the arbitral tribunal decides on jurisdiction before ruling on the merits, any party may request a final decision by a national court, within 30 days of the notification of such decision. This decision is not subject to appeal.

When assessing the validity of the arbitration agreement under Mexican law, consideration needs to be given to the separability principle (Article 1432 of the Commerce Code) by both national courts and arbitral tribunals. According to the said principle, any arbitration agreement included in a contract shall be considered as a separate, independent agreement, and, thus, a ruling stating that a contract is null and void does not entail the invalidity of the arbitration clause.

Also, when assessing the validity of the arbitration agreement, both arbitral tribunals and national courts must take into consideration the existence of any grounds that could cause the arbitration agreement to not be enforceable (please see question 1.2 above).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There is no specific provision on joinder or consolidation of third parties in the Commerce Code specifically regarding arbitration proceedings; this will depend mainly on the arbitration rules chosen by the parties (institutional or *ad hoc*) and the additions or modifications to these that they may agree to.

It is worth mentioning that, according to Mexican law, there are several cases where non-signatories of an arbitration agreement may be bound by it, such as: (i) assignment of rights; (ii) succession; (iii) merger of companies; and (iv) acquisition of shares of simplified stock companies. There is no uniform criterion on whether non-signatories can be bound to an arbitration agreement in other situations, and Mexican courts have not ruled on the matter.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The special title on commercial arbitration found in the Commerce Code does not contain provisions on limitation periods for the commencement of arbitrations. This is subject to the law applicable to the merits of the dispute. For the determination of the law applicable to the merits, please see question 4.1 below.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Generally, in the case of insolvency, the arbitration agreement remains enforceable, and parties are free to start or continue with arbitral proceedings against a party who is subject to a bankruptcy proceeding. However, depending on the timing of the initiation of the insolvency proceeding, a party may try to attract the arbitration proceeding to the insolvency judicial trial.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Parties are free to decide on the applicable substantive law applicable to the merits of the case. If the parties have not reached an agreement in this regard, the arbitral tribunal must determine the applicable law pursuant to Article 1445 of the Commerce Code, taking into account the characteristics and elements of the case.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The Commerce Code does not contain provisions that force the parties to submit their arbitration proceedings to a specific set of rules, regardless of their arbitration agreement. In addition, in the case where the said agreement is non-existent, the arbitral tribunal is not bound to apply the Mexican conflicts of law rules.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The recognition and enforcement of arbitration agreements are governed by the provisions contained in the Fourth Title, "Commercial Arbitration", of the Fifth Book, "Commercial Trials", of the Commerce Code.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

According to Article 1427, Section II of the Commerce Code, the parties are free to agree on the number and method of selection of the arbitrators, either by specifically determining such rules or by subjecting themselves to the rules of an institution.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Failing such agreement, the proceedings shall be conducted by a single arbitrator, pursuant to Article 1426 of the Commerce Code. Under that same article, the Commerce Code provides a standard procedure for the selection of arbitrators: in case of a single arbitrator, if the parties cannot reach an agreement, a judge will appoint, at the request of any party, the person who shall act as single arbitrator. When facing proceedings with three arbitrators, each party shall appoint one, and the two appointed arbitrators shall select the third. If any party fails to appoint an arbitrator within 30 days from receiving the request of the other party to do so, or the two already appointed arbitrators fail to agree on the appointment of the third within 30 days after the appointment of the second arbitrator, the third arbitrator shall be appointed by a national judge. The decision of the judge in both cases is final and thus is not subject to appeal.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Pursuant to Article 1429 of the Commerce Code, the parties may determine the procedure to challenge arbitrators. However, in the absence of such agreement, the Commerce Code establishes that any party who wishes to challenge the appointment of a person as arbitrator must send to the tribunal, within 15 days from its constitution or from the date on which the party attains knowledge of the existence of the circumstances on which the challenge is based, a letter explaining the reasons believed to justify such challenge. The arbitral tribunal must rule on the issue.

If a challenge is unsuccessful, the petitioner may file before a judge a request for review of the matter, which is not subject to appeal. Even if the decision is still pending before the judge, the arbitral tribunal, including the arbitrator being challenged, may continue with the proceeding and issue an award, pursuant to Article 1429 of the Commerce Code.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Article 1428 of the Commerce Code imposes a duty upon any

person who has been designated as a candidate for appointment as arbitrator or who has already been appointed as such, to inform the parties of all possible circumstances that may give rise to doubts as to his/her impartiality or independence and which may constitute grounds for challenge. Challenges to arbitrators can only be based on circumstances that give rise to doubts as to their impartiality or independence, or on the lack of a quality they must have according to the arbitration agreement, pursuant to Article 1428 of the Commerce Code.

The arbitration rules issued by the *Cámara de Comercio de la Ciudad de México* ("CANACO"), the *Centro de Arbitraje de México* ("CAM") and the *Construction Arbitration Center* ("CAIC") also contain provisions requiring the independence, neutrality and impartiality of arbitrators, as well as provisions containing their duty to inform any fact or circumstance that could create doubts on their independence.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Arbitral proceedings, as well as the recognition and enforcement of awards, are governed by the provisions contained in the Fourth Title, "Commercial Arbitration", of the Fifth Book, "Commercial Trials", of the Commerce Code. These provisions apply to both domestic and international arbitrations.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

No. The Commerce Code only requires that parties must be treated with equality and given a full opportunity to present their case (Article 1434 of the Commerce Code).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

No. However, in practice, arbitral tribunals usually take into consideration the conduct of the parties during the proceedings when assigning the costs in the final award.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators have the power to order interim measures if they deem it necessary, prior to the request of one of the parties. Arbitrators also have the power to decide on their own jurisdiction.

As for duties, arbitrators must treat the parties with equality and allow them to have full opportunity to present their case. They must also inform the parties of any possible circumstances that may give rise to doubts as to his/her impartiality or independence and which may constitute grounds for challenge.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Under the law regulating Article 5 of the Constitution in Mexico City, only attorneys admitted to practise in Mexico may provide legal services on a regular basis. However, counsel to the parties and arbitrators may act and participate in proceedings in Mexico provided they do not do it on a regular basis. There is no definition of what "regular basis" means, and courts are silent in this regard.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

According to Article 1480 of the Commerce Code, arbitrators and arbitral tribunals may be held liable – together with the requesting party – for any damages arising from the granting of interim measures. Other than this, there is no express provision in the Commerce Code regulating the liability of arbitrators regarding the rest of the arbitral proceedings.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes, but only in specific matters where the assistance of the courts is necessary, such as the enforcement of interim measures and awards, the challenge of arbitrators and challenges to the jurisdiction of the arbitral tribunal (on this regard, please see question 3.4 above). This is because Article 1421 of the Commerce Code contains the principle of "non-intervention" or of "minimum-intervention" by the courts in arbitrations.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Under the Commerce Code (Article 1425), parties may request from a court an interim measure of protection – before or during the arbitral proceedings. Similarly, Article 1433 of said Code provides that the arbitral tribunal may, at the request of either party, order the necessary provisional remedies required to protect the subject matter under dispute. The Commerce Code does not incorporate provisions that define the types of interim measures that an arbitral tribunal may grant. Arbitral tribunals are allowed full discretion to grant any kind of preliminary and interim measures of protection and relief (Articles 1433 and 1478 of the Commerce Code).

An arbitral tribunal does not need the assistance of the courts for issuing interim measures. Article 1479 of the Commerce Code provides that all interim measures ordered by an arbitral tribunal shall be recognised as binding. However, the assistance of the courts is needed for the enforcement of these measures.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

At any moment before or during the arbitration proceedings,

the parties have the right to request interim measures from the competent courts (Article 1425 of the Commerce Code). The court has complete discretion to grant whatever interim measures it deems appropriate for the case (Article 1478 of the Commerce Code).

In the event the interim measure is granted before the arbitration proceedings have been initiated, there is no specific provision establishing that it will cease to have effect once the arbitral tribunal is constituted. In addition, there is no specific provision regulating whether the arbitral tribunal has the authority to modify or revoke the interim measures granted by the court.

The issuance of interim measures by the courts does not have any effect on the jurisdiction of the arbitral tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

There are no specific provisions or requirements for the granting of interim reliefs regarding arbitration proceedings. However, according to Mexican law provisions and legal precedents on interim relief in procedures other than arbitration, two main circumstances are required to justify the granting of interim relief: the likelihood of success of the requesting party on the merits (*fumus boni iuris*); and the urgency to grant the relief sought (*periculum in mora*) (see also Article 17(A)(1) of the Model Law).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Mexican law does not expressly regulate the power of national courts to order anti-suit injunctions aiming to prevent a party from initiating or continuing proceedings before a court (whether national or international).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Pursuant to Article 1433 of the Commerce Code, unless otherwise agreed by the parties, the arbitral tribunal is entitled to order, at the request of either party, the interim measures it deems necessary to preserve the subject matter of the dispute. Accordingly, the tribunal may freely decide to request the presentation of a guarantee or security in an amount sufficient to cover any damages arising from the enforcement of the interim measure.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Article 1479 of the Commerce Code provides that all interim measures ordered by an arbitral tribunal shall be recognised as binding, and, unless otherwise determined by the tribunal, such interim measures shall be enforceable upon request to the courts.

The court to which enforcement of a tribunal-ordered interim measure is requested according to Article 1480 of the Commerce Code may refuse enforcement if – among other things: the court considers such refusal to be based on one or more of the grounds set forth in Article 1462, Section I (a), (b), (c) or (d) and Section II of the Commerce Code, which are the same grounds for refusing enforcement of an arbitral award; if the tribunal's order regarding a provision of security was not complied with; or if the interim measure has been terminated or suspended, either by the tribunal or by a national court in which the arbitration procedure is being heard.

There are no specific provisions regarding interim measures ordered by arbitral tribunals in other jurisdictions. Therefore, these interim measures are given the same treatment as those ordered by arbitral tribunal in Mexico.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Article 1439 of the Commerce Code provides that the parties shall – within the scheduled calendar – express all the facts on which their claim is based, disputed points, their respective initial submissions and provide the arbitral tribunal with all the documents and evidence they deem necessary to support their case. However, the Commerce Code does not have specific provisions regarding the types of evidence that can be admitted, nor rules governing the taking of evidence, disclosure issues, etc.

As a general principle, applicable not only to the taking of evidence but to the entire proceeding, the right of each party to be heard and present its case, as well as the principle of equal treatment of the parties during the proceedings, must be observed by the arbitral tribunal at all times.

It is a common practice in Mexico that both arbitrators and parties apply the IBA Rules on the Taking of Evidence in International Arbitration. However, unless otherwise agreed to the contrary, the arbitral tribunal may determine the procedure on the basis of the agreement between the parties on that specific matter or, failing such agreement, at its own discretion.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Under the Commerce Code, arbitral tribunals depend on the assistance of the national courts for the enforcement of disclosure orders and witness attendance orders, in the given case that these are not complied with willingly.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

There are no specific cases in the Commerce Code under which the arbitral tribunal or the parties – with the arbitral tribunal's consent – can request the national court's assistance. The Commerce Code only states that if the court deems it appropriate, its decision of assistance shall only be made after a hearing with all of the parties of the arbitration.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

There are no specific provisions on this regard in the Commerce Code. This is subject to what the rules of an applicable institution could provide on the matter.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Under Mexican law, there are no specific rules on privilege regarding arbitration proceedings. However, there are several provisions in Mexican statutory law that determine that certain communications must be considered as privileged.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 1448 of the Commerce Code contains the formal requirements for the validity of an award under Mexican law regarding arbitration proceedings seated in Mexico. These are:

- The award must be in writing.
- The award must be signed by the arbitrators (if there is more than one arbitrator, the signature of the majority suffices).
- The award shall be reasoned, unless an agreement on the contrary by the parties or when the award is rendered by mutual consent and in the terms agreed by the parties, pursuant to Article 1447 of Commerce Code.
- The award must set forth the date on which it was rendered and indicate the seat of arbitration. Once the award is rendered, the tribunal shall give notice to the parties by delivering a copy of it, signed by the arbitrators.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Pursuant to Articles 1450 and 1451 of the Commerce Code, either party may – unless a different period of time was agreed by them and with prior notice to the other party – request the tribunal to:

- Correct an error of calculation, copying, typography or of a similar nature found in the award.
- If the parties agree on it, give an interpretation upon an issue or upon a specific part of the award.
- Render an additional award regarding any claim sought in the proceedings but not mentioned in the final award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The grounds for denial of enforcement of an award found in Article 1462 of the Commerce Code mirror those found in Article V of the New York Convention of 1958 ("the NY Convention"). These are:

- One of the parties to the arbitration agreement did not have legal capacity during the conclusion of the contract or the agreement was not valid under the law the parties have subjected it to, or, failing such agreement, under Mexican law.
- A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was somehow unable to present its case.
- The award deals with issues that were not contemplated in or falling outside of the scope of the arbitration agreement.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties or, absent such agreement, was contrary to the law of the seat of arbitration.
- The award is either not yet binding on the parties or was set aside by a court at the seat of arbitration.
- The subject matter of the dispute is not arbitrable under Mexican law.
- The award is contrary to public policy.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

This issue has not been resolved by Mexican caselaw. However, under Mexican law, it is clear that any ground for annulment based on public policy considerations cannot be waived by the parties.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Under Mexican law, arbitral awards are considered final and are not subject to an appeal. However, parties may agree on an appeal procedure within the arbitration proceedings. The decision of this appeal would be considered as the final award by the Mexican courts. It is extremely rare to find this type of agreement in Mexican arbitration practice.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Under Mexican law, arbitral awards are considered final and are not subject to an appeal. The only way to challenge an award is through a setting-aside proceeding before a local or Federal court, which is limited to the specific causes provided in the Commerce Code. The judgment issued by the court in that setting-aside proceeding cannot be appealed; however, it can be challenged through an *amparo* claim.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Mexico has been party to the NY Convention since 1971. Mexico has no reservations to the application of this convention. The provisions of the Commerce Code on the recognition and enforcement of arbitral awards mirror those of the NY Convention, including the grounds for the denial of the enforcement of arbitral awards.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Mexico is a party to the Inter-American Convention on International Commercial Arbitration (also known as the Panama Convention) ratified in 1977 and a party to the Inter-American Convention on

Extraterritorial Validity of Foreign Judgments and Arbitral Awards (also known as the Montevideo Convention) ratified in 1987.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In order to recognise and enforce an arbitral award in Mexico, the interested party must file a request containing the arbitration agreement, the award and, if the award or the agreement to arbitrate is not in Spanish, a certified translation.

If the request meets the requirements referred to above, the judge will then summon the opposing party and grants it 15 days to submit an answer and offer evidence on the validity of the arbitral award. Upon the expiration of such term, if the parties do not offer any evidence and if the judge does not consider it necessary, the parties are summoned to a pleadings hearing, which will take place within the following three days.

If the parties file evidence or if the judge deems it necessary, the parties are granted a 10-day period to produce evidence, pursuant to Articles 1471 to 1476 of the Commerce Code.

In addition, a court may *ex officio* deny recognition and enforcement of an award under Mexican law, if one of the grounds found in Article 1464 of the Commerce Code for the denial of recognition or enforcement is met (for these specific grounds, please see question 10.1 above).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Under Mexican law, arbitral awards are considered final. Therefore, national courts are prohibited from analysing and deciding on the merits of the arbitral award. Their intervention is limited to analysing *prima facie* the existence of the specific grounds found in the Commerce Code for the denial of recognition or enforcement of arbitral awards.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Courts have been very careful not to take into consideration arguments that result in the revisiting of the merits of a case. For that reason, several Mexican courts have issued rulings denying the annulment of awards based on allegations of breach of public policy with the aim of enabling the court to revisit the merits of the case.

Additionally, in a recent case, the First Chamber of the Mexican Supreme Court of Justice ruled on a case arising from a power purchase agreement executed between CFE, a state-owned electricity company, and an independent power producer. CFE tried to set aside the award before the Mexican courts under the argument that there were public policy violations and that the arbitral tribunal ruled on issues that, according to the power purchase agreement, corresponded to technical expertise. Among other things, the Supreme Court determined that even when the matters submitted to arbitration – and therefore the decision reached by an arbitral tribunal – seem to violate matters of public policy, the state is allowed to make exceptions to the general rule that precludes these matters from being submitted to arbitration. This is by virtue of the special nature that the state has under public law regarding the conclusion of contracts with private individuals. In this sense, public entities that have agreed in the first place to submit to arbitration all disputes that arise from public contracts cannot afterwards argue the limitation of public policy.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Commerce Code does not regulate confidentiality in arbitral proceedings. Nevertheless, in practice, parties tend to agree on the confidentiality of the proceedings, either in the arbitration agreement or by means of the rules of a specific institution.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

It depends on a case-by-case basis and on the applicable rules of confidentiality.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The special title on commercial arbitration found in the Commerce Code does not contain provisions on damages. This is subject to the law applicable to the merits of the dispute. The Commerce Code's provisions on arbitration do not limit the scope of damages that could be found in the law applicable to the merits.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Since there are no limitations in the Commerce Code for a tribunal to allocate remedies allowed by law as it deems appropriate, provided the parties have included a request in this respect as part of their claims, the tribunal is entitled to award interest (simple or compound) according to the rate agreed by the parties. In case there is no agreement in this respect, the tribunal can award the annual legal rate of 6%, pursuant to Article 362 of the Commerce Code. However, this mandatory interest rate will only apply if the rules governing the substance of the dispute are Mexican law.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Yes. Article 1452 of the Commerce Code allows the parties to determine the rules applicable to the costs of the arbitration. The general rule is that the costs of arbitration must be paid by the unsuccessful party. However, if the arbitral tribunal considers it appropriate, because of the specific circumstances of the case, it may divide the costs between the parties pursuant to Article 1455 of the Commerce Code. Pursuant to Article 1416 of the Commerce Code,

recoverable costs include the fees of the arbitrators, travel expenses incurred by them, fees charged by experts, travel expenses incurred by witnesses, the fees of the managing institution and, if approved by the arbitral tribunal, the costs and legal fees of the prevailing party.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

No. However, if the winning party is a party subject to the applicable Mexican tax law and receives an income from the enforcement of the award, then said income would be subject to tax. Tax matters are not arbitrable in Mexico.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Although there is no specific provision regarding third-party funding in Mexican law, those kinds of agreements are not forbidden. Therefore, it is possible to execute third-party funding or risk-sharing agreements. We do not know of any companies dedicated to funding in litigation or arbitration. Many companies from the United States and the United Kingdom have advertised their services in the Mexican forum. However, their engagement still remains uncommon.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes. Mexico signed the ICSID Convention on January 11, 2018. Its ratification date and its subsequent entry into force are still pending.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Mexico has 35 BITs, of which 30 are in force. Besides ICSID, Mexico is party to over 16 international treaties with investment provisions, such as: the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); the Mexico-Northern Triangle Free Trade Agreement (Salvador, Guatemala and Honduras); the Montevideo Treaty (Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela); and the Mexico-European Free Trade Association.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Mexico does not use any specific language noteworthy of mention in its investment treaties. In fact, Mexico does not use a model treaty in its negotiations with other countries.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Mexico is undoubtably considered an arbitration-friendly jurisdiction. Mexico tends to willingly comply with the awards rendered against it. Issues of state immunity before Mexican courts vary depending on whether the party opposing enforcement is the Mexican government or a foreign state. All assets of the Mexican government are not subject to attachment by Mexican courts. However, assets of foreign governments are subject to attachment by Mexican courts provided they are used for a private or commercial purpose. Mexico is a signatory party of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Over the past decade, there has been a growing tendency among Mexican courts to favour enforcement of foreign arbitral awards. Currently arbitration, and ADR mechanisms in general, are being more broadly used, to the point that, recently, the Mexican Constitution was amended to include, in Article 17, a reference to ADR mechanisms. Mexican Federal courts have issued legal precedents declaring the right to access ADR mechanism to be a fundamental right recognised by the Mexican Constitution.

Also, considering the increasing use of ADR mechanisms in Mexico for resolving domestic and international disputes, the Federal Executive government, together with several research institutes and academics, are currently working on a bill proposing a national ADR law, which aims to establish a common platform for conducting disputes under an ADR mechanism, including arbitration (e.g. minimum standard of principles governing ADR proceedings).

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Regarding arbitral institutions in Mexico, CANACO has created special set of rules for a fast-track arbitration procedure. Also, the arbitration rules of CAM contain Article 42 titled "Summary Procedure", which allows the parties to agree on the reduction of the time terms of the general rules, subject to the approval of the arbitral tribunal. Finally, the CAIC has issued rules on the allocation of the costs of arbitrations. Additionally, the CAIC rules on arbitration contain provisions for special procedures of "small amount arbitrations" and of "complex arbitrations".

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VON WOBESER Y SIERRA

Von Wobeser y Sierra, S.C. is one of the leading firms in arbitration not only in Mexico but also in Latin America. Since the firm was formed, it has been actively involved in the promotion and practice of arbitration. The firm is an active member of all the relevant national and international arbitration institutions (International Chamber of Commerce, American Arbitration Association, CANACO, London Court of International Arbitration, CAM, etc). The experience of our law firm in arbitration includes any possible activity related to an arbitration procedure. As arbitrators (either Co-arbitrators or Chairman of Arbitral Tribunals) we have extensive experience. Members of our law firm participate in an average of seven arbitrations per year. We have also participated as expert witnesses in international disputes involving Mexican law. In this regard, we have been able to influence the outcome of some arbitrations by including and explaining some legal arguments not clearly developed in early stages of the arbitrations. Finally, we have also served as counsel to enforce before Mexican courts, arbitration awards that were not voluntarily complied with.

Peru

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The legal requirements of an arbitration agreement are determined by subsection 2 of article 13 of the Peruvian Arbitration Act (D.L. 1071), enacted on 27th June 2008 and in force since 1st September 2008, which establishes that the arbitration agreement must be in writing. This requirement also states that the arbitration agreement may take the form of a clause included in a contract in the form of an independent agreement; this would be in a way required by law – the legislator has indicated that it "must" be recorded in writing.

Another thing to consider is that an arbitration agreement is valid if it expressly and unequivocally reflects the parties' intention to submit the dispute to arbitration. However, this requirement has not been followed by the affirmation "under sanction of nullity", unlike that established by article 10 of the repealed General Act of Arbitration No. 26572.

Article 144 of the Civil Code exists for cases when the law imposes a form and does not sanction its non-observance with nullity; it constitutes only a means of proving the existence of the act.

In this way, when the monitoring of a certain formality is established, but, in turn, the non-monitoring is not sanctioned with nullity, we will be in the presence of an act (*ad probationem*). According to the general regulations, it can then be argued that the written arbitration agreement is an act (*ad probationem*) and not solemn.

In that sense, as indicated by the main Peruvian scholars, an arbitration agreement that had not been formalised in writing would not be vitiated by nullity, but could, however, present serious drawbacks. However, as the will of the parties is truly relevant, the writing or not of the arbitration agreement will be of little importance.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The essential elements of the arbitration agreement, in accordance with what is established by the Peruvian Arbitration Act (D.L. 1071), are: the expression of the will of the parties to submit to arbitration; and the determination of the contractual legal relationship "or of another nature" whose controversies will be submitted to arbitration. Likewise, the parties may, among others: establish the rules of the arbitration process; determine if they will be subject to *ad hoc* or institutional arbitration; determine the place of arbitration; and opt for the applicable law.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

There is no rule in Peruvian law that attributes any kind of power to the national courts to intervene in the application of arbitration agreements. However, the law establishes mechanisms by which the national courts can declare the effectiveness of an arbitration agreement in case there is difficulty in determining the existence of it.

Likewise, the substantive law provides for the exception of an arbitration agreement that allows the party invoking it before the national courts to withdraw from the judicial jurisdiction; the national courts largely tend to protect this exception and respect the autonomy of arbitration, which is clearly defined both in the law of arbitration and in the procedural law of the judicial system.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

In Peru, the arbitration proceedings are governed by the provisions set forth in the Peruvian Arbitration Act (D.L. 1071).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Both domestic and international arbitration proceedings are governed by the Peruvian Arbitration Act (D.L. 1071), with a few provisions only applicable to international arbitration proceedings.

These few provisions only applicable to international arbitration proceedings are set forth in: article 2, paragraph 2; article 13, paragraph 7; article 22, paragraph 1; and article 63, paragraph 8.

In article 2, paragraph 2, there exists an explicit prohibition to states or companies, organisations or enterprises controlled by a state invoking the privileges of their own law to avoid the obligations arising from the arbitration agreement. This prohibition includes the Peruvian state itself.

Article 13, paragraph 7 states that the arbitration agreement, in international arbitration proceedings, shall be valid and the dispute

arbitrable, if the requirements of the rules of law chosen by the parties to govern the arbitration agreement, or if the rules of law applicable to the merits of the dispute, or of Peruvian law, are met. Therefore, there is a requirement, at least as residual, of Peruvian law applicability.

Article 22, paragraph 1 states that in no case is an arbitrator required to be an attorney, as is settled for domestic arbitration in law proceedings.

Article 63, paragraph 8 states that when none of the parties to the arbitration is Peruvian or has its domicile, usual place of residence or principal place of business in Peruvian territory, the parties may expressly agree the waiver of any application to set aside or to limit such application to one or more grounds set out for the annulment of the award.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Peruvian Arbitration Act (D.L. 1071) is based on the UNCITRAL Model Law. The Monist Model created by the UNCITRAL Model Law is utilised in Article 1, paragraph 1. Therefore, the Peruvian Arbitration Act (D.L. 1071) provides a single legal framework applicable to both domestic and international arbitrations.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

For domestic arbitration procedures only, the Peruvian Arbitration Act (D.L. 1071) contains a few mandatory rules that cannot be subtracted by the parties. However, the general principle, both for domestic and international arbitration proceedings, without prejudice to the mandatory nature of these rules in domestic arbitration, is that the parties are free to determine the conduct of arbitration proceedings themselves or by reference to a set of arbitration rules.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

As opposed to what is commonly perceived with regards to Peru, there are many subject matters that could be referred to arbitration. First of all, domestic arbitration, governed by the Peruvian Act, includes arbitration for corporate disputes and partners, as well as arbitration regarding testaments. Other acts which deal with arbitration are specialised like the Law in Public Procurement – contracts between government and private companies – in relation to health insurance, labour relationships, mining activities, the environment and electricity arbitrations. In all kinds of domestic arbitration, the golden rule is that the subject must be about the patrimonial rights, i.e. business, contracts, breach of contracts, properties, penalties for breaching contracts, etc. When facing international arbitrations, our acts regarding international arbitration are referred to.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The arbitral tribunal is authorised to rule on the question of its own jurisdiction, because the Peruvian Arbitration Act (D.L. 1071) recognises the principle of *Kompetenz-Kompetenz*.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

If any party commences court proceedings in apparent breach of an arbitration agreement, the court will admit the claim. But if the plaintiff files a formal objection grounded in the arbitration agreement, the court will accept for granted the sole existence of the arbitration agreement, because the Peruvian Arbitration Act (D.L. 1071) rules that this action in this situation is mandatory.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The court recognises that the arbitral agreement is mandatory among the parties (that is the reason for considering to accept the formal objection). As we mentioned in question 3.2, the court respects the tribunal's decision as to its own jurisdiction. When the award is challenged or set aside for one of the parties, based on the lack of jurisdiction of the arbitral tribunal, the scope of the arbitral agreement among the parties and the subject matters will be reviewed, but the court never loses the general point of view that the arbitral agreement is mandatory between the parties.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The arbitral tribunal only has jurisdiction over the parties which are part of the arbitral agreement. This common rule is accepted by all legislation of other countries and is included in Peruvian legislation. However, the Peruvian Arbitration Act (D.L. 1071) rules about the extension of the arbitral agreement, and admits to include in an arbitral procedure someone who is not a party but participated in the development of the contract, which linked up the parties; as article 14 of the Peruvian Arbitration Act (D.L. 1071) states: "*The arbitration agreement extends to those whose consent to submit to arbitration, according to good faith, is determined by their active and decisive participation manner in the negotiation, conclusion, execution or termination of the contract that includes the arbitration agreement or to which the agreement is related. It also extends to those who intend to derive rights or benefits of the contract, according to its terms.*" This issue solves, in national arbitration, the participation of a third party which does not sign the contract but establishes business with one of the parties related to the matter of the contract. The arbitral tribunal applies this rule without fear and the court respects this rule.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The laws which prescribe limitation periods for the commencement

of arbitration in Peru are to be found in the Civil Code. The rules outlined in article 2001 of the Civil Code establish different periods of time: 10 years to collect or to enforce the debt or to avoid a contract; seven years for the action for damages derived from simulated acts; and two years for the action for damages concerning patrimonial responsibility.

These rules are considered substantive because they are in the Civil Code, but in order to refuse the action against the claimant, it is necessary to file a formal objection known as a prescription exception.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

When the pending insolvency affects the party which submitted the insolvency proceeding and this party is the debtor who must pay the other parties, the process will not be affected by the insolvency proceeding. The important issue is about the enforcement of the award; because the law ruled that the creditor cannot collect the money directly to the debtor, he must address the authority of the insolvency proceeding.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Pursuant to article 57 of the Peruvian Arbitration Act (D.L. 1071), the law applicable to the substance of a dispute is determined by the parties. They can agree to the applicable law in the arbitral agreement, and if they did not determine it in the agreement, the arbitrators will determine the rule most convenient to the case. The parties can deal and agree what will be the sequence to apply the law, and establish how and what will be applied in their contracts; this works in international or national arbitration. In special domestic arbitration involving the Law in Public Procurement – contracts between government and private companies – the law establishes a special sequence to apply, and this rule is mandatory for the arbitrators; if they do not observe the rule, the award will be void.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The mandatory law will mainly prevail over the law chosen by the parties when public order is affected.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Arbitration is recognised by the Peruvian Constitution, which is the main law in the country. Pursuant to article 13 of the Peruvian Arbitration Act (D.L. 1071), the formation, validity and legality of arbitration agreements were ruled by such law.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

According to articles 22 and 23 of the Peruvian Arbitration Act (D.L. 1071), parties can freely agree on the procedure to appoint the arbitral tribunal, as long as the principle of equal treatment of the parties is respected. The Act also states that any stipulation that gives the appointed arbitrators responsibility to just one of the parties shall be null and void.

Additionally, the Peruvian Arbitration Act (D.L. 1071) sets forth that, only in domestic arbitration in law, there is a requirement to be a lawyer in order to be an arbitrator, unless otherwise agreed by the parties. Moreover, in case parties opt for an institutional arbitration, arbitrators may only be selected from the pool of professionals indicated by such entity.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The Peruvian Arbitration Act (D.L. 1071) also sets forth default procedures to appoint arbitrators if parties have not agreed to one and/or in case of failure. In connection to this, according to section D of article 23, by the request of any party, the Chamber of Commerce of the seat of the arbitration will appoint arbitrators for domestic arbitrations and the Chamber of Commerce of Lima in case of international arbitrations.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

As previously mentioned, according to the Peruvian Arbitration Act (D.L. 1071), there is a default procedure to appoint arbitrators in case the chosen method fails. However, since it is not explicitly forbidden according to Peruvian law, in order for a court to intervene in the selection of arbitrators, both parties would have to agree on it. Notably, that is a stipulation that would be very difficult to find in any contract, since it is common practice to agree to a procedure or use the default one, not to mention the barriers that this agreement would encounter since there is not even a regulated procedure for such situations under the Peruvian Civil Procedure Law.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Article 28 of the Peruvian Arbitration Act (D.L. 1071) sets forth that all arbitrators must be independent and impartial. Furthermore, from their appointment, all arbitrators must disclose any circumstances which may give justified doubts as to this person's impartiality or independence, and holds this obligation throughout the arbitration process, without delay.

Additionally, an arbitrator can be challenged by the parties if the circumstances given rise to justified doubts as to their impartiality, independence or if they do not meet the requirements established by the parties or law.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Yes, there are. The law that governs the procedure of every

arbitration in Peru's jurisdiction is the Peruvian Arbitration Act (D.L. 1071). However, it is possible for both parties to choose their own procedure rules, which have to be established in the arbitration agreement; in such case, the Peruvian Arbitration Act (D.L. 1071) is supplementary.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Yes, there are. First and foremost, in order to start any arbitration in Peru's jurisdiction, there needs to be an arbitration agreement that indicates that both parties are willing to submit to arbitration to resolve the legal dispute. The party who is interested in initiating the arbitration will need to file a petition for arbitration, which contains the same arbitration agreement.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Yes, there are. Article 38 of the Peruvian Arbitration Act (D.L. 1071) establishes that both parties (including their attorneys if they are acting on behalf them) are obliged to act in good faith during the whole arbitration process. Another rule that governs the conduct of the counsel is the one established in the article 51 of the Peruvian Arbitration Act (D.L. 1071), which determines that every arbitration act must be kept confidential, including the arbitration award. In the case of the attorneys, they need to comply with the Code of Ethics of the Lawyer, which contains restrictions and duties that all lawyers must meet. These rules of conduct are the general rules that must be applied to all arbitration processes that take place in Peru's jurisdiction, regardless of the counsel's nationality.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

All arbitrators have got the right to decide on their own jurisdiction, even when there are objections questioning it. In that sense, the principle of *Kompetenz-Kompetenz* applies in Peru's jurisdiction. On the other hand, unless the arbitration is an in-law one, it is not a requirement to be a lawyer in order to be an arbitrator. As for the duties, all the arbitrators in Peru's jurisdiction must resolve the legal dispute according to the rules that the parties have agreed upon, the Peruvian Arbitration Act being supplementary. Also, they are obliged to keep confidential all of the arbitration acts which occurred in the arbitration process, including the arbitration award. Additionally, they must act impartially during the whole process.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

No, there are not. There is no restriction in Peru for lawyers from other jurisdictions to appear in legal matters.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Peruvian laws do not grant the arbitrator absolute immunity in their actions. As evidence of this, if the arbitrator breaches his or her duties, he could be disqualified from the arbitration process, regardless of being liable for punitive damages for his or her actions.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

In Peru, the autonomy of the arbitration principle governs in every arbitration process, which means once the arbitration process has been initiated, national courts do not have jurisdiction to deal with procedural issues in the arbitration. However, unlike judges, arbitrators cannot use coercive measures in order to collect evidence. In this case, the national courts are able to assist the arbitration tribunal.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes, according to the Peruvian Arbitration Act (D.L. 1071), once arbitral tribunals are constituted they are permitted to issue the interim measures they consider necessary to guarantee the effectiveness of the award, at the request of a party. Correspondingly, the types of reliefs are: a) intended to maintain the *status quo*; b) intended to avoid damages to the arbitration process; c) to secure assets that may allow the enforcement of the award; and d) to preserve evidence.

Furthermore, the measures may take the form of an award or any other form, and the benefited party can seek assistance from the Peruvian courts in order to enforce it.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes. A court is entitled to grant preliminary or interim reliefs in proceedings subject to arbitration, which does not constitute a waiver of a party's right to arbitrate such dispute. However, this circumstance is only possible if the arbitral tribunal has not been constituted yet and the benefited party must initiate the arbitration proceeding within the following 10 days after the relief is granted.

Furthermore, in the case of international arbitrations, during the arbitral proceedings and with the prior authorisations of the arbitral tribunal, parties may request national courts to adopt interim measures.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In general, local courts process the requested measures and grants them as long as they meet the conditions regulated by Peruvian Civil Procedure Law. However, an inconvenience that is important

to mention under these circumstances is that Peruvian courts take approximately 30 days in order to grant interim reliefs, which evidently might end up being harmful for the interested party.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions cannot be issued under Peruvian law.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Security for costs is not treated in Peruvian law, but it is important to mention that the Peruvian Constitution has a principle – at article 2 (a 24) – about the things that people can make and establish: no one is obliged to do what the law does not mandate, nor prevented from doing what the law does not prohibit.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The preliminary relief and interim measures are enforceable before the Peruvian judges, and when parties do not comply with the arbitral tribunal order, the execution must be carried out by a judge in accordance with article 48 of the Peruvian Arbitration Act (D.L. 1071). Likewise, pursuant to article 3 of the aforementioned Act, the judicial authority must enforce the mandates of the responsible arbitrators. In the case of interim measures, issued by foreign arbitral tribunals, it may be recognised and executed in Peru pursuant to section 4 of article 48, but it should be mentioned that the recognition may be rejected as indicated in sections b, c, and d of article 75 of the Peruvian Arbitration Act (D.L. 1071). The most outstanding aspects are, among others: those referred to the lack of notification of the appointment of the arbitrator; that the interim measure refers to aspects not provided for in the arbitration agreement; or that the constitution of the arbitral tribunal has not been carried out in accordance with the agreed procedure. The judicial court in charge of the enforcement of any award, interim measures or preliminary relief is the Civil Court Specialized in Commerce Law.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The rules of evidence that apply to arbitral proceedings in Peru are contained in the Peruvian Arbitration Act (D.L. 1071). Nevertheless, the rules of evidence contained in international regulations are perfectly applicable to arbitral proceedings in Peru, because it is not forbidden in the Peruvian Arbitration Act (D.L. 1071).

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Arbitral tribunals can reject witness participation.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

In accordance with Peruvian arbitral legislation, this is not possible.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

In accordance with Peruvian legislation (Peruvian Arbitration Act (D.L. 1071)), witnesses can be sworn in before the tribunal and cross-examination is allowed, but it is not mandatory.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

There is no privilege rule in the Peruvian jurisdiction.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

According to section 1 of article 56, regarding the requirements of an award, all awards must contain reasons unless the parties had agreed to something different. Article 55, concerning the form of the award, establishes, for example, that all of them must be written and signed, does not mention signing every page, but in Peru it is common to sign every page of the award. Other requirements are the obligation to mention the costs and the assignment of them to the parties (article 70 of the Peruvian Arbitration Act (D.L. 1071)).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The arbitral tribunal has the power to clarify, correct or amend an arbitral award. After serving the award to the parties, the arbitral tribunal, on its own initiative, could clarify, correct or amend the award within 10 days to serve the award to the parties.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

According to article 62 of the Peruvian Arbitration Act (D.L. 1071), the arbitral award can only be challenged through the annulment of the arbitral award. In that sense, the only grounds for annulment of the arbitral award are as follows: (a) the arbitration agreement is invalid or nonexistent; (b) either party was not notified of the designation of the arbitrator or the arbitration proceedings or there was a violation of the right to be heard; (c) the composition of the arbitration tribunal or the arbitration proceedings violated the

rules or the regulations that both parties have agreed upon; (d) the arbitration tribunal has manifestly exceeded its powers; (e) in case of national arbitration, the arbitration tribunal has solved a non-arbitrability legal dispute; (f) non-arbitrability of the legal dispute or, in case of international arbitration, the arbitral award is contrary to the international public policy doctrine; or (g) the legal dispute has been solved after the deadline agreed by both parties or the arbitration tribunal.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Unless the arbitration is an international one, it is not possible for both parties to agree to exclude any basis of challenge against an arbitral award.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The arbitral award is final and not subject to appeal; therefore, both parties cannot agree on additional grounds to expand the scope of appeal.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

In Peru's jurisdiction, the arbitral award cannot be appealed. However, it can be challenged under restricted conditions (see question 10.1).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Peru ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1988 and has not entered any reservations. The relevant national legislation is the Peruvian Arbitration Act (D.L. 1071) and the Civil Procedure Code (RM N° 10-93 JUS); both contain a favourable regime towards the recognition and enforcement of international arbitral awards.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Apart from the New York Convention, Peru is also a party to the Inter-American Convention on International Commercial Arbitration (Panama Convention) from 1975, which was also ratified in 1988.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In domestic arbitration and according to the Peruvian Arbitration Act (D.L. 1071), at the request of a party and unless public force is not needed, arbitral tribunals are allowed to enforce their awards themselves as long as the parties have agreed to it or if it is established in the applicable set of rules. Moreover, the benefited party may also request the enforcement to the competent national courts, which, in practice, take a positive approach towards the enforcement of arbitral awards.

In the case of the recognition and enforcement of foreign arbitral awards, the Peruvian Arbitration Act (DL. 1071) sets forth that the interested party must file a petition for the recognition of the award to the Superior Court. Furthermore, after the award is partially or fully recognised, the competent First Instance Commercial Court will enforce it according to the provisions stated in article 68.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Article 59 of the Peruvian Arbitration Act (D.L. 1071) explicitly provides that an arbitral award is to be considered *res judicata*. The fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, in order to benefit from the *res judicata* effect, a party has to invoke that an arbitral award has already decided such disputes.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

According to Peruvian law, the enforcement of an arbitral award may be refused on the grounds of international public policy; for example, if there is a violation of due process.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Yes, certainly in the Peruvian jurisdiction, arbitral proceedings are confidential. There is no exception for this rule. The law that governs confidentiality is the Peruvian Arbitration Act (D.L. 1071).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings can be referred to and relied on in subsequent arbitral proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The applicable substantive law determines the available remedies in an arbitration proceeding, and Peruvian law does not recognise the concept of punitive damages. Moreover, the Peruvian Arbitration

Act (D.L. 1071) states that the parties are free, to a large extent, to agree on the potential remedies in their case. However, as a general rule, any remedy has to comply with the applicable public order.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The rule is that the parties can agree on the interest; however, they cannot agree on interest up to the rate appointed by the Central Reserve Bank, which controls the rate of interest in Peru. When the parties do not have an agreement about interest, we apply the legal interest rate in accordance with article 1245 of the Peruvian Civil Code.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Yes, the parties are entitled to recover fees and/or costs. The Peruvian Arbitration Act (D.L. 1071) states in article 73 that the Board shall respect the parties' agreement for the purposes of allocating or distributing the arbitration's costs. The same article 73 states that, in failing to reach an agreement, the cost of arbitration shall be borne by the losing party, although the Board is entitled to apportion these costs between the parties, if that is reasonable under the circumstances.

When the parties have opted for institutional arbitration, the arbitration costs will be set by the arbitration institution chosen by these parties. In Peru, the arbitration institutions have a chart of arbitrators' fees and procedural costs previously established, which are accepted by the parties at the time of submitting to the regulations of that established entity.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The Peruvian Arbitration Act (D.L. 1071), nor the tax law, sets an award subject to tax of any kind. Nevertheless, according to Peruvian law, all the taxable income obtained by the taxpayers is subject to taxes. Taxpayers are, in accordance with the provisions of Peruvian Law, those considered domiciled in the country, without considering the nationality of the natural persons, the place of incorporation of the legal entities, or the location of the production source. In the case of taxpayers not domiciled in the country (its branches, agencies or permanent establishments), the tax is levied only on taxable income from a Peruvian source.

Consequently, if the obligation covered by the arbitration award is considered as a Peruvian source of income, it will be taxed.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

In Peru there are no restrictions, except for those established by the Substantive Law that regulates contracts and obligations, and by the rules of public order. Indeed, there are professional funders active in the market.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, it has. Peru is party to the ICSID Washington Convention. Peru is also party to the Convention Establishing the Multilateral Investment Guarantee (MIGA).

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Peru has signed 34 Bilateral Investment Treaties (BITs). Peru has also signed the following multi-party investment treaties, some of which contain investment chapters: Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); Pacific Alliance Additional Protocol (2014): TPP (2016); Peru Framework Agreement (2012); Colombia-Ecuador-EU-Peru Trade Agreement (2012); EFTA-Peru FTA, MERCOSUR-Peru Complementation Agreement; ANDEAN-EC Cooperation Agreement; ANDEAN-MERCOSUR Framework Agreement; LAIA Treaty; Cartagena Agreement; and so on.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Peru has a long tradition of international agreements, including international investment treaties. In that sense, the language used in these treaties has evolved to adopt the language of current international use, which includes expressions such as "the most favoured nation" and "national treatment", among others.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

According to the Peruvian Arbitration Act (D.L. 1071), in the case of international arbitration, if one of the parties is the state (or a company, organisation or company controlled by a state), it cannot validly invoke the prerogatives of its own right to evade the obligations arising from the arbitration agreement.

In other words, if the state (or society, organisation or company controlled by a state) signed an arbitration agreement, it cannot validly disregard the effects of the aforementioned agreement, arguing immunity from its own jurisdiction or any other characteristic of its state sovereignty.

Article 2, paragraph 2 of the Peruvian Arbitration Act (D.L. 1071) is an innovation, and a very important one, in granting pre-eminence to the arbitration agreement on the national provisions applicable to the state party.

This provision covers both the state itself and any of its political or administrative subdivisions, as well as any society controlled directly or indirectly by the state, its divisions or subdivisions. It also applies to companies or even to organisations of which the state or its entities are party to. Likewise, it should be noted that

subsection 2 of article 2 applies both to arbitrations that take place in Peru and to those that take place abroad.

As many Peruvian scholars say, the primary rule of the Peruvian Arbitration Act (D.L. 1071) is that the state should be treated as a private person, avoiding this rule makes use of some type of prerogative, in order not to resort to arbitration.

Article 2, paragraph 2 is a mandate addressed to the judicial authorities to prevent the invalidity of the arbitration agreement due to the inability of the state to dispose of the disputed matter. This provision is consistent with the jurisprudential practice tending to interpret restrictively any prohibition to submit to arbitration referring to matters involving the state or society, organisation or company controlled by the state.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

There are no noteworthy trends or current issues affecting the use of arbitration in the Peruvian jurisdiction.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

There have been no steps of that type recently.

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He has extensive experience in the areas of arbitration, insurance, civil procedure law and labour law.

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MONTEZUMA ABOGADOS

Montezuma Abogados is a law firm located in Lima, Peru and a member of the Inlaw Alliance of Law Firms, a regional legal network with a presence in more than 11 countries in Latin America.

Our firm is made up of a group of lawyers who cover a broad range of issues in our litigation and arbitration practice, including civil commercial disputes, construction and investment arbitration. The firm also provides legal advice on corporate and commercial law.

Middle East and North Africa Overview

International Advocate Legal Services

Diana Hamadé

Introduction

2018 is officially the international arbitration year *par excellence*, as far as the MENA region is concerned. The region has set a record in the development of the practice in an unprecedented way as far as laws, rules and centres are concerned. Two of the Gulf States which have been known for their arbitration scrutiny have finally issued arbitration laws, and the two most prestigious English and French international arbitration centres in the world, the LCIA and the ICC, have recently set up in the MENA region.

What was said by many practitioners, about the long road ahead of Middle Eastern countries to establish one or more truly global arbitration centres, or even embrace arbitration as an alternative to the natural jurisdiction of the courts, has been proven simply naïve.

The MENA countries may not have been, until lately, among the most preferred locations for international arbitrations, like Paris, London, New York and Geneva, because of their less developed legal systems, but this status is changing rapidly. The arbitration laws issued in most countries of the MENA region are based on the UNCITRAL Model Law on International Commercial Arbitration of 1985. Most MENA countries are also signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), except for Iraq and Libya.

The global economic crisis has resulted in a sharp rise in international arbitration cases in the past two decades, which, according to the latest statistics by the International Chamber of Commerce (ICC), involved parties from North Africa accounting for more than one-third of all African parties and the overall number of Middle Eastern parties accounting for approximately one-third of Asian parties.

It is obvious that the governments of the MENA countries have come to realise, despite, or because of, the political restlessness, among many other reasons, that a modern international arbitration regime is critical for foreign investment. The investment-savvy countries in the region, especially the Gulf States, whose governments are eager to diversify their economies and end their dependence on oil and gas revenues, are taking serious steps in the direction of international arbitration. Middle Eastern countries have launched legislative initiatives towards becoming more "arbitration-friendly" to respond to the increasing demand of foreign investors for arbitration as a dispute resolution mechanism.

The experiences of the MENA countries in arbitration may be diverse but the United Arab Emirates (UAE) is increasingly becoming a model to follow in international arbitration in the region. It is fair to say that the UAE is competing with regional and international cities in offering arbitration services to regional investors. According to statistics, the UAE was among the 10 most frequently listed nationalities of parties worldwide and a very attractive seat for international arbitrations in the region.

UAE

Federal Arbitration Law No. 6 of 2018

Until June 14th, 2018, arbitration in the UAE was governed by articles 203 to 218 of the Civil Procedures Code of 1992 (CPC). Other than these articles, there was no arbitration law; nonetheless, arbitration in the UAE thrived. Various drafts of a Federal Arbitration Law had been under discussion since 2008 and many were expected to be passed but nothing materialised – until May 3rd, 2018 when Federal Law No. 6 of 2018 was issued and came into force on June 14th following its publication in the Official Gazette on May 15th.

The new Law is broadly based on the UNCITRAL Model Law and, in consistency with its provisions, provides for limited grounds to annul an arbitral award, and grants the arbitral tribunal the authority to rule on its own jurisdiction.

The previous weakness of the arbitration regime caused by the courts nullifying arbitral awards on procedural technicalities, which caused serious delays and expenses, is dealt with now in the new Law, with specific grounds to challenge an arbitral award, inspired by article 34 of the UNCITRAL Model Law, and procedures to enforce an arbitration award filed directly before the UAE Federal or local Court of Appeal, not before the Courts of First Instance, as before. The Arbitration Law also includes several provisions designed to promote efficiency in arbitration and to prevent significant delays.

As to the scope of its application, the Law refers to both international arbitration and domestic arbitration, granting international arbitration the recognition it lacked previously. It also granted the arbitral tribunal extended powers within and according to the parties' agreement. Articles 3 to 8 of the Law are aimed at enabling the UAE to become a seat in international arbitrations

Amendment to Article 257 of the Penal Code

Among the latest regulatory initiatives in relation to arbitration, the UAE legislator decided to make a change to the UAE Penal Code No. 3 of 1987, amended by Federal Decree Law No. 7 of 2016, adding arbitrators to experts and translators in article 257, where criminal liability is imposed on those who issue decisions and opinions in contradiction with their duties of impartiality and neutrality. There has been widespread criticism of this step, calling it a drawback for international arbitration. While many practitioners are not concerned with the said amendment (confident that such a criminal

liability will not be a threat), the UAE legislator has refrained from commenting thereon.

The New York Convention, Procedure and Public Policy

The New York Convention is one of the key instruments in international arbitration. The UAE became a signatory to the New York Convention in 2006. The UAE judiciary has since then come a long way in its compliance to embrace and uphold treaty obligations.

Following years of applying the outdated and sometimes irrelevant conditions for enforcement listed in the CPC to enforcement actions, disregarding the pro-enforcement bias enshrined in the New York Convention, a series of decisions which commenced in 2010 and culminating in the Court of Cassation's decision No. 132/2012 in *Airmech Dubai LLC v Macsteel International LLC* affirmed the primacy of the New York Convention to the enforcement of foreign awards and the lack of relevance of the CPC.

Since then, the primacy of the New York Convention has been reaffirmed by all levels of the Dubai judiciary, including the Court of Cassation. In the case of *Al Reyami Group LLC v BTI Befestigungstechnik GmbH & Co KG*, which concerned the enforcement of an ICC award seated in Stuttgart, the Dubai Court of Cassation upheld the decision of the Court of Appeal that the New York Convention was embedded in UAE domestic law by Federal Decree No. 43 of 2006 and article 125 of the UAE Constitution, and rejected any grounds for challenge that fell outside the scope of article V of the New York Convention.

The DIFC Law and Courts

The Dubai International Financial Centre (DIFC) is a financial freezone set up in Dubai in 2004 and promotes itself as a leading arbitration hub. Its courts have adopted a strong pro-arbitration stance. The DIFC Law No. 1 of 2008, amended by DIFC Law No. 6 of 2013 (the Arbitration Law) is based on the UNCITRAL Model Law.

In 2015, the DIFC Courts devised a method by which parties can agree to have a DIFC Courts' judgment converted into an arbitral award, which can then be enforced in 152 states around the world, including the UAE, under the New York Convention, acting as a host for onshore enforcement (Practice Direction No. 2).

The use of the DIFC Courts as a conduit court for enforcement in onshore UAE became possible following the DIFC Court of Appeal in *DNB Bank ASA v Gulf Eyadah Corporation* (2015) DIFC CA 007, but the authorities in the UAE, and following an appeal to the Supreme Court of the UAE, decided to limit the potential conflict of jurisdiction created between the DIFC Courts and Dubai courts by setting up a Joint Judicial Tribunal under Decree No. 19 of 2016.

From its very first decision, Cassation No. 1/2016 (Judicial Tribunal) *Daman Real Capital Partners Company LLC v. Oger Dubai LLC*, until the latest decision, and in almost half of such decisions, the Judicial Tribunal has determined that it will not prevent the DIFC Courts from serving as a conduit jurisdiction for the onward enforcement of a domestic arbitral award in mainland Dubai, if there are no parallel proceedings before the Dubai courts involving the same parties on the same subject matter.

Since the setup of the Chamber of Commerce in Dubai, and since arbitration was introduced through ICC involvement with the General Secretariat of the UAE Chambers, other chambers followed suit so almost every emirate now has its own arbitration institution.

The DIAC

The Dubai International Arbitration Centre (DIAC) was established by the Dubai Chamber of Commerce as a centre for commercial arbitration to replace the former Conciliation and Commercial Arbitration Centre of Dubai set up in 1994. The DIAC, which was officially inaugurated in May 2003, is currently the largest and busiest arbitration centre in the Gulf region. It went through some significant modifications in 2007, which included the issuing of its own Arbitration Rules, which have been amended recently by the new DIAC 2018 Arbitration Rules. The New Rules were launched in 2018 aimed at filling the gaps in providing extra protections addressing loopholes in the previous rules. The DIFC, as the default seat of arbitration, was one of the highlights of the amendments, in addition to measures increasing procedural efficiency and avoiding delays (e.g., emergency arbitrator, expedited proceedings and power to sanction counsel conduct).

The DIFC-LCIA

Located in the DIFC and in collaboration with the London Court of International Arbitration (LCIA), the DIFC-LCIA Arbitration Centre, which offers itself as a credible modern alternative to a seat located in "onshore" UAE, was established in February 2008. The Centre was closed due to conflict and other administrative problems, subsequently addressed by the amended Arbitration Law of 2014 aimed at restructuring the DIFC so that the technical objections to the DIFC-LCIA would be put to rest.

For parties doing business throughout the Gulf and MENA region, the pro-arbitration jurisdiction of the DIFC is now made available. Its objectives are to promote and to administer effective, efficient and flexible arbitration and other ADR proceedings. With the relaunch of the DIFC-LCIA, the DIFC Courts, the curial courts for arbitrations and the Rules of the DIFC-LCIA (largely modelled on the LCIA Arbitration Rules), a perfect hub for international arbitration has been created.

The ADGM ICC

The ADGM ICC Centre is Abu Dhabi's answer to the DIFC. In July of last year, the ADGM announced the establishment of its arbitration hearing centre by early 2018. This development acts as a supplement to the recent agreement with the International Court of Arbitration of the International Chamber of Commerce (ICC Court), who have launched their Middle East representative office in the ADGM. In addition to its provision of arbitration and mediation services, the centre also seeks to provide high-quality in-class training in dispute resolution services. What will make this centre stand out is its modern, pro-litigation framework that has been modelled on the UNICTRAL Model Law with a series of contemporary modifications to accommodate the needs of users in the MENA region.

Bahrain

Among the Middle East and North Africa jurisdictions, Bahrain has long been the most welcoming to arbitration, having acceded to the New York Convention in 1988 and having adopted parts of the UNCITRAL Model Law in the original International Commercial Arbitration Act (ICAL) of 1994. The Bahrain Chamber for Dispute Resolution was set up in 2009 in partnership with the American Arbitration Association (BCDR-AAA). Bahrain designated a specialist tribunal comprising two judges from Bahrain's highest jurisdiction and a third member chosen from the BCDR-AAA's roster of neutrals, rather than trial by its local courts, as the primary dispute resolution mechanism in large cases involving licensed financial institutions or international commercial disputes involving either foreign parties or a significant foreign nexus.

The Bahrain Chamber for Dispute Resolution, a dispute-settlement institution based on a joint venture between the Bahrain Ministry of Justice and the American Arbitration Association, launched the new Arbitration Rules to bring the centre in line with the best practices of arbitration.

The new Bahrain Chamber for Dispute Resolution Arbitration Rules came into effect in October 2017, following substantial revisions to the previous law in Bahrain, the ICAL of 1994, including full incorporation of the UNCITRAL Model Law.

The centre's amended 2017 Rules reflect best practices and incorporate the latest developments in arbitration. The amendments provide the centre with a modern and advanced set of Arbitration Rules, which make it attractive to international parties and signals a commitment to establishing itself as a major arbitration centre in the region.

Bahrain, in fact, boasts one of the most innovative and arbitration-friendly legislative regimes in the Middle East, supported by a modern, well-run institution in the form of the BCDR-AAA.

Qatar

Qatar has become significantly receptive to international arbitration within the last 15 years. Qatar assented to the New York Convention in 2002 without declarations or notifications. The country then went onto establish the Qatar Financial Centre (QFC) in 2005. This was a separate jurisdiction along the lines of the DIFC in Dubai; and in 2006, it launched the International Centre for Conciliation and Arbitration (QICCA). Both the QFC and the QICCA have adopted rules based upon the UNCITRAL Model Law. Qatar adopted a new arbitration law (Law No. 2 of 2017) promulgating the Law of Arbitration in Civil and Commercial Matters (the Qatar Arbitration Law). This new law supersedes the arbitration chapter contained in Qatar's Code of Civil and Commercial Procedure and is largely based on the UNCITRAL Model Law, which is internationally recognised and widely used by many states as the basis of their own arbitration law.

Additionally, the ICC holds its regional office for the MENA region in Qatar.

Previously, both domestic and international arbitrations were subject to the Civil and Commercial Procedure Code, which provided for appellate review of arbitral awards on the merits and nullification on procedural grounds. This proved challenging for parties seeking enforcement of their awards in Qatar, whether domestic or foreign.

In the well-known decision in *International Trading and Industrial Investment v DynCorp Aerospace Technology*, the Qatari Court of Cassation set aside a Paris-seated ICC award on the merits, as if sitting in direct appeal from the arbitral tribunal rather than as an enforcement proceeding.

In 2012, the Qatari Court of Cassation held that arbitral awards are null unless issued in the name of His Highness the Emir of Qatar, thus treating arbitral awards as indistinguishable from, and so subject to the same procedural requirements as, national court judgments. However, in 2014, the Court of Cassation reversed several lower court decisions in which similar findings had been made, claiming they had improperly applied Qatari law. Of particular interest are Qatar Court of Cassation – Appeals Nos. 45 and 49/2014, which found that, while Qatari law would normally require a domestic arbitral award to be issued in the name of His Highness the Emir of Qatar, the Doha-seated award in that case should be treated as foreign and thus subject to the New York Convention, owing to the parties' choice of the ICC rules.

Saudi Arabia

Saudi Arabia has taken a serious interest in international arbitration, pursuing its political and strategic initiatives by encouraging investments and business from international companies within the Kingdom. In 1958, awards were issued by the tribunal in *Saudi Arabia v Arabian American Oil Co*, which refused to apply *Shariah* law to a dispute over Aramco's exclusive oil concession in Saudi Arabia and decided in Aramco's favour, causing the Saudi government to take the step to bar its ministers and agencies from agreeing to arbitration without the prior approval of the president of the Council of Ministers or permission from a legal enactment. An arbitration law was issued in 1983 and the Kingdom acceded to the New York Convention in 1994, but for many years its arbitration law gave Saudi courts wide discretion over merits, procedure and enforcement, including a requirement that arbitration agreements be judicially approved prior to the commencement of arbitral proceedings.

By 2012, the Saudi government appeared to shift its policy, enacting a new arbitration law based, in part, upon the UNCITRAL Model Law. This new law eradicated the requirement of judicial pre-approval, offers guidance for determining the validity of an arbitration agreement, loosens the arbitrator qualifications, and permits parties to choose procedures, substantive law and seat, provided they do not violate the public policy of Saudi Arabia or *Shariah* law. Perhaps most critically, the new law circumscribes the supervisory powers of the Saudi courts over enforcement of arbitral awards. Where previously a court could, and frequently did, reconsider the merits during enforcement proceedings, the new law prohibits the inspection of the facts and subject matter of the dispute.

The Saudi Centre for Commercial Arbitration has been formed by the Council of Saudi Chambers (CSC), in consultation with the Kingdom's justice, commerce and industry ministries, and in coordination with the governor of the Saudi Arabian General Investment Authority. The CSC, which is the official federation for the 28 Saudi chambers of commerce and industry, acts as an umbrella organisation for the centre. The centre has a board of nine directors who serve a three-year term and is empowered to exercise arbitration both inside and outside Saudi Arabia on commercial disputes.

Iraq

While Iraq has not yet acceded to the New York Convention, the Iraqi courts have taken the task of fitting international arbitration into Iraqi law upon themselves. In *Iraqi Ministry of Finance v FincantieriCantieriNavaliItalianiSpA*, the Baghdad Commercial Court openly declared that Iraqi law was outdated and vague, and referred to the UNCITRAL Model Law and the New York Convention (despite neither applying in Iraq) in deciding that the Iraqi Civil Procedure Code applied to international arbitrations. This permitted the court to stay its proceedings pending the decision of a French court on the validity of an arbitral award, signalling that the Iraqi courts possess a certain degree of discretion in this arena. The decision was upheld by the Iraqi Court of Cassation.

In March 2014, in keeping with the recent creation of specialised commercial courts, the Iraqi government reportedly began organising workshops for senior judges on arbitration and other private dispute resolution mechanisms.

However, the climate in Iraq remains uncertain as its government struggles to address other priorities.

Iran

Arbitration in Iran is governed by articles 454 to 501 of the Iranian Code of Civil Procedure, and international arbitration (defined as arbitration proceedings where at least one of the parties was not Iranian when the arbitration agreement was concluded) is governed

by the Law on International Commercial Arbitration of 1997 (LICA), which is based on the UNCITRAL Model Law.

Iran also boasts two arbitration centres, the Tehran Regional Arbitration Centre and the Arbitration Centre of Iran Chamber.

Article 139 of the Iranian Constitution continues to restrict referral to arbitration of disputes involving public and governmental property where one party is foreign, unless prior approval of the Council of Ministers and of Parliament is obtained.

Despite a little drop in the use of arbitration in Iran in recent years due to economic sanctions, following the Joint Comprehensive Plan of Action agreed on July 14th, 2015 between Iran and the P5+1 countries, the lifting of sanctions is expected to open Iran to much needed foreign investment in a variety of industry sectors, including the oil and gas and automotive sectors, as well as the civil aviation industry. This will undoubtedly renew interest in arbitration in Iran.

With a legislative framework already in place and with the hope of foreign investments, Iran will soon feature prominently in the region's arbitration landscape.

Egypt

Egypt was one of the very early signatories of the New York Convention. Egypt also signed the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention") on February 11th, 1972, which entered into force in Egypt on June 2nd, 1972. The different successive regimes in Egypt considered arbitration an effective means to attract foreign investment, which necessitated successive amendments to the Egyptian Investment Law No. 156 of 1953. As a result, the Egyptian Investment Law was amended three times during the 1970s to provide the necessary legal framework for investment under the then nationwide open-door policy.

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) was set up as an independent non-profit international organisation. Pursuant to the Headquarters Agreement, the Cairo Centre and its branches enjoy all the privileges and immunities of independent international organisations in Egypt.

The total number of arbitration cases filed before CRCICA until June 30th, 2016 reached 1,109 cases. In the second quarter of 2016, 23 new arbitration cases were filed compared to 12 cases filed in the same quarter in 2015.

Morocco

Both foreign and domestic arbitration proceedings and enforcement of awards are governed by the Moroccan Code of Civil Procedure, Law No. 1-74-447 of September 28th, 1947, as completed and modified by Law No. 08-05 of November 30th, 2007 (the Civil Procedure Code). The provisions of the Moroccan Code on Civil Procedure relating to arbitration are loosely based on, and are generally in conformity with, the UNCITRAL Model Law.

One of the key institutions is the Moroccan Court of Arbitration within the International Chamber of Commerce of Morocco. Other notable arbitration institutions in the country include the Euro-Mediterranean Centre for Mediation and Arbitration and the Moroccan Centre on Mediation and Arbitration in Rabat.

In accordance with Moroccan law, there are various instances in which the court may intervene in arbitration proceedings. Parties to an arbitration agreement may also have recourse to the courts in order to obtain interim or conservatory measures, before or during arbitration proceedings. Furthermore, court intervention is also required for enforcing arbitration awards.

Foreign arbitration awards are recognised in Morocco but only if they are properly established and if such recognition is not contrary to Moroccan or international public policy. An order that refuses to recognise or enforce a foreign award is subject to appeal, while an order that decides to recognise or enforce the foreign award may be appealed on a limited number of grounds (e.g., the arbitral tribunal was irregularly constituted or the recognition or enforcement is contrary to public policy). Morocco acceded to the New York Convention in 1959.

Lebanon

Arbitration is not a new concept in Lebanon, having been recognised by the legal system since the first Code of Civil Procedure of 1933. The Lebanese Code of Civil Procedure (CCP), which was enacted by Decree Law 90/83, with amendments resulting from Law No. 440 of July 29th, 2002, devotes an entire chapter to arbitration with a distinction being made between domestic arbitration (articles 762 to 808 of the CCP) and international arbitration (articles 809 to 821 of the CCP). However, the provisions of the Lebanese arbitration law are not based on the UNCITRAL Model Law.

Lebanon is also a signatory to the New York Convention and has been since 1998.

In principle, all disputes can be submitted to arbitration in Lebanon. Article 762 of the CCP provides that contracting parties may insert in their commercial and civil contracts a clause providing that all disputes which rise from the validity, performance or the interpretation of their contracts will be settled by way of arbitration. There is no specialist arbitration court in Lebanon. The Court of First Instance will hear requests for the appointment of arbitrators when the need arises.

There are several arbitration bodies relevant to international arbitration in this country:

- the Lebanese Arbitration Centre of the Chamber of Commerce and Industry and Agriculture of Beirut and Mount Lebanon, which was founded in 1995: the function of the Lebanese Arbitration Centre is to settle national and international disputes through arbitration or optional conciliation. The Centre has its own set of Rules of Conciliation and Arbitration;
- the Lebanese National Committee of the ICC of Paris to which the ICC Secretariat reverts in some cases to designate arbitrators;
- the Chartered Institute of Arbitrators, which operates in Lebanon through its local branch; and
- the Lebanese and International Arbitration Centre of the Beirut Bar Association (LIAC-BBA).

These bodies can act as appointing authorities if so designated by the parties or upon the request of a foreign arbitration.

Conclusion

North African and Middle Eastern countries, predominantly sought by investors in the resources and infrastructure sectors, have been involved, in recent years, in international disputes referred to international arbitration. Because of this increase in arbitrations, and as part of a wider vision for states in this region to bolster their standing as global financial and trading hubs, many have set up their own arbitral institutions and upgraded their arbitration laws

and regulations to the standards of international best practice. As more disputes from the Middle East and North Africa are referred to arbitration, having a preferred seat for arbitration in the region is becoming ever more relevant. High-profile cases are also calling for participants in the arbitration process, be they institutions, arbitrators or counsel, to understand the laws and their implications on arbitration proceedings, and to be ready to address them.

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Sub-Saharan Africa Overview

John Bell

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1. Introduction

As ongoing international investment interest and economic growth across Africa continues apace, arbitration is increasingly becoming the preferred mode of commercial dispute resolution and the chosen path of recourse for the protection of investor rights across the continent, both domestically and internationally.

Throughout the continent there is a growing appreciation and acceptance at government level, as well as through the courts, that arbitration is a useful and necessary means of commercial dispute resolution. This is coupled with an increasing awareness of the need for greater certainty, on the part of international investors, as to the willingness of the courts and state authorities to recognise submission to arbitral proceedings and their outcome, along with the enforcement of arbitral awards within their particular jurisdictions.

Importantly, it should be noted that the degree to which arbitration is accepted as a means of dispute resolution, coupled with the willingness of the local courts to recognise and enforce arbitration awards, differs from country to country across the continent.

2. Trends on Submission to Arbitration

There is no uniformly adopted, centralised law relating to arbitration across Africa. Most typically, though, the practice on international commercial transactions involving African parties, ranging from project finance, mining and construction to logistics and commodity related transactions, is for submission of disputes to one of the leading international arbitration bodies for administered arbitration. Most favoured in this regard are the International Chamber of Commerce (ICC) Court of Arbitration and the London Court of International Arbitration (LCIA). In regard to choice of law as well as the seat of the arbitration, where the parties move away from domestic law and jurisdictional application, the most commonly followed jurisdictions are the United Kingdom and France, with London and Paris most commonly chosen as the seat.

While the preference for neutrality, along with the expertise in UK and French law, often lead to the nomination of eminent UK and European jurists as arbitrators, parties from African countries are increasingly nominating domestic jurists with expertise in arbitration to serve on these tribunals. Engaging an arbitrator with a sense of domestic perspective and appreciation of local laws and their enforcement often has the advantage of countering concerns by local courts at the enforcement stage that an enquiry into the merits and conduct of the arbitral process should not be undertaken when challenged. Notably, international arbitration bodies, such as the Chartered Institute of Arbitrators, are active across the continent with branches in Kenya, Mauritius, Nigeria, South Africa and Zambia (Egypt forms part of the Middle East and Indian Subcontinent region).

Highlighting this trend, in May 2016, the International Council for Commercial Arbitration (ICCA) held its Congress in Mauritius. Mauritius is increasingly becoming a 'port' of choice for investors seeking to enter African markets. Mauritius has since strengthened its position as a business and arbitration hub for the African continent with the conclusion of a partnership between the London Court of International Arbitration and the Mauritius International Arbitration Centre – creating the LCIA-MIAC centre. It also has the distinction of hosting the first office of the Permanent Court of Arbitration outside of the Hague.

Mauritius is not alone in seeking to position itself as a hub for African arbitrations. The Casablanca International Mediation and Arbitration Centre organised an arbitration conference, Casablanca Arbitration Days, in partnership with the ICC International Court of Arbitration (ICC), the International Centre for Dispute Resolution (ICDR) and the London Court of International Arbitration (LCIA). Not to be outdone, Kenya has taken strong steps toward modernising its alternative dispute resolution (ADR) regime in amending its existing legislative scheme to emphasise ADR and arbitration mechanisms. The Nairobi Centre for International Arbitration (NCIA) was established in 2013 and in 2015 it published its own arbitration and mediation rules.

Currently, there are many African states which have wholly or partially adopted arbitration legislation in line with the United Nations Commission on International Trade Law (UNCITRAL) Model Law, being suited for uniform recognition and enforcement of both domestic and international arbitration proceedings. Nigeria, for example, has based its Arbitration and Conciliation Act on the UNCITRAL Model Law and boasts an arbitration-friendly judiciary. In addition, there are currently 33 African states that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, obliging them to recognise and give effect to arbitral processes undertaken through other signatory states, the most recent of these being the Democratic Republic of the Congo.

South Africa, in particular, has been slow in following the latest best practice in international arbitration and is not considered user-friendly. However, as African economies grow and more infrastructure development and economic activity occurs, South Africa is being seen as an emerging arbitration jurisdiction. To its credit, it has well-developed arbitral institutions and many experienced arbitrators in various industries, coupled with a judiciary inherently supportive of arbitration as an autonomous form of dispute resolution. In July 1998, the South African Law Reform Commission (SALRC) considered international

commercial arbitration and recommended the application of the UNCITRAL Model Law to international commercial arbitration and the promulgation of a new international arbitration act in South Africa. Following on from this development the International Arbitration Act, 15 of 2017 ("**International Arbitration Act**") was finally promulgated into law in December 2017.

The International Arbitration Act now governs the recognition and enforcement of international arbitration awards. To this end, the International Arbitration Act has repealed the Recognition and Enforcement of Foreign Arbitral Awards, 40 of 1977. In addition, the International Arbitration Act has included in its terms the UNCITRAL Model Law and legislated foreign arbitration procedures and the ability of arbitrators to rule on the extent of their own competence on an issue before them (the *kompetenz-kompetenz* principle).

3. Regional Initiatives

The establishment of the Organisation for the Harmonization of Business Law in Africa (OHADA) in 1993 by 13 Central and West African states, now grown to 17, has been a strong driver for the adoption of international arbitration, as well as key elements of the UNCITRAL Model Law by member states. OHADA has developed the Uniform Arbitration Act. Its purpose is to, amongst other things, regulate the recognition and enforcement of arbitration agreements and awards, its provisions superseding national law on arbitration (to the extent that any conflict arises). This is particularly useful in respect of enforcement, as not all OHADA members have assented to the New York Convention. OHADA was established expressly to facilitate and encourage both domestic and foreign investment in the member states, and is principally based on a modernised French legal model in regard to process and effect, along with the establishment of a supra-national court seated in Abijan, Ivory Coast, to ensure uniformity in judgments and recognition of process.

Pursuant to a legislative initiative in 2009, the Lagos Court of Arbitration (LCA) was launched in 2012 and has since become a Nigerian and West African regional hub for both arbitration and mediation proceedings. Although it recognises UNCITRAL and OHADA, Ghana is a good example of a country that is following its own arbitration path through the adoption of the Alternative Dispute Resolution Act, 2010. This Act has comprehensively revised Ghana's existing laws on arbitration and enforcement of both domestic and international arbitral awards.

Following the establishment of a permanent Court of Arbitration, the Mauritius International Arbitration Centre Limited (MIAC) was established in 2011 pursuant to an agreement between the LCIA and the Government of Mauritius. Following its establishment, MIAC is actively promoting itself across Africa as a preferred alternative to the traditional international arbitration bodies for African international arbitrations.

The Association of Arbitrators (ASA) and the Arbitration Foundation of Southern Africa (AFSA) are the two pre-eminent South African arbitration bodies, administering both domestic and international arbitrations in the SADEC region, albeit largely from a domestic support base. Africa ADR is an initiative driven by the AFSA, as well as a number of other regional arbitration bodies including MIAC, the Centre du Arbitrage, based in the Democratic Republic of the Congo (CDA), and the Centro de Arbitragem Conciliação e Mediação, based in Mozambique.

Arguably the most important development in recent years is the creation of the China Africa Joint Arbitration Centre Johannesburg (CAJAC) in co-operation with AFSA, Africa ADR (AFSA's external arm), the ASA and the Shanghai International Trade Arbitration Centre in late 2015. It will serve as an international arbitration venue for disputes involving parties from China and Africa. It is envisaged that CAJAC will operate from both South Africa and China and will hear disputes relating to business in Africa in Johannesburg and disputes relating to business in China in Shanghai, respectively.

4. Investment Treaty Arbitration

Bilateral investment treaties (BITs) have, since the 1990s, been a core element of African foreign policy to encourage investor confidence and certainty as to the business environment, typically including submission by the affected state to international arbitration tribunals. In addition, 43 African states (South Africa being a notable exception) are party to the 1965 Washington Convention on the Settlement of Investment Disputes (ICSID) as administered by the World Bank. African states have historically featured prominently and regularly as respondents in ICSID proceedings. Within a more favourable international investment climate, many African states are questioning their participation in ICSID and ongoing willingness to conclude BITs including the South African Government, which recently recorded its intent to reverse its historic willingness to conclude such agreements with more than 30 investor states. Coupled with this policy change is a renewed resolve by the South African Government to revisit its domestic legislation on international arbitration and bring it in line with international best practice, with the intention to allow foreign investors suitable recourse through localised arbitration.

To this end, the Protection of Investment Act 22 of 2015 (the "**Protection of Investment Act**") was passed in late 2015 with the principle aim of strengthening South Africa's ability to attract foreign investment, increase exports and maintain a balance between the rights and obligations of all investors in South Africa. Though it has yet to come into force (at the time of writing), the Protection of Investment Act will, by and large, replace the BITs between South Africa and other countries, which typically provide for arbitration as the preferred method of dispute resolution. When it is in operation, the Protection of Investment Act will prescribe domestic mediation as a first step to the resolution of a foreign investment law dispute, provided the foreign investor and the South African Government can agree on the appointment of a mediator. An alternative is for foreign investors to approach the domestic courts to resolve their dispute under domestic administrative law remedies and the Protection of Investment Act. This will certainly impact on the resolution of disputes.

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Chapter 49

Botswana

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Arbitration agreements (or submission, as referred to by the Arbitration Act) are provided for by s2 of the Arbitration Act of Botswana, Cap 06:01, which states: (1) that they must be written; (2) that they can be made wherever; (3) that they must be to submit present or future differences to arbitration; and (4) whether an arbitrator is named or not.

1.2 What other elements ought to be incorporated in an arbitration agreement?

An arbitration clause is included in a contract between parties specifying that in the event of a dispute, it will be resolved by arbitration and not by the courts of Botswana. Some clauses may specify that the arbitration agreement or contract can be governed by any law other than domestic law.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Where parties fail to reach an agreement, the courts will intervene. Parties in a pending action in court may apply to court to refer their matter to arbitration. Authority to this effect is found in the case of *Bm Packaging (Pty) Ltd v PPC Botswana (Pty) Ltd* 1998 BLR 309 (HC), where it was held that where either party requires for a dispute to be referred to arbitration, the other party must accede to it, in that the parties should have agreed to this in advance in terms of the contract. The High Court has discretion to stay proceedings until finalisation of alternative dispute resolution process agreed to by parties. Authority to this effect is found in the case of *MAQBOOL AND ANOTHER v MPHOYAKGOSI AND ANOTHER* 2012 2 BLR 369 HC, where it was held that the court had a discretion to stay proceedings until finalisation of the alternative dispute resolution process and generally required a strong case to be made out before it absolved the parties of compliance with their agreement. Discretion to stay proceedings is held by the court, on the condition that it is satisfied that the dispute in question falls within the scope of arbitration.

S6 (1) of the Arbitration Act provides *that any party to a submission ... may apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings subject to terms and conditions as may be just.*

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act of Botswana Cap 06:01.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The Arbitration Act governs domestic arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

No. The Alternative Dispute Resolution Bill, which contains sections that are based on the UNCITRAL Model Law, has currently been placed before parliament, but has not yet been passed.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

There are none.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

This is provided for by s7 of the Botswana Arbitration Act which provides that:

Criminal cases, so far as the prosecution or punishment thereof is concerned, shall not be submitted to arbitration, nor, without special leave of the Court, shall any of the following matters be submitted to arbitration:

a) matters relating to status;

b) matrimonial causes; or

c) matters in which minors or other persons under legal disability may be involved.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, an arbitrator is allowed to rule on the question of its own jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Where an agreement to submit future disputes to arbitration has been made, parties to a contract must cooperate when this situation arises. A party to such an agreement may not unilaterally elect to proceed to court in order to resolve any dispute as this will deprive the other party of his/her contractual obligation to arbitration. This is provided for by s6 (1) of the Arbitration Act, which states that:

If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter B agreed to be referred to arbitration, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings subject to such terms and conditions as may be just.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

S13 (1) and (2) of the Arbitration Act provides that:

(1) The Court may at any time, upon motion, remove any arbitrator or umpire against whom a just ground of récusation is found to exist, or who has misconducted the proceedings in connection with the arbitration.

(2) Where an arbitrator or umpire has misconducted the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside, and may award costs against any such arbitrator or umpire personally.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There are no circumstances under which Botswana law allows an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an arbitration agreement; the individuals should either be:

(a) party to a submission; or

(b) any person claiming through or under him.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

S17 of the Arbitration Act provides that:

Subject to the provisions of section 19(2), and anything to the contrary in the submission, an arbitrator or umpire shall have the power to make an award at any time.

The time limit, if any, for making an award, whether under this Act or otherwise, may from time-to-time be extended by order of the Court or a judge thereof, whether that time has expired or not.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

S6 of the Arbitration Act provides that:

(1) If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect to any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings subject to such terms and conditions as may be just.

(2) The provisions of subsection (1) shall, in the case of the death or insolvency of any party to which it might apply, apply mutatis mutandis to the executor or trustee in the insolvency of such party.

(3) The death or insolvency of a party to a submission shall not be deemed to revoke such submission.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The law applicable to the substance of a dispute is agreed upon by the parties to the arbitration. Where an agreement is not reached, the applicable law becomes that of the place where the arbitration is to be carried out, or that of the place where the contract is to be performed.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There are none.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The rules that govern the formation, validity and legality of

arbitration agreements will generally be determined by the law of the place where the arbitration is conducted.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Yes. This is provided for by the following provisions from the Arbitration Act:

S10(1) – *Where a submission provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the submission shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.*

S11 – Provides the court with the power to appoint an arbitrator or umpire in any of the following cases: *Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.*

S12 – *Provides that arbitrators should be disinterested parties.*

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The court can appoint an arbitrator for them.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. This is provided for by s11 of the Arbitration Act which provides the court with the power to appoint an arbitrator or umpire in any of the following cases:

a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;

c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;

d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have similar powers to act in the case and make an award as if he had been appointed by consent of all parties.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

S12 of the Arbitration Act provides that:

An arbitrator must be and continue throughout the proceedings to be disinterested with reference to the matters referred and the parties to the case. He should have no interest (direct or indirect) in the matter referred or the parties to the reference, and he should know of nothing disqualifying him from being impartial and disinterested in the discharge of such duties.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Yes. The Arbitration Act of Botswana Cap 06:01 provides for the arbitrational procedures. The parties are, however, primarily guided by the arbitration agreement (submissions) they have entered into.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Yes. This is provided for by s10 (1) of the Arbitration Act which states that:

(1) Where a submission provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the parties, the submission shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Yes. This is not expressly stated in the Arbitration Act; however, it implies that arbitrators should:

(1) be able to perform their duties;
(2) be disinterested parties;
(3) not misconduct themselves and the proceedings in any way;
(4) be fair; and
(5) be fit and proper persons.

The Act is silent on whether these rules apply to the conduct of counsel within Botswana and from other countries.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The following powers and duties are imposed on arbitrators:

1. The authority of an arbitrator or umpire appointed by, or by virtue of, a submission shall, unless a contrary intention is expressed in the submission, be irrevocable except by leave of the court or a judge thereof.
2. Unless a contrary intention is expressed therein, every submission shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Part of this Act to an award includes a reference to an interim award.
3. The report or award of any arbitrator on any such reference shall, unless set aside by the court, be equivalent to a finding of fact by the court.
4. The power to administer oaths or to take the affirmations of the parties and witnesses appearing.
5. The power to correct in any award any clerical mistake or error arising from an accidental slip or omission;
6. The duty, on the application of either party, to appoint a commissioner to take the evidence of a person residing outside of Botswana and forward the same to arbitrators in the same way as if he were a commissioner appointed by the court.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Yes. In relation to arbitration, the Arbitration Act does not provide for any such restrictions, thus there are no restrictions to this effect.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The Arbitration Act is silent on this.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes. The Arbitration Act provides for this;

1. Appointment or removal of an arbitrator

The court or a judge may, on application by the party to the arbitration, appoint an arbitrator, umpire or third arbitrator who shall have similar powers to act in the proceedings and make an award as if he had been appointed with consent of all parties.

2. Enforcement of award

An award on a submission may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given, judgment may be entered in terms of the award.

3. Interlocutory powers

Any party to a submission may apply for process of the court in order to compel a witness to attend.

Any party to a submission is entitled, subject to the law relating to procedure of the court, to obtain from the court an order:

- for the examination of a witness or witnesses before a special examiner either in Botswana or elsewhere;
- for the discovery of documents and interrogatories;
- for evidence to be given by affidavit in the same circumstances as in litigation;
- for another party to give security for costs in the same way as a litigant;
- for the inspection, or the interim preservation, or the sale of goods or property;
- for an interim injunction or similar relief;
- for directing an issue by way of interpleader between two parties to a submission for the relief of a third party desiring so to interplead; and
- for substituted service of notices required by this Act, including service upon an agent in Botswana of a party resident elsewhere.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes. S18 of the Arbitration Act provides for this where it states that:

Unless a contrary intention is expressed therein, every submission shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Part of this Act to an award includes a reference to an interim award.

It is not required that an arbitrator seek assistance from the court to do so.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes, a court is entitled to grant preliminary or interim relief in proceedings subject to arbitration. S6 of the Arbitration Act provides that any party to a submission, or any person claiming through or under such party, should apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings subject to such terms and conditions as may be just.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

It depends on the circumstances of each case. In providing for this, s20 of the Arbitration Act states that

An award on a submission may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The Arbitration Act is silent on this.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Yes. S31 of the Arbitration Act provides for this, it states:

Any order made under this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The arbitrator has no statutory powers to grant interim measures and preliminary relief. The Botswana courts will set aside preliminary relief and interim measures ordered by tribunals.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The rules of evidence as observed in a court of law are followed as far as possible. The Arbitration Act provides for the following:

S32 – *False Evidence*

Any person who wilfully or corruptly gives false evidence before any such officer, referee, arbitrator or umpire shall be guilty of perjury in the same way as if the evidence had been given in open Court, and may be dealt with, prosecuted and punished accordingly.

S16 – Interlocutory Powers of the Court

Any party to a submission may take out process of the Court for the attendance of witnesses, but no person shall be compelled under any such process to produce any document which he could not be compelled to produce during the trial of any action.

S28 – *Subpoena or Summons*

The issue of a subpoena or summons on a witness to compel his attendance and the production of evidence or documents before an arbitrator, umpire, officer of the Court or official referee, as the case may be, may be procured in the same way and subject to the same conditions as if the matter were an action pending in Court:

(a) by any party to a submission, or any arbitrator, or umpire thereunder;

(b) by the parties to the proceedings under any order of the Court; or

(c) by any officer of the Court, official or special referee hearing any reference under order of Court, provided that:

I. no person shall be compelled on such subpoena to produce any document or thing the production of which would not be compellable on trial of an action; and

II. the clerk of the court of any magistrate may issue such subpoena in the name and on behalf of the Registrar of the Court upon payment of the same fees as are chargeable for the issue of a subpoena in the magistrates' court.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Yes. This is found in s16 of the Arbitration Act where it states:

Any party to a submission may take out process of the Court for the attendance of witnesses, but no person shall be compelled under any such process to produce any document which he could not be compelled to produce on the trial of any action.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

A court may intervene in matters of disclosure where a party is compelled to present a document which they ordinarily would not be compelled to present during trial of an action in court.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The Arbitration Act provides the following:

- *The arbitrator or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power:*
  - *a) to administer oaths or to take the affirmations of the parties and witnesses appearing;*
  - *b) on the application of either party to appoint a commissioner, to take the evidence of a person residing outside Botswana and forward the same to arbitrators in the same way as if he were a commissioner appointed by the court.*
- *Any person who wilfully or corruptly gives false evidence before any such officer, referee, arbitrator or umpire shall be guilty of perjury in the same way as if the evidence had been given in open Court, and may be dealt with, prosecuted and punished accordingly.*

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The issues of privilege that arise in arbitration proceedings are similar to those that arise in litigation.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The Arbitration Act provides for this in various provisions outlined below:

a) An arbitrator or umpire shall have power to make an award at any time.

b) The time limit, if any, for making an award, whether under this Act or otherwise, may from time-to-time be extended by order of the Court or a judge thereof, whether that time has expired or not (s17).

c) An award on a submission may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award (s20).

d) The award to be made by the arbitrator, arbitrators or umpire shall be in writing, and shall, if made in terms of the submission, be final and binding on the parties and the persons claiming under them respectively (regulation 13).

There is no requirement, under the Act, that the award contain reasons or that the arbitrators sign every page.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The Act is silent on this.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Parties are entitled to challenge an arbitral award given by an arbitrator who has misconducted the proceedings in connection with the arbitration. Authority to this effect is found in the case of *Champion Construction (Pty) Ltd v Allen and Another* (2006) 2 BLR 56, where an application was brought to review and set aside an arbitrator's final award on the basis that in making his decision he had committed errors of law.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Yes, it is possible to do so, as long as this was included in the arbitration agreement (submission).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Arbitration agreements that provide for an appeal generally do not expand the scope of appeal beyond the grounds applicable in appeals from the High Court to the Supreme Court of Appeal. If the arbitration agreement provides for an appeal, however, the parties could, by agreement, expand the scope of the appeal.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Parties are only entitled to appeal if the arbitration agreement provides for an appeal. Where the arbitration agreement provides for an appeal, the procedure will be determined by the agreement or by the rules of the arbitration organisation administering the arbitration.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Botswana entered a reservation that the convention would apply only to the recognition of awards made in the territory of another contracting state on 20 December 1971.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Yes. The SADC Protocol, which was signed by the heads of state or government on 18 August 2006.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

For a foreign arbitration award to be enforced, a party to the arbitration would have to bring an action on the award as one would do with a foreign judgment. In addition, statutes allow a person, in whose favour an award has been made, to enforce an award on an arbitration agreement in the same manner as a judgment with leave of the court. Even though (under the Convention) an arbitration award issued in any other state can generally be freely enforced in any other contracting state, it is only subject to certain, limited defences. These defences are:

1. a party to the arbitration agreement was, according to the law applicable to him, under some incapacity;
2. the arbitration agreement was not valid under its governing law;
3. a 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;
4. the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (subject to the proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those matters not so submitted);
5. the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the "*lex loci arbitri*");
6. the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement;
7. the subject matter of the award was not capable of resolution by arbitration; or
8. enforcement would be contrary to "public policy".

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Matters that have been finally determined by an arbitral tribunal are precluded from being reheard, between the same parties, in a national court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The Arbitration Act is silent on this.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Act does not necessarily provide for the confidentiality of arbitration proceedings. However, if the arbitration agreement does not expressly state that the arbitration proceedings are confidential, such a term will be implied.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

A party may not disclose information about the arbitration to an outsider without the consent of the other party to the arbitration.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Arbitration Act is silent on this.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The Arbitration Act is silent on this; however, interest for a judgment is provided for by the Prescribed Rate of Interest Act.

S3 of the Prescribed Rate of Interest Act reads as follows:

1. *If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other written law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court, on the ground of special circumstances relating to that debt, orders otherwise.*
2. *The Minister may, by order published in the Gazette, prescribe a rate of interest for the purposes of subsection (1).*

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The Act is silent on this though the common procedure is that costs follow the event and the winner will be entitled to its costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Yes. S14 of the Arbitration Act provides the following:

The fees made payable to any arbitrator or umpire by an award, notwithstanding that such fees may have already been paid by the parties, shall be subject to taxation at the expense of the parties desiring taxation by the taxing officer of the Court, with the right of appeal to the Court, provided that:

(i) no taxation or reduction of such fees shall be allowed if they are in accordance with any agreement between the arbitrator or umpire concerned and the party applying for taxation; and

(ii) the party applying for taxation and the arbitrator or umpire, taxation of whose fees is thus applied for, shall be entitled to appear before and be heard by the Court in the matter of such taxation.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The Act is silent on this but, at present, contingency fees are not permissible.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, it has.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Botswana has signed eight bilateral treaties, the first on 31 July 1997 and the last on 21 March 2011.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The Arbitration Act is silent on this matter.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The distinction between *jus imperii* and *jure gestiones* is important because it determines the nature of conduct, acts or transactions for which a state is entitled to claim jurisdictional immunity. A foreign state enjoys immunity from jurisdiction whenever a dispute relates to its sovereign activities (*jus imperii*), whilst it cannot claim such immunity from private acts (*jure gestiones*).

It is an established principle of the Roman Dutch common law that principles of public international law which are not inconsistent with legislation or common law form part of the law of Botswana and the courts are bound to give effect to them. In Botswana, this preposition was recently accepted by Kirby J (as he then was) in the case of the *Republic of Angola v Springbok Investments (Pty) Ltd* [2005] 2 B.L.R. 159 at p 163E, where he said:

Similarly, I have no doubt that the rules of international law form part of the law of Botswana, as a member of the wider family of nations, save in so far as they conflict with Botswana legislation or common law, and it is the duty of the court to apply them.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The most common disputes referred to arbitration are labour disputes. Part II of the Trade Dispute Act deals specifically with the establishment of procedure for the settlement of trade disputes generally (s314).

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

For industrial court matters:

1. The arbitrator shall attempt to resolve the matter referred to him/her within 30 days.
2. A party aggrieved by the decision of the arbitrator may appeal against such decision to the Industrial Court within 14 days of the arbitrators' decision and such appeal shall lie only in respect of a decision:
   (a) to join a party to the arbitration proceedings; or
   (b) concerning the jurisdiction of the arbitrator to make an award.

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Luke and Associates is one of the leading firms in Botswana with wide-ranging expertise covering International Arbitration. The law firm was established in 1996, and has a broad-based general practice with a reputation for offering a full range of quality legal services, frequently working with numerous firms of international repute in several jurisdictions around the world. It provides a diverse range of corporate and commercial legal services required by companies, financial institutions and government bodies. It was recently voted the third-best law firm in Botswana.

Kenya

Njeri Kariuki Advocate

Njeri Kariuki

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

An arbitration agreement MUST be in writing and may form a separate agreement or be included as a clause within a contract. Such agreement may be incorporated by reference to another document, may be contained in an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement, or may be an exchange of pleadings where there is no contravention of the existence of an arbitration agreement.

1.2 What other elements ought to be incorporated in an arbitration agreement?

As with arbitration clauses drafted in any other jurisdiction, reference must be made to, among other things:

- the types of dispute to be adjudicated upon, i.e. *all or any*;
- the number of arbitrators; and
- the default appointing party in the event of disagreement.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The judiciary's attitude towards arbitration, the respect for the sanctity of the process and the contractual terms in addressing parties' selection of the forum and the governing law has markedly improved in the last several years. The Commercial Division of the High Court has adopted the view that parties will be referred to arbitration even where parties do not call its attention to the existence of arbitration clauses and these are noted by the Court. Coupled with this, the Courts often make referrals to arbitration and may play a monitoring role.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Arbitral proceedings in Kenya operate under the Arbitration Act 1995 as amended in 2010. Where enforcement of domestic awards is concerned, the provisions of the Civil Procedure Act come into play.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes; in Kenya, only the Arbitration Act 1995 as amended in 2010 exists to govern both domestic and international arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Arbitration Act 1995, as originally promulgated, was a mirror image of the UNCITRAL Model Law, including concepts such as *kompetenz kompetenz*, which do not have counterparts in the Common Law. However, through the 2010 amendments, arbitrator immunity and the general duty of parties were introduced alongside provisions on the effect of the award and costs and expenses.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

No mandatory rules exist in Kenya to govern international arbitration proceedings. Parties are free to choose any rules as they see fit.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

In the Kenyan context, most subjects are regarded as arbitrable save for criminal matters.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Section 17 of the Kenya Arbitration Act permits a Tribunal to rule on the question of jurisdiction by importing the concept of *kompetenz kompetenz*.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

With the increasingly positive attitude of the Courts towards arbitration in the last several years, parties who file proceedings in breach of an arbitration agreement are sent back to arbitration, even where the parties are unaware of the existence of such a clause within their contract. A quirk in our law requires the party in the know, for the most part, the respondent, to file stay proceedings after entering an appearance and the filing of a defence would ordinarily hand jurisdiction over to the Courts. However, the Courts today are adopting ways to pass jurisdiction back to arbitration.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Section 14 of the Arbitration Act allows for parties to challenge the jurisdiction of an arbitrator and agree on the procedure to do so. If the challenge proves unsuccessful, it is open to the party that initiated the challenge to apply to the High Court which will, after hearing the parties, including the arbitrator who is entitled to appear and be heard, either uphold the arbitrator's decision by rejecting the challenge or acknowledge the challenge as valid and remove the arbitrator. As can be seen, the remit of the High Court is quite limited. Section 10 of the Arbitration Act is very clear in that the Courts may only intervene in arbitration matters where permitted by the Arbitration Act.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The Arbitration Act 1995 as amended in 2010 does not speak to this issue at all. Therefore, the general law as it relates to arbitration applies and as is the case in other jurisdictions, consolidation of arbitral proceedings and/or joinder may only come to pass with the consent of the parties.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Kenyan Statute of Limitations does not contain a provision limiting the bringing of arbitration claims within a specified period. However, it is arguable that as a commercial contract, an arbitration clause will fall into the ambit of general civil matters and therefore be limited to a period of six years. The specific arbitration agreement may also contain a limitation period within which the arbitration must be commenced which is typically 30 days; on the other hand, the right to arbitrate may be forfeited by virtue of the fact that no party has taken any step within a given period, usually to be found within the arbitration agreement.

The National Courts will not interfere with the agreement of the parties, unless, of course, as with everything, there are compelling reasons to do so. The Arbitration Act 1995 does not address this issue and the Courts therefore have a free hand to deal as they deem it fit.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

By virtue of Section 38 of the Arbitration Act, if the trustee in bankruptcy adopts the contract containing an arbitration agreement to which a bankrupt is a party, that agreement is enforceable against the trustee in bankruptcy.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The substantive law to be applied is that to which reference is made within the body of a contract. Where reference to the substantive law has not been made, the arbitrator is free to make a ruling on the same upon application of the parties and should a party be unsatisfied with the outcome, an application on a point of law may be made to the High Court under Section 39 of the Arbitration Act.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The circumstances would have to be quite exceptional for that to occur, if at all.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The Arbitration Act does not provide for any specific choice of law rules in this regard. Courts and Tribunals, however, normally give priority to choice of law by parties and uphold the English Common Law Rules on the governing law of an arbitration agreement which is to be determined by undertaking a three-stage enquiry into express choice, implied choice, and the closest and most real connection.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Save for any limits put in place by the parties themselves in their Arbitration Agreement, the Kenyan Act does not place any limits on party autonomy in the selection of an arbitrator. Having said that, considering that some limits must be placed on party autonomy which could otherwise go to extremes if allowed free rein, particularly as those involved are, for the most part, parties to a private contract, issues of public policy will at all times take precedence.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In that event, the parties may fall back on Section 12 of the Arbitration Act.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The Courts may only intervene upon application of a party who is dissatisfied with the choice of arbitrator made by the other party. Section 12(5) of the Arbitration Act governs this intervention.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Rule 5 of the Chartered Institute of Arbitrators (Kenya Branch) Rules (2012) demands independence and impartiality of an Arbitral Tribunal and, as a result, arbitrators are required to make full disclosure of potential conflicts of interest and MUST remain independent, neutral and impartial at all times. The IBA Rules on Conflict of Interest are another authoritative source in this regard.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Section 20 of the Arbitration Act is clear that parties are free to choose the procedure of the reference by consent on the failure of which, the arbitrator becomes the Master of Procedure. In addition, since 24th December 2015, the Arbitration Rules of the Nairobi Centre for International Arbitration apply where any agreement, submission or reference provides for arbitration under the said Rules.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

No; the law does not prescribe any procedural steps in respect of arbitral proceedings in Kenya.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no homegrown rules to speak of. The IBA Rules on Party Representation in International Arbitrations largely hold sway in this regard.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Section 19 of the Arbitration Act embodies one of the Rules of Natural Justice that requires equal treatment of the parties. In addition, Sections 18, 20, 26, 27 and 28 of the Arbitration Act grant an arbitrator a good variety of powers. Parties are also free to grant the Tribunal any additional powers and any rules chosen by the parties as being applicable to the reference will grant an arbitrator further powers, provided these do not conflict with the statute or public policy.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Lawyers from other jurisdictions are termed as "*unqualified persons*" under the Advocates' Act and may not practise in Kenya. However, the Attorney-General of the Republic has discretion in this regard, but only as to suits or matters to be specified; the definition of the latter may include arbitration.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Section 16B of the Arbitration Act provides for immunity of an arbitrator for all acts done in good faith during the course of arbitral proceedings.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes; but only upon application of a party and with the leave of the arbitrator, and as is specifically provided for under the Arbitration Act 1995.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

By virtue of Section 18 of the Arbitration Act, an arbitrator has the power to grant interim measures of protection. There are no limits placed on the types of relief available, but should not, in any event, offend public policy, although, in terms of enforcement, the Court's assistance under Section 7 of the Arbitration Act will be necessary.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The Courts may only intervene in arbitration matters where permitted by the Arbitration Act. Accordingly, under Section 7, a party may seek the Court's assistance by way of application. This applies to both interim and preliminary relief but in respect of the former, leave of the arbitrator must be obtained under Section 18. There is no effect on the jurisdiction of the Tribunal which continues unabated.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

National Courts are very positive in this regard. Such requests

are dealt with by the Commercial Division of the High Court on a priority basis.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Section 6 of the Arbitration Act is clear that, provided a stay of proceedings is sought by a party seeking to enforce an arbitration clause prior to the filing of a defence, a stay will, by the force of law, be granted.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Section 18(1)(c) of the Arbitration Act gives a Tribunal the power to order a claimant to pay security for costs. The National Courts have jurisdiction to grant similar applications.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Again, the National Courts are very positive and pro-arbitration in the Kenyan jurisdiction.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The Evidence Act does not apply in arbitration proceedings in Kenya. The parties are, however, free to consent to the application of the strict rules of evidence. Section 20(3) is clear that the Tribunal's powers include the determination of the admissibility, relevance, materiality and weight of any evidence.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The Arbitration Act does not address the disclosure of documents. An arbitrator has no power to order disclosure unless agreed by the parties or under the agreed rules if the parties cannot agree. Parties can agree on disclosure rules but public policy must always be a consideration when making an agreement.

A Tribunal (or a party with the Tribunal's leave) can seek the High Court's assistance in taking evidence (which includes witness attendance) (Section 28 of the Arbitration Act).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

The National Courts have no such jurisdiction, considering that the Arbitration Act does not address this point and neither does the Arbitral Tribunal have such power unless granted by the parties or the rules to which the reference is subject to.

As noted under question 8.2, a National Court may only assist in requiring the attendance of witnesses upon application of an Arbitral Tribunal or a party with the Tribunal's leave.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Section 20 of the Arbitration Act gives a Tribunal the power to determine the procedure relating to the taking of evidence where parties are not in agreement. Section 20(5) specifically deals with administering oaths and affirmations, leaving it to the Tribunal to decide how best to handle these.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The Evidence Act and the Common Law Rules regarding privilege apply in Kenya; accordingly, the communications cited attract privilege. Privilege can only be waived by the consent of the party concerned.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Section 32 of the Arbitration Act requires that an award be in writing and that it contain reasons, unless the parties have agreed otherwise or where the award is made by consent. An award must be signed by the Tribunal (a majority) but it is not necessary for every page to be signed. In addition, an award must be dated and make reference to the place of arbitration.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Section 34 of the Arbitration Act gives Arbitral Tribunals the power to correct or clarify an arbitral award within an agreed period or the stipulated 30 days, either on their own initiative or upon the application of a party. However, there is no power to amend an award. An additional award may be delivered within a period of 60 days upon the application of a party in respect of any claims that may not have been canvassed.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

An award may only be challenged in accordance with Section 35 of the Arbitration Act.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Yes; parties may agree that there will be no recourse to the High Court upon publication of an award.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties have no power to expand the scope of appeal beyond the grounds set out in Section 35 of the Arbitration Act.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Under Section 35(3) of the Arbitration Act, an appeal must be filed within three months of the date of receipt of the arbitral award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The Republic of Kenya acceded to the New York Convention on 10th February 1989, with a reciprocity reservation. The New York Convention was incorporated into Kenyan Law through Section 36(2) of the Arbitration Act 1995 as amended in 2010.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Within the East African Region, Kenya has signed the East African Community Treaty which provides for arbitration as one of the available means of settling disputes (Article 32).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The approach remains positive. Section 36 and Section 37 of the Arbitration Act are very clear on the standards and procedure to be followed in enforcing an award in Kenya, as assisted by the Arbitration Rules 1997 annexed to the Arbitration Act. A miscellaneous application need only be filed with the Commercial & Admiralty Division of the High Court of Kenya as required by Section 36 of the Arbitration Act, supported by the documents called for in Section 36(3) thereof, and then be set down for hearing. The length of time between the filing of the application and its hearing will vary, depending on whether the business of the Court allows for applications to be heard expeditiously. The flip-side of this issue is a party's right to challenge the enforcement of an award. In this regard, recent case law has given rise to different opinions as to whether the High Court of Kenya should have the first and last say on an application seeking to set aside an award. One such dispute is currently before the Supreme Court of Kenya and its decision, as the Republic's final Court, is awaited.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The only grounds on which a party may appeal are set out in Section 35 of the Arbitration Act. The facts of the case, for example, are not open to appeal.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Applications filed to enforce or to object to an award are considered seriously by the Kenyan Bench and the resulting jurisprudence reflects the view that arbitration is now regarded as complementary to the Court system. The concept of public policy itself does not lend itself to a precise definition and it is only on rare occasions that public policy is cited as a reason for refusing the enforcement of an arbitral award within the Kenyan Courts. An award would have to be in conflict with several factors, such as the Constitution of Kenya, the interests of national security and diplomatic relations, as well as considerations of economics, public morals and perceptions, amongst others.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitral proceedings in Kenya are confidential. The Evidence Act coupled with the Common Law govern matters related to confidentiality. The IBA Rules on the Taking of Evidence may also be applied as reflective of "best practice".

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Disclosure of such information may only be obtained or relied upon in subsequent proceedings with the consent of the parties to the arbitral proceedings. It should be taken into account, however, that arbitral awards do not create precedents so can be of little assistance in subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Arbitration Act does not specifically prescribe limits to the types of remedies that an Arbitral Tribunal may award; party autonomy remains paramount in this regard. Tribunals are, therefore, at liberty to award traditional remedies as well as innovative ones, provided such remedies accord with the Laws of the Kenyan Republic and do not step on the toes of public policy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

In an award, Section 32C of the Arbitration Act permits the inclusion of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award, unless otherwise agreed by the parties and to the extent permitted by the substance of the dispute.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Costs and fees are recoverable as reasonable costs, and parties are free to agree which costs are recoverable; they may even go so far as to cap or place a ceiling on costs. Where the parties are unable to agree, the arbitrator has the discretion to decide how to apportion costs. In the exercise of such discretion, the principle or standard generally applied is that "costs follow the event" and where the Tribunal is not inclined to apply this standard, reasons for not doing so must be given. The discretion of the Tribunal in relation to the award of costs is contained in Section 32B(1) of the Arbitration Act.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Awards are subject to VAT (only where appropriate), and VAT is also payable on the costs of arbitration.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Contingency fees are not legal in Kenya, and the author is not aware of the existence of such funders, either in litigation or arbitration within the Kenyan jurisdiction.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The Republic of Kenya signed the ICSID Convention on 24th May 1966, and became a Contracting Party on 2nd February 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Kenya has signed BITs with the following countries: Burundi; China; Finland; France; Germany; Iran; Italy; Kuwait; Libya; Mauritius; the Netherlands; Slovakia; Switzerland; Turkey; and the United Kingdom. There are also ongoing negotiations for a BIT between the East African Community and the United States. While some are in force, others have been signed but are yet to come into force. Other Investment Agreements include the Trade and Investment Framework Agreement between the United States and the East African Community (EAC) (2008).

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

A wide range of language is used in the investment treaties.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Case law from Kenyan Courts shows that states enjoy immunity from jurisdiction, enforcement and execution, unless they have submitted to the jurisdiction by agreement, agreed to waive immunity, are acting in a commercial transaction or have entered into an arbitration agreement.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

With the setting up of the Nairobi Centre for International Arbitration, a process is currently in place seeking to harmonise legislation on arbitration with a view to adopting best practices and to put in place an attractive legal framework that will foster the further growth of arbitration. The Government of Kenya has already taken steps to incorporate dispute resolution clauses in all of its contracts (including those of any government agency) that will refer any disputes for resolution to the NCIA (which will also be the default appointing body for any such contracts).

As a growing trend, a greater number of commercial disputes are being referred to arbitration. The same applies to the construction industry.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Chartered Institute of Arbitrators (Kenya Branch) remains at the forefront in this regard by carrying on training on these and other subjects, and targeting practitioners across the board so as to keep them up to speed with any developments.

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Njeri Kariuki Advocate is a Nairobi-based, medium-sized law firm founded by Njeri Kariuki with a view to growing clientele in the areas of real estate (conveyancing) law, probate and succession, commercial contracts, company/business formations, and secretarial matters. Njeri has ended up building a niche for herself in arbitration and ADR. She holds a Diploma in International Commercial Arbitration (Keble College, Oxford) from the Chartered Institute of Arbitrators and is a Fellow & Chartered Arbitrator of the Institute. Njeri is a trainer and tutor with the Institute as well as an accredited mediator and conducts mediations under the High Court of Kenya-annexed Mediation Scheme. Over a period of three years, Njeri chaired a Dispute Adjudication Board, which was set up to help bring an international geothermal project to fruition, and besides contributing to several international journals on arbitration, has received citations from *Chambers Global* over the last four years.

Nigeria

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The Arbitration and Conciliation Act 1988 (ACA) (Cap A18 Laws of the Federation of Nigeria 2004) is the federal or national law governing arbitration in Nigeria. The Act also domesticated Nigeria's treaty obligations arising under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. In 2009, Lagos State enacted its own state law, the Lagos State Arbitration Law 2009. Other independent international arbitration centres in Lagos, such as the Lagos Court of Arbitration established in 2012 and the Lagos Regional Centre for International Commercial Arbitration established in 1989, have their own arbitration rules. However, this chapter focuses on the federal law (ACA), but references will be made to the Lagos State Law where necessary.

The basic legal requirement of an arbitration agreement under this law is that an arbitration agreement must be in writing or must be contained in a written document signed by the parties. Section 1 of ACA provides that every arbitration agreement shall be in writing and contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement or in an exchange of points of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by another. Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract. This provision presupposes that an arbitration must be consensual and indicates that an arbitration agreement may either be an express clause in a contract whereby parties agree to refer future disputes to arbitration, or in a separate document (Submission Agreement), whereby parties agree to submit their existing dispute to arbitration. An arbitration agreement may also be inferred from written correspondence or pleadings exchanged between parties.

However, there are situations of non-consensual or compulsory arbitration, as depicted in statutes and consumer standard form contracts. For instance, under the Pension Reform Act, the regulator National Pension Commission, PENCOM, can refer any dispute to arbitration. Also, under the National Investment Promotion Act, any foreign investor who registers under the Act is automatically entitled to bring a treaty arbitration under the ICSID system. Arbitration provisions contained in such statutes are deemed to be binding on any person to whom they apply.

The following additional legal requirements for a valid arbitration agreement can be distilled from the provisions of ACA:

5.1 The arbitration agreement must be in respect of a dispute capable of settlement by arbitration under the laws of Nigeria. See section 48(b)(i) and section 52(b)(i) of ACA.

5.2 The parties to the arbitration agreement must have legal capacity under the law applicable to them. See section 48(a)(i) and section 52(2)(a)(i) of ACA.

The arbitration agreement must be valid under the law to which the parties have subjected it or under the laws of Nigeria. In other words, the agreement must be operative, capable of being performed and enforceable against the parties. See sections 48(a)(ii) and 52(a)(ii) of ACA.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Apart from the requirement of writing (in the case of consensual arbitration), other elements like the place (or seat) of arbitration, language of arbitration, number of arbitrators, governing law of the contract, arbitral rules or institution, etc. ought to be incorporated in the arbitration agreement. Including such elements in the arbitration agreement would ensure the validity of the clause and provide the parties good measure of control and autonomy over the arbitration procedure, especially since most of the provisions of ACA are subject to the express agreement of parties, that is, non-mandatory. See section 16 of ACA.

Section 6 of ACA provides the default number of arbitrators as three in the absence of any express agreement by the parties. The default number of arbitrators under the Lagos State Arbitration Law is one (sole arbitrator), but parties are free to stipulate otherwise by the arbitration agreement. See section 7(3) of the Lagos State Arbitration Law 2009.

The method or procedure for the appointment of the arbitrators could also be specified in the arbitration agreement. In the case of a sole arbitrator, it may be a joint appointment by the parties or by an appointing authority and in the case of three arbitrators, each party can appoint one arbitrator and the two appointed will then appoint the third. In the case of multi-party arbitrations (arbitrations between more than two parties), it is more useful for parties to agree on an appointing authority. See section 7 of ACA on the procedure for appointing arbitrators where no procedure is stipulated in the arbitration agreement.

Apart from the above, the level of qualification or expertise which the arbitrator or arbitrators should have, the timelines for the conclusion of the arbitration and giving the final award, and

the governing law may be stipulated in the arbitration agreement. Parties can choose from a variety of arbitration rules, such as the International Chamber of Commerce (ICC) Rules, London Court of International Arbitration (LCIA) or other international rules, as well as local rules under ACA and the Lagos State Arbitration Law 2009. The arbitration agreement should state whether the choice of law for the contract also applies to the arbitration agreement. In view of the increasing number of lawsuits on arbitration, especially actions to set aside arbitral awards, it is becoming useful to insert a term in the arbitration clause that parties agree to be bound by the decisions of the tribunal and shall not challenge the award except on grounds of misconduct. However, ACA provides grounds for setting aside an award and so there is the question of whether the courts will uphold an agreement that is contrary to law. Also, such a clause may be adjudged to be an ouster of the court's jurisdiction which the court will be reluctant to uphold.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Nigerian courts have adopted a positive approach to the enforcement of arbitration agreements. A review of the decided cases shows a general recognition by Nigerian courts of arbitration as a good and valid alternative dispute resolution mechanism. In ***C.N. Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd.*** *(2005) 1 NWLR Part 940 577*, the court held that arbitral proceedings are a recognised means of resolving disputes and should not be taken lightly by both counsel and parties. However, there must be an agreement to arbitrate, which is a voluntary submission to arbitration.

Where there is an arbitration clause in a contract which is the subject of court proceedings, a party to the court proceedings may promptly raise the issue of an arbitration clause and the courts will stay proceedings and refer the parties to arbitration. See sections 4 and 5 of ACA. See ***Transnational Haulage Limited v. Afribank Nigeria Plc & Anor*** *(Unreported Suit No. LD/1048/2008)* ruling delivered on 28 September 2010, granting a stay of proceedings pending arbitration.

Sections 6(3) and 21 of the Lagos Law empower the court to grant interim orders or reliefs to preserve the *res* or rights of parties pending arbitration. Although ACA in section 13 gives the arbitral tribunal power to make interim orders of preservation before or during arbitral proceedings, it does not expressly confer the power of preservative orders on the court, and section 34 of ACA limits the courts' power of intervention in arbitration to the express provisions of ACA. The usefulness of section 6(3) of the Lagos State Arbitration Law 2009 is seen when there is an urgent need for interim preservative orders and the arbitral tribunal is yet to be constituted. Our experience in this regard is that such applications find no direct backing under ACA and have always been brought under the Rules of Court and under the court's inherent jurisdiction to grant interim orders. However, in ***Afribank Nigeria Plc v. Haco*** *(Unreported FHC/L/CS/476/2008)*, the court granted interim relief and directed the parties to arbitrate under the provisions of ACA. Upon the publication of the award, the parties returned to the court for its enforcement as judgment of the court. See also ***Transnational Haulage Limited v. Afribank Nigeria Plc and Anor*** (*supra*).

Also, in Nigeria an arbitral award can, irrespective of the country in which it is made, be recognised as binding on the parties by virtue of the provisions of the Arbitration and Conciliation Act 1988 and the Foreign Judgments (Reciprocal Enforcements) Act. Cap 152 Laws of the Federation of Nigeria 2004 makes foreign arbitral awards registerable in Nigerian courts if, at the date of registration, it could be enforced by execution in Nigeria.

The courts in Nigeria are often inclined to uphold the provisions of sections 4 and 5 of ACA, provided the necessary conditions are met. In the case of ***Minaj Systems Ltd. v. Global Plus Communication Systems Ltd. & 5 Ors*** *(Unreported Suit No. LD/275/2008)*, the Claimant instituted a court action in breach of the arbitration agreement in the main contract and on the Defendant's application, in a ruling delivered on 10 March 2009, the court granted an order staying proceedings in the interim for 30 days pending arbitration. In ***Niger Progress Ltd. v. N.E.I. Corp.*** *(1989) 3 NWLR (Part 107) 68*, the Supreme Court followed section 5 of ACA, which gives the court the jurisdiction to stay proceedings where there is an arbitration agreement. In ***M.V. Lupex v. N.O.C*** *(2003) 15 NWLR (Part 844) 469*, the Supreme Court held that it was an abuse of court process for the Respondent to institute a fresh suit in Nigeria against the appellant on the same dispute during the pendency of the arbitration proceedings in London. In ***Akpaji v. Udemba*** *(2003) 6 NWLR (Part 815) 169*, the court held that where a Defendant fails to raise the issue of an arbitration clause and relies on the same at the early stage of the proceeding, but takes positive steps in the action, he would be deemed to have waived his right under the arbitration clause. In ***Williams v. Williams*** *(2014) 15 NWLR (Part 1430) 213 at 239–240* the Court restated the irrevocability of an arbitration agreement except by an agreement of parties or leave of a judge.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Parties are free to choose the law governing the arbitration proceedings, but where they have not predetermined the law, the arbitral proceedings will be governed by ACA. Also, if the seat of the arbitration is Nigeria, then ACA will apply as governing law of the arbitration. Parties can also choose the rules that will regulate the arbitration proceedings. Where no rules are specified, the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to ACA. (See section 15(1) and (2) of ACA.) Where the Rules contain no provision in respect of any matter, the arbitral tribunal may conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure a fair hearing. If parties have chosen ACA as the governing law, ACA will govern both the arbitral proceedings itself and the enforcement of the award. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (domesticated as the Second Schedule to ACA) governs the enforcement of foreign awards. Nigeria is a signatory to the New York Convention and has domesticated the Convention in compliance with section 12 of the 1999 Constitution as amended through the enactment of ACA. Since arbitration is under the concurrent and residuary list of the 1999 Constitution, both the federal and state governments can legislate on it. There are existing arbitration laws by Lagos State Nigeria. Lagos State Arbitration Law is perhaps the most developed and the state aims, by this, to make Lagos the centre for arbitration in Nigeria.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

There is no distinction between domestic and international arbitration under ACA and the Rules made pursuant to it. Generally, ACA and the Rules apply to any arbitration whose seat is in Nigeria or which parties have agreed will be governed by ACA. (See the

long title of ACA and section 15(1) thereof.) However, parties are free to choose the rules applicable to the arbitration proceedings and may even choose arbitration rules of a different country or the rules of an international or foreign arbitral institution. See section 53 of ACA.

Part III of ACA, comprising sections 43 to 55, contains specific provisions on international commercial arbitration (and conciliation), but the heading of Part III and wording of section 43 suggest that these provisions, in addition to other provisions of ACA, apply to international arbitration. However, going by the general rule that specific provisions override general provisions, any difference between the other provisions of ACA and Part III on international arbitration will be resolved in favour of the provisions of Part III. For instance, section 44 slightly differs from section 7 on the appointment of arbitrators in the sense that section 44 provides that an appointing authority shall appoint arbitrators if parties are unable to agree on a sole arbitrator or if party-appointed arbitrators do not agree on a presiding arbitrator; whereas, section 7 provides that the court shall make the appointment in both circumstances. Again, section 48 provides elaborate grounds for setting aside an award; whereas, under sections 29 and 30, the grounds for setting aside an award are merely stated as decisions beyond the scope of the submission to arbitration, misconduct of the arbitral tribunal, and improper procurement of the arbitral proceedings. Similarly, section 52 provides elaborate grounds for refusing the recognition or enforcement of an award, whereas the grounds for the refusal of recognition are not stated in the other provisions of ACA. It has sometimes been argued in applications for the setting aside or refusal of the recognition of awards, that sections 48 and 52 do not apply to domestic arbitration, but this issue has not been fully tested judicially in Nigeria.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which is incorporated as the Second Schedule to ACA, is applicable to the recognition and enforcement of arbitral awards arising out of international commercial arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

ACA is largely based on the UNCITRAL Model Law with minimal differences. One such difference is the provision on the power of the court to stay proceedings. The UNCITRAL Model Law does not expressly confer on the court the power to stay proceedings commenced in breach of an arbitration clause, whereas ACA expressly confers this power on the court. **Article 8(1)** of the UNCITRAL Model Law, which is headed '*Arbitration agreement and substantive claim before court*', simply provides that the court shall "refer the matter to arbitration" in such circumstances, whereas section 4 of ACA, with an identical heading, expressly provides that the court shall "order a stay of proceedings and refer the parties to arbitration". While the power of court to stay proceedings may be implied in Article 8(1) of the Model Law, it may be argued that an application for a stay of proceedings finds no direct legal backing under the Model Law, unlike ACA, which confers an express power of stay of proceedings on the court and goes further in **section 5** to make more elaborate provisions on stay of proceedings. Another difference is the provision of **Article 13(3)** of the Model Law, which allows parties to go to court to challenge the decision of the arbitral tribunal on its own competence. ACA gives the tribunal power to decide on a challenge to an arbitrator, but does not provide for further recourse to the court against the decision of the tribunal on the issue.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Arbitration under ACA is generally consensual and there is party autonomy in the conduct of arbitration proceedings, including international arbitration proceedings. Most of the provisions in ACA and the Rules are subject to and may be varied by the parties' agreement. However, section 33(a) of ACA implies that there are some provisions of ACA which are deemed mandatory and which parties cannot derogate from.

In contemporary business-to-business transactions such as telecommunications, pension and capital market transactions like mergers and acquisitions (M&A), mandatory arbitration clauses are increasingly being imposed by statutes or regulators. The basic question would be whether it is reasonable for regulators to insist on the insertion of mandatory arbitration clauses in commercial transactions they regulate or refer disputes to arbitration before taking a final administrative decision. The position is yet to be tested in Nigerian courts, but in Nigeria the mandatory pre-arbitration clause in a commercial agreement, particularly in a capital market transaction regulated by SEC, is gaining weight and, like the position in the United States relating to a business agreement, the regulators are championing the process particularly for high-value transactions. Agreements like the vending and underwriting agreements must, by regulation in Nigeria, carry an arbitration clause under the New Consolidated Securities and Exchange Commission Rules 2011. Statutes such as the Pension Reform Act and Nigeria Communications Commission Act and regulators such as the Securities and Exchange Commission (SEC) are increasingly resorting to mandatory arbitration clauses in Nigeria.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

ACA does not stipulate any particular subject matter that may not be referred to arbitration. The question of whether or not a dispute is arbitrable is therefore left for interpretation by the courts. In ***Ogunwale v. Syrian Arab Republic*** *(2002) 9 NWLR (Part 771) 127*, the Court of Appeal held that the test for determining whether a dispute is arbitrable is that the dispute or difference must necessarily arise from the clause contained in the agreement. However, not all disputes are necessarily arbitrable. Only disputes arising from commercial transactions can be referred to arbitration (see section 57(1) of ACA on the definition of arbitration and commercial disputes). Disputes not falling within the category of commercial disputes (e.g. domestic disputes), would not be arbitrable under ACA, though they may be referred to customary arbitration. Such disputes as competition or anti-trust disputes with elements of criminality and nullification of patent rights are generally not arbitrable, although there are some exceptions. In ***Federal Inland Revenue Service v. Nigerian National Petroleum Corporation & 2 Ors. – Suit No. FHC/CS/774/2011***, a case involving the Federal Inland Revenue Service (FIRS), NNPC, Shell Petroleum and other international oil companies (IOCs) operating in Nigeria, a Federal High Court in Abuja voided an arbitral award under a Joint Operating Agreement between the government and the IOCs on the ground that the subject matter of the arbitration (interpretation, application and administration of the Petroleum Profit Tax Act, the

Deep Offshore Act, Education Tax Act and Company Income Tax Act) was not arbitrable, but was a function solely to be carried out by Federal Inland Revenue Service. However, the Court of Appeal in ***Statoil (Nig) Ltd v. Nigerian National Petroleum Corporation*** *(2013) 14 NWLR (Part 1373) 1* effectively overturned the decision of the Federal High Court. The Court of Appeal essentially held that the jurisdiction of an arbitral tribunal is premised on the agreement of the parties and that parties are to be bound by their agreement, implying that, albeit the dispute may be related to taxation matters, if the parties agree to refer it to arbitration, then the arbitral tribunal has jurisdiction.

It is important to note that the decision in ***Federal Inland Revenue Service v. Nigerian National Petroleum Corporation & 2 Ors.*** – *Suit No. FHC/CS/774/2011* was upheld by the Court of Appeal by the judgment delivered on 31 August 2016 in *Suit No. CA/A/208/2012* which is an appeal filed by the affected oil companies challenging the judgment of the Federal High Court. In its judgment, the Appellate Court declared that only the Federal High Court and not an arbitration tribunal can exercise jurisdiction on issue of revenue of the government of the Federation connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria. It appears that the decision of the Court of Appeal was however challenged at the Supreme Court and the outcome is awaited. Also, some matters are generally more suitable for litigation than arbitration. For instance, applications for the immediate enforcement of rights or the preservation of *res*, e.g. the enforcement of fundamental human rights, application for *Anton Piller, Mareva* and other injunctions, are less suitable for arbitration than litigation. In addition, since an arbitrator has no statutory power of joinder under ACA, multi-party proceedings may be less suitable for arbitration under ACA, unless the arbitration agreement makes specific provision for it. It is hoped that ACA would be revised to address multiparty provisions as other arbitral institutions like the International Chamber of Commerce (ICC) and the UNCITRAL Rules have done.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

An arbitral tribunal is permitted to rule on its own jurisdiction. Section 12 of ACA provides that an arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement. In any arbitral proceedings, a plea that the arbitral tribunal does not have jurisdiction or is exceeding the scope of its authority should be raised promptly, as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings and the tribunal may, in either case, admit a later plea if it considers that the delay was justified. The arbitral tribunal may rule on any plea referred to it under subsection (3) of section 12, either as a preliminary question or in an award on the merits, and such ruling shall be final and binding.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Where a party in court proceedings raises the issue of an arbitration agreement promptly, the court will uphold the arbitration agreement and stay proceedings pending arbitration. However, the courts will usually require the requesting party not to have taken some positive steps in the furtherance of the litigation, apart from an appearance in court. The Notice of Arbitration or any other evidence that arbitral proceedings have been set in motion will help to convince the court that the party invoking the arbitration clause is serious and desirous of pursuing arbitration. In the absence of that, the courts are still inclined to stay proceedings in favour of arbitration upon being convinced that there exists a valid arbitration agreement.

However, while some courts treat an arbitration agreement as a compelling ground for a stay of court proceedings, others treat it as discretionary. This point is illustrated by the cases of ***M.V. Lupex v. N.O.C.*** *(2003) 15 NWLR (Part 844) 469* and ***RCO and S Ltd v. Rainbownet Ltd*** *(2014) 5 NWLR (Part 1401) 516 at 534* on the one hand, and ***K.S.U.D.B. v. Fanz Ltd.*** *(1986) 5 NWLR (Part 39) 74* on the other hand.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Generally, by virtue of section 12(4) of ACA, a ruling by the arbitral tribunal on its jurisdiction is final and binding and is not subject to appeal. This is strengthened by section 34 of ACA, which provides that *"A court shall not intervene in any matter governed by this Act, except where so provided in this Act"*. However, a party who can prove circumstances of impartiality or lack of independence on the part of the tribunal can challenge the tribunal's constitution in court on the basis of section 8(3)(a) of ACA, which provides that *"An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence"*. But even so, the challenge should be first made to the tribunal itself unless the challenged arbitrator withdraws from office or the other party agrees to the challenge. See section 9(3) of ACA. If the other party does not agree to the challenge and the challenged tribunal does not withdraw, the court can address the issue at the instance of the challenging party. See Article 12 of the Arbitration Rules.

Also, the court can address the issue of the jurisdiction and competence of an arbitral tribunal after the award has been made and proceedings have been instituted for the setting aside or refusal of the recognition and enforcement of the award. Lack of jurisdiction is not expressly stated to be grounds for the setting aside or refusal of the recognition and enforcement of an award under ACA so as to make it an issue which the court can address, but it has been held to constitute misconduct on the part of the tribunal for which an award may be set aside under section 30 of ACA. See the case of ***Taylor Woodrow Ltd. v. GMBH*** *(1991) 2 NWLR (Part 175) 604*.

ACA is not specific on the standard of review of a tribunal's decision. The tribunal has the competence to rule on its jurisdiction and under ACA (unlike the UNCITRAL Model Law) its decision is not subject to review. If the tribunal rules that it has jurisdiction when it does not, the award will be set aside and the entire arbitral proceedings would be a waste of time. See ***Triana Ltd v. UTB Plc*** *(2009) 12 NWLR (Part 1155) 313*. However, a tribunal in ruling on its own jurisdiction will decide based on a number of factors like the existence or validity of an arbitration agreement, the express provisions or requirements of the arbitration agreement, the scope of the tribunal's authority or powers, the impartiality and independence of the tribunal in relation to the parties and subject matter of the dispute, and the qualifications of the arbitrator(s) in accordance with the arbitration clause. (See sections 8 and 12 of ACA.)

In the recent Court of Appeal *Case of* ***Shell Petroleum Development Company of Nigeria and Ors v. Crestar Integrated Natural Resources Limited (2015) LPELR-40034 (CA)***, the Court granted an anti-arbitration injunction against the Claimant in the arbitral proceedings. It is noteworthy that this decision does not attack the

jurisdiction of the arbitral tribunal to continue with its proceedings, but restrains the Claimant from pursuing them in light of the reasons adumbrated in the Court's ruling.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Under ACA, an arbitration agreement must be valid; otherwise, the court may set aside or refuse recognition and enforcement of the award. A valid arbitration agreement is one which unequivocally evidences the parties' agreement to arbitrate, whether in the form of a clause in the main contract or a separate submission agreement or an exchange of pleadings or correspondence between the parties. (See section 1 of ACA.) An arbitral tribunal has no jurisdiction under ACA over parties who are not themselves party to an agreement to arbitrate and any award made without jurisdiction will be null and void. In practice, where persons who were not party to the arbitration agreement are sought to be enjoined, a submission agreement is signed by which the parties submit to the jurisdiction of the arbitral tribunal and thereby agree to be bound by the award.

Section 40(3) of the Lagos Arbitration Law provides that a party may, by application and with the consent of the parties, be joined to arbitral proceedings, but ACA does not contain such provision. It follows that whilst Federal law does not allow joinder of non-parties; conceptually, such a joinder is possible under the Lagos Arbitration Law. At present, no jurisprudence has developed on this point. In contemporary practice and with the spate of increase in multi-party (and multi-contract) arbitrations, parties who were not parties to the original arbitration agreement are made to submit to the jurisdiction of an arbitral tribunal. For instance, in ***FGN v. CTTL*** *(Unreported Suit No. FHC/L/CS/421/2009)*, the Federal High Court refused to set aside an ICC award against the Federal Government of Nigeria, a non-signatory and its state agency which signed the arbitral agreement, on the basis that though FGN was not a party to the agreement it had given presumed consent by its conduct and involvement with the execution and implementation of the contract.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Generally, under Nigerian law, there are limitation periods for the commencement of various civil actions: for simple breach of contract, it is six years; for an action relating to land, it is 12 years; and for actions against public officers, it is three months. (See Limitation Laws of the various states, the Fatal Accidents Act and the Public Officers Protection Act.) ACA does not provide limitation periods for commencement of arbitration. However, the Lagos Arbitration Law, in section 35(1), provides that limitation laws shall apply to arbitral proceedings as they apply to judicial proceedings and in section 35(4) defines "limitation laws" to mean "*such limitation laws as are applicable under the law governing the subject of the dispute*". Thus, limitation laws are considered as substantive law and are determined by the law applicable to the main contract.

Section 8(1)(d) of the Limitation Law of Lagos State (Cap L67 Laws of Lagos State of Nigeria Vol. 5) stipulates the limitation period of six years for an action to enforce an arbitration where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the Arbitration Act. The section bars actions (court actions) to enforce an arbitral award from being instituted after six years from when the cause of action arose. It does not apply to the substantive arbitration proceedings. The interpretation section (section 69) of the Limitation Law expressly defines "actions" as *"any proceeding (other than a criminal proceeding) in a court established by law"*.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

There are two categories of insolvency proceedings: non-collective proceedings; and collective proceedings. For non-collective proceedings (e.g. the creditor's appointment of a receiver or receiver/manager to realise the assets of the company), a pending insolvency proceeding will not operate as a stay of ongoing arbitration or other proceedings against the insolvent company. However, once a company is in receivership, leave or consent of the receiver or the court, the court is required to commence arbitral proceedings against the company. This is because the receiver or receiver manager becomes subrogated in the rights and liabilities of the company and exercises the powers of the board of directors of such company until the discharge of the receivership by virtue of section 393 of the Companies and Allied Matters Act (CAMA). See ***N.B.C.I. v. Alfijir (Mining) Nigeria Limited*** *(1999) 14 NWLR (Part 638) 176 at 184–185.*

As regards collective proceedings (e.g. winding-up proceedings and/or arrangements and compromises which are predicated on a liquidation process), a pending insolvency proceeding ought to operate as a stay of all other proceedings against the company. See sections 412 and 417 of the Companies and Allied Matters Act (CAMA). The purpose is to preserve the assets of the company in a single pool so that they are available to satisfy creditors in order of priority. However, the Supreme Court of Nigeria has held that on the basis of section 567 of CAMA, which defines the court as the Federal High Court, sections 412 and 417 of CAMA only operate as a stay of proceedings before the Federal High Court. See the case of ***Federal Mortgage Bank of Nigeria v. NDIC*** *(1999) LPELR-1270 (SC)*. The effect of this decision is that collective insolvency proceedings will not affect or stay proceedings before the State High Courts, or arbitral or other tribunals. Nevertheless, the author's view is that the provisions should apply to proceedings before all courts, including Federal and State High Courts, and arbitration and other proceedings. This view is based on the *pari passu* principle on the equality of treatment of different categories of creditors in collective insolvency proceedings. See sections 494 and 495 of CAMA. Also, the intendment of sections 412 and 417 of CAMA is to grant a moratorium against all creditor claims which is a useful stop-gap in managing insolvency. Such an objective will be defeated if some creditors can pursue their claims whilst others cannot. Best practices of insolvency seek to protect the priority of creditors and this Supreme Court decision may open a floodgate for 'secondary' creditors to obtain 'backdoor judgments' against a company in liquidation to the detriment of the petitioner in valid winding-up proceedings.

The challenge seems to be created by the not-so-robust insolvency legal framework in Nigeria, but a lot of efforts are currently being made to develop the Nigerian insolvency regime. Several affected Self-Regulatory Organizations (SROs) such as the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) and the Nigerian Bar Association Section on Business Law (NBA-SBL) have been making concerted efforts with government authorities (the Presidential Enabling Business Environment Council (PEBEC) and the Corporate Affairs Commission (CAC)) to improve on the

statutory framework to achieve a more business rescue-friendly and modern insolvency legislation. BRIPAN initially promoted a standalone Insolvency Bill covering personal and corporate insolvency, formal reorganisations, regulation of the profession and integrating the Cross-Border Insolvency Model Law. More recently, NBA-SBL has been working with the Nigerian Federal Executive arm through the PEBEC to promote an Omnibus Bill to facilitate ease of doing business including reform of insolvency provisions of the CAMA. On the other hand, the CAC has recently updated the CAMA and the updated bill is at an advanced stage of approval, having been passed already by one out of the two Federal Legislative bodies (the Senate). The insolvency provisions of the new CAMA are said to include the introduction of CVAs and Administration following the UK Model (in contrast to the NBA-SBL PEBEC report on Ease of Doing Business which favoured the South African Business Rescue framework instead). They also are said to include provisions introducing the recognition of the need of regulation of insolvency professionals through the request that IPs should be registered with BRIPAN and with the CAC.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The law applicable to the substance of a dispute is determined by the particular system of law governing the contract itself, i.e. the interpretation and validity of the contract and the rights and obligations of the parties, the mode of performance and the consequences of breach of the contract. In a purely domestic arbitration, the applicable law will usually be Nigerian law, unless otherwise expressly agreed by the parties. In international arbitration, two or more different national laws may be applicable to the substance of the contract and parties may, by agreement, choose to be governed by either of the national laws or even a neutral law. The principle of party autonomy largely influences the choice of law applicable to the dispute. ACA, like the UNCITRAL Model Law, allows the parties to choose the law applicable to their contract, but if parties fail to make such a choice, the arbitral tribunal shall apply the law applicable to the dispute. The conflict of law rules are complex, but follow or mirror English law. Where the subject matter is property located in Nigeria, *lex situs*, i.e. the law of the place where the property is located, will apply, and if located in a foreign country, then that law will apply. For contracts, the law of the place of residence of the respondent or where the contract was entered into or place of performance will apply. Where personal law is involved, or where a native is involved, the native law and custom would apply except where the person expressed a contrary intention, e.g. marriage under the Marriage Act is expression of contrary intention. For a company, the law of the place of central command and control will apply. Nigerian courts have recognised the right of parties to submit to an applicable law by agreement as seen in ***Stabilini Visinoni Ltd v. Mallinson and Partners Ltd*** *(2014) 12 NWLR (Part 1420) 134 at 182.*

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Where the seat of arbitration is Nigeria, the mandatory laws of Nigeria would prevail over any agreement of parties that is contrary to public policy or that will amount to a contravention of another relevant law within the jurisdiction. For instance, a choice of foreign law as the law governing the contract, which is perceived to be intended to evade tax laws, or as an outright breach of constitutional provisions, may not be upheld. Similarly, as a matter of public policy, courts in Nigeria, even in applying foreign law as the law chosen by the parties, are not obliged to apply provisions of foreign law that are incompatible with their own mandatory rules or those of another country with which the contract is closely connected. The doctrine of freedom of contract or party autonomy is exercisable to the extent of statutory restriction or intervention. See the cases of: ***M.V. Panormos Bay v. Plam Nig. Plc*** *(2004) 5 NWLR (Part 855) 1 at 14;* and ***Tawa Petroleum v. M.V. Sea Winner*** *3 NSC 25.*

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Where parties have not expressly chosen the law applicable to the arbitration, the law of the seat of arbitration would apply. Thus, where the seat of arbitration is in Nigeria, ACA and the Arbitration Rules made pursuant to ACA would govern the formation, validity and legality of the arbitration agreement, as well as the entire arbitral procedure, unless parties have expressly stated otherwise. See sections 15 and 53 of ACA.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Under ACA, parties have the autonomy to appoint arbitrators of their choice. This autonomy is, however, limited to the extent that the arbitrators so-appointed must be independent and impartial and must make a declaration or disclosure of any circumstances that may affect their independence or impartiality. Also, the parties' choice of arbitrators must be in accordance with the arbitration agreement itself. For instance, the chosen arbitrator(s) must have the experience or professional qualification stipulated in the arbitration agreement in order to have a properly composed tribunal and, consequently, a valid award.

A joinder of parties in arbitration may limit the parties' autonomy to select arbitrators, but an arbitrator has no power of joinder under ACA.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Under ACA, parties are free to agree on the method of appointment of arbitrators, but where they do not stipulate the method or the method chosen by them fails, the arbitrator(s) will be appointed by the court. Section 7 of ACA prescribes a default procedure. It provides that the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator. Where no procedure is specified, in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, but if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so by the other party or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement. In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement made within 30 days of such disagreement. Where, under an appointment

procedure agreed upon by the parties, a party fails to act as required under the procedure, or the parties or two arbitrators are unable to reach agreement as required under the procedure or a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means, for securing the appointment. A decision of the court under subsections (2) and (3) of section 7 shall not be subject to appeal.

See the case of ***Ogunwale v. Syrian Arab Republic*** *(2002) 9 NWLR (Part 771) 127*, where the court held that by virtue of section 7(4) of the Arbitration and Conciliation Act, a decision of the High Court relating to the appointment of an arbitrator shall not be subject to appeal. However, it is only a decision strictly within sections 7(2)(a) and (b) and section 7(3)(a), (b) and (c) of the Act that shall not be subject to appeal. The court further held that sections 7(4) and 34 of the Arbitration and Conciliation Act cannot override the right of appeal conferred on a party by section 241(1) of the 1999 Constitution, as such right of appeal has constitutional backing.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A court can intervene in the appointment of arbitrators where parties fail to agree on the procedure or method of appointment or where the procedure agreed upon is not complied with. In ***Ogunwale v. Syrian Arab Republic*** *supra*, the court held that by virtue of Article 8(1) of the Arbitration Rules, when a court is requested to appoint an arbitrator pursuant to Article 6 or Article 7, the party who makes the request shall send to the court an affidavit together with a copy of the contract out of or in relation to which the dispute has arisen, and a copy of the arbitration agreement if it is not contained in the contract and the court may require, from either party, such information as it deems necessary to fulfil its functions. The court further held that the Arbitration Rules govern and regulate the Arbitration Panel. They are to an Arbitration Panel what the Rules of Court are to regular courts. Where non-compliance with a rule of court is peripheral, not affecting the foundation or fundamentals of the case, it could be curable and a court of law and equity will treat it as a mere irregularity and cure it. In the instant case, the names of the arbitrators were furnished to the trial court through a letter instead of by an affidavit and the court held it to be a peripheral irregularity that could be cured.

Apart from the power of the court to intervene in the case of non-appointment by the parties, the court can also intervene to replace appointed arbitrators who cannot act due to lack of independence and impartiality or any other circumstance on which an arbitrator may be challenged. Section 11 of ACA provides that where the mandate of an arbitrator terminates under section 9 or 10 of the Act (by challenge or failure or impossibility to act), or because of his withdrawal from office or revocation of his mandate by the parties' agreement, or for any other reason whatsoever, a substitute arbitrator shall be appointed in accordance with the same rules and procedure that applied to the arbitrator who is being replaced. Thus, an arbitrator who is appointed by the court and who is unable to act for any reason will be replaced by the court.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

It is a fundamental requirement under ACA that an arbitrator must be independent and impartial. The arbitrator has a duty to ensure and maintain his independence and impartiality and to disclose any circumstances which may affect his independence and impartiality. This duty endures throughout the arbitration proceedings, covering all parties until the final award. A breach of it may constitute misconduct for which an award may be set aside. Even a party-appointed arbitrator is bound by this duty to be and to remain independent and impartial. The requirement of independence and impartiality of an arbitrator is emphasised by section 8 of ACA and the section provides for the challenge of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Generally, the concept of impartiality presupposes that an arbitrator must not be bias in favour of one of the parties or as regards to the issues in dispute. Independence and neutrality presupposes that the arbitrator has no such relationship or derives no such benefits from any of the parties as would oblige him to act in favour of that party. From the wordings of section 8 of ACA, the arbitrator's duty to maintain his independence and impartiality or his duty of disclosure is a mandatory provision from which the parties cannot derogate. Article 12 of the 2008 Arbitration Rules of the Regional Centre for International Commercial Arbitration Lagos contains similar provisions on the independence and impartiality of an arbitral tribunal. Article 12.2 thereof emphatically provides that no arbitrator shall act in the arbitration as an advocate of any party and no arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The arbitration procedure in Nigeria is governed by the national law (ACA and the Arbitration Rules made pursuant to ACA) as well as various state laws. ACA and the Arbitration Rules apply to all arbitral proceedings whose seat is in Nigeria, unless the parties have agreed on another choice of law. ACA and the Rules and other state arbitration laws also apply to any arbitration which parties have agreed will govern the dispute. (See the long title of ACA and section 15 thereof.) Enforcement of arbitral awards arising out of international commercial arbitration is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Apart from the national law, other laws that may be applicable to arbitral proceedings in Nigeria include the Lagos State Arbitration Law 2009 and the Lagos Court of Arbitration Law 2009, the Arbitration Rules of the Regional Centre for International Commercial Arbitration Lagos ("Regional Centre Rules"), Rules of Court and International Arbitration Laws chosen by the parties.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Under ACA and in practice, certain procedural steps are required, especially for a valid institution or commencement of arbitral proceedings. These include:

1. Issuance or communication of the Notice of Arbitration by the claimant to the respondent in the prescribed format. See Article 3 of the Arbitration Rules. 30 days' notice is required.
2. Appointment and Constitution of the tribunal. See Articles 6–13.

3. Meetings (Preliminary Meeting, Prehearing Meeting, Prehearing Review, Inspection of documents or subject matter, etc.). See Article 16.
4. Hearing and determination of preliminary issues if any. See sections 12 and 13 of ACA.
5. Parties' presentation of respective cases, documents and any other evidence. See section 19 of ACA, Articles 18–23 of the Rules.
6. Hearing (if oral evidence is to be taken). Section 20 of ACA, Articles 24 and 25 of the Rules.
7. Re-hearing in the event of the replacement of an arbitrator. Note that re-hearing is mandatory in the event of the replacement of a sole or presiding arbitrator, but in the event of the replacement of any other arbitrator, re-hearing is at the discretion of the tribunal. See Article 14 of the Arbitration Rules.
8. Final submissions (oral or written). Article 29 of the Rules.
9. Publication of the Final Award by the tribunal to the parties. Sections 24–28 of ACA, Articles 31 and 32 of the Rules.
10. Apart from the above, there are other procedural steps under ACA, such as the procedure for the default of parties in appearance and presentation of a case or pleadings, the procedure for the challenge of arbitrators, the procedure for the enforcement of an award or challenge of enforcement, etc.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The first Schedule of the Arbitration Rules made pursuant to ACA (Article 1, Rule 4) deals with the representation and assistance of the parties. It provides that "*the parties may be represented or assisted by legal practitioners of their choice*". No particular rules of conduct are prescribed or required of counsel in arbitration proceedings in Nigeria. However, Nigerian counsel is generally bound by the Legal Practitioners Act (LPA) Laws of the Federation 1990 (as amended) and the Rules of Professional Conduct (RPC). The LPA and RPC apply to legal practice in Nigeria. Nigerian Counsel practising in foreign countries would be expected to abide by the Rules of the foreign countries and it would seem that by Rule 11 of the LPA that they can be punished by the Legal Practitioners Disciplinary Committee of the Body of the Benchers, where they are found to have committed professional misconduct or "*infamous conduct in any professional respect*" in a foreign country, the conduct of which is likely to bring the Nigerian legal profession to disrepute. Therefore, one could say that the Rules of Professional Conduct remain binding on Nigerian counsel in arbitral proceedings outside Nigeria.

Besides, where parties so agree, the International Bar Association (IBA) Guidelines on Party Representation in International Arbitration can be used as a guide on the conduct of counsel in arbitration proceedings in Nigeria, although they are non-binding rules. It is noteworthy that not all practitioners of arbitration are lawyers. All arbitrators are bound by the rules of professional conduct promulgated to regulate standards of service and professionalism in the respective arbitral institutions which they belong to. For instance, the Chartered Institute of Arbitrators, UK has its Code of Professional and Ethical Conduct for Members. In a similar manner, the Lagos Multi-Door Courthouse has its Code of Ethics for Arbitrators.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Under ACA, the arbitral tribunal has several powers, including the power to:

- Rule on its own jurisdiction.
- Issue interim orders of preservation.
- Appoint experts.
- Order the production of documents or evidence.
- Administer oaths or take affirmations of parties and witnesses appearing before it.
- Extend time for filing case statements, pleadings, written statements, etc.
- On its own volition, correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature.
- Terminate arbitral proceedings and issue a consent award upon the settlement or agreement of parties.
- Determine the admissibility, relevance, materiality and weight of any evidence placed before it.
- Make interim, interlocutory or partial awards.

The arbitrator also has several duties under ACA, some of which are:

- A duty to act in accordance with the arbitration agreement.
- A duty to decide the dispute in accordance with the terms of the contract.
- A duty to maintain its impartiality and independence throughout the arbitral proceedings.
- A duty to give the parties adequate advance notice of the date, place and time of hearings.
- A duty to give each party full and equal opportunity of presenting its case.
- A duty to act fairly between the parties and in accordance with natural justice.
- A duty to act within the scope of its jurisdiction.
- A duty to decide and dispose of all issues submitted to it by the parties.
- A duty to give a reasoned and valid award and to ensure that the award is enforceable.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Under the Legal Practitioners Act, a person who is not called to the Nigerian Bar is not entitled to appear before a court in Nigeria or act as a solicitor, unless on conditions stipulated in sections 2 and 7 of the Act. By virtue of sections 2 and 7 of the Legal Practitioners Act Cap L11 Laws of the Federation of Nigeria 2004, a person is only entitled to practice as a barrister and solicitor in Nigeria if he has been called to the Nigerian Bar, or he is admitted by warrant of the Chief Justice on special circumstances or if he is exercising the functions of the office of the Attorney General, Solicitor General or Director of Public Prosecutions or such civil service office specified by the Attorney General.

The above restrictions do not strictly apply to the representation of parties in arbitration. Under ACA, parties need not be represented by lawyers or legal practitioners. Article 4 of the Arbitration Rules provides that the parties may be represented or assisted by legal

practitioners of their choice. The wording of Article 4 and the use of the word "may" places no jurisdictional restrictions on persons appearing on behalf of parties before an arbitral tribunal. Further, the restriction in the Legal Practitioners Act seems clearly to be limited to an appearance in "court" and since an arbitral proceeding is not a court proceeding, the restriction is not applicable to foreign legal practitioners appearing before an arbitral tribunal in Nigeria.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

ACA does not provide for arbitrator immunity, but the Lagos Arbitration Law 2009 provides for arbitrator immunity. Section 18 of the Lagos Law provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of the arbitrator's functions as arbitrator unless the act or omission is determined to have been in bad faith. This provision applies to an employee or agent of an arbitrator as it applies to the arbitrator, but it does not affect any liability incurred by an arbitrator by reason of resignation. Article 45 of the Regional Centre Rules provides for absolute immunity on the Regional Centre staff, director, arbitrators and experts for any act or omission in connection with any arbitration conducted under the Rules.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The extent of intervention of the courts is limited by section 34 of ACA, to the extent permitted by ACA. The courts' powers of intervention, as permitted by ACA, are limited to such issues as the appointment of a tribunal or substitute arbitrators, the removal of an arbitrator on the grounds of misconduct, making of interim orders, compelling the attendance of witnesses, the enforcement and recognition of awards or the refusal of the same, and the setting aside of awards. By virtue of section 33 of ACA, any procedural issues in an arbitration ought to be raised before the tribunal and it is only if the tribunal fails to deal with the issues or does not adequately deal with them that the court can be called upon to deal with the procedural issues after the conclusion of arbitral proceedings. This is usually done by way of an application to set aside the award in whole or in part or to refuse recognition and enforcement of the same. In this regard, Nigerian law is more in consonance with the Model Law and does not allow the English Arbitration Act 1996 procedure which allows intervention by the courts on various questions of law decided by the tribunal.

Note that Order 52 Rule 9 of the Federal High Court Rules 2009 allows an arbitrator or umpire upon any reference by an order of court, if he thinks fit and in the absence of any contrary provision to state its award as to the whole or any part of it in the form of a special case for the opinion of the court. However, the Rules of Court are only binding on the court that is subject to them.

In the Court of Appeal case of ***Statoil (Nig) Ltd v. Nigerian National Petroleum Corporation*** (*supra*) it was held that a lower court was wrong to grant an injunction to a party that wanted to prevent the continuation of arbitration proceedings even though that party had entered into an agreement to resolve all disputes through arbitration. The Court held that nowhere in ACA is a court empowered to halt arbitral proceedings through the issuance of an injunction. As the Act does not provide for the intervention of the court to restrain arbitration by injunction, the court lacks jurisdiction to do so.

Unlike the decision in ***Statoil v. NNPC*** (*supra*), in ***Shell v. Crestar*** (*supra*), the Court of Appeal granted an anti-arbitration injunction against the Claimant in the arbitral proceedings. It is, however, important to qualify this position because this decision does not attack the jurisdiction of the arbitral tribunal to continue with its proceedings, but restrains the Claimant from pursuing them in light of the reasons adumbrated in the Court's ruling.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Under the ACA, an arbitral tribunal has the power to order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security in connection with any measure taken. (See section 13 of ACA.) There is no restriction on the type of interim reliefs which the tribunal can grant; however, it is suggested here that in awarding interim reliefs, the tribunal should be careful to act within the scope of its jurisdiction, as determined from the arbitration agreement and the law applicable to the contract.

Although section 13 of ACA confers on the tribunal the power to grant interim reliefs without recourse to court, it is doubtful if the tribunal can enforce compliance with its interim orders since the tribunal has no coercive powers. The Lagos Arbitration Law 2009 puts it more clearly by providing in section 29(1) that an interim measure issued by an arbitral tribunal shall be binding, unless otherwise provided by the arbitral tribunal; recognised and enforced upon application to the High Court by a party, irrespective of the jurisdiction or territory in which it was issued subject to the provisions of subsections (2) and (3) of this section. Article 29 of the Regional Centre Rules also gives the tribunal power to grant interim measures; it provides that such interim measures may be made in the form of an interim award.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

ACA does not expressly give the courts the power to grant interim relief in respect of arbitral proceedings. However, the courts are entitled by the Rules of Court and under their inherent jurisdiction to grant interim orders in any matter where there is a situation of urgency and this power of the courts can be inferred from Article 26(3) of the Arbitration Rules. Thus, once a party can show that there is a situation of urgency which will cause irreparable harm if not remedied by an interim order of the court, the court is entitled to grant the order. (See ***Afribank v. Haco*** *supra.*) See also ***Maevis v. FAAN*** (Unreported Suit No. FHC/L/CS/1155/2010).

In the recent case, ***Nigerian Agip Exploration Ltd v. Nigerian National Petroleum Corporation and Oando Oil*** (***NAEL v. NNPC***, unreported CA/A/628/2011), (February 25 2014), the court emphasised that urgency is a condition for the granting of an interim injunction, stating that such injunctions are "*granted in cases of extreme urgency so as to preserve the 'res' pending the determination of the motion on notice*".

The Lagos Arbitration Law expressly confers on the court the power to make interim orders in respect of arbitral proceedings. (See sections 6(3) and 21 thereof.)

A party's request for interim relief would, in most cases, have effect on the *res,* i.e. the subject matter of the dispute and the parties' or tribunal's dealings with it, rather than on the tribunal's jurisdiction. However,

if the nature of interim relief sought affects the arbitral proceedings itself, such as where the relief is sought to restrain the commencement or continuance of arbitration on the grounds that the dispute is not arbitrable or that the arbitration agreement is not valid, etc., then the tribunal's jurisdiction may be affected by the request for relief. Be that as it may, if an arbitral tribunal has already been constituted, such objections or grounds ought to be brought before the tribunal itself.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The courts are generally careful about granting interim reliefs. In litigation, the courts will only grant interim relief in situations of real urgency that might cause irreparable damage if not remedied, where there is a threat of violation of the applicant's rights or interest and damages will not be an adequate remedy, etc. Similarly, in relation to arbitral proceedings, the courts will only grant interim relief when there are convincing circumstances of urgency; for instance, where the arbitral tribunal has not yet been constituted or will not be constituted in time and there is an urgent need to preserve the *res* from destruction or removal from the jurisdiction. Where an arbitral tribunal has already been constituted, it is likely that the courts will require the application for interim relief to be brought first before the tribunal itself under section 13 of ACA.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

ACA does not provide for anti-suit injunctions in aid of arbitration and this procedure has not been tested in Nigeria to our knowledge. The courts are, however, empowered under ACA to order a stay of court proceedings commenced in breach of an arbitration clause.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The national courts have the power to order security for costs under the various Rules of Court. ACA confers similar powers on an arbitral tribunal, but does not confer an express power on the courts to order security for costs in relation to arbitration proceedings. Section 13(b) of ACA provides that the arbitral tribunal may require any party to provide appropriate security in connection with any interim measure made or taken. Sections 26(1) and 29(3) of the Lagos Law contain similar provisions.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Arbitral tribunals are empowered to grant interim measures by virtue of section 13 of the ACA, while by virtue of section 34 of the ACA the national courts are restrained from intervention, save as specifically provided under the ACA. There is no express provision for the enforcement of interim measures granted by an arbitral tribunal, but it is foreseeable that in the event a party attempts to flout such an interim measure, recourse could be had to the national court to prevent such contemptuous attitude.

The Arbitration Law of Lagos State 2009 is of great assistance, however, by virtue of its sections 21 to 30. Specifically, an interim measure granted by an arbitral tribunal is given binding enforceability upon application to the High Court (section 29).

Interestingly, there are two conditions for the grant of an interim measure *viz.* that monetary damages will not be an adequate remedy should the interim measure not be granted and that there are serious issues to be determined in the substantive claim, which would not fetter the discretion of the arbitral tribunal to make subsequent determination.

The arbitral tribunal is as well-empowered to extend, modify, suspend or terminate any interim measure. There is also provision for the tribunal directing for security for the interim measure to be supplied by the applicant party. The applicant party in whose favour an interim measure is granted is also mandated to inform the tribunal of any material change in circumstances on which basis the interim measure was granted *ab initio*. Where a tribunal finds that an interim measure ought not to have been granted, it is empowered to award costs against the beneficiary party.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

ACA and the Arbitration Rules contain minimal procedural provisions on rules of evidence. (See section 20 of ACA and Articles 24–29 of the Rules.) In Nigeria, the substantive law of evidence in legal proceedings is the Evidence Act 2011. This Act repealed the old Evidence Act (Cap E.14 Laws of the Federation of Nigeria 2004) which provided in section 1(2)(a) that the Evidence Act is not strictly applicable to arbitral proceedings. The 2011 Evidence Act does not expressly exclude arbitral proceedings from its application, but the preamble "*...A New Evidence Act which shall apply to all judicial proceedings in or before courts in Nigeria; and for related matters*" implies that the Act does not strictly apply to arbitration. However, the general rules of evidence, like a fair hearing, natural justice, an equal treatment of parties and the full opportunity of parties to present their case, rule against hearsay evidence, etc., are applicable to arbitral proceedings by virtue of the provisions of ACA and case law. With the agreement of parties, an arbitral tribunal may adopt any other rules of evidence which it considers appropriate. Tribunals in Nigeria sometimes adopt the IBA Rules of Taking Evidence.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Article 24(3) of the Arbitration Rules provides that the tribunal may, at any time during the arbitral proceedings, require the parties to produce documents, exhibits, or other evidence within such a period of time as the arbitral tribunal shall determine. Section 20(6) of ACA provides that any party to an arbitral proceeding may issue a writ of subpoena *ad testificandum* or subpoena *duces tecum,* i.e. for the purpose of compelling attendance of a witness to give oral testimony or to produce documents. By these provisions, an arbitral tribunal has the authority to order the disclosure of documents (including third-party disclosure). This power is, however, limited by the *proviso* in section 20(6) of ACA to the extent that no person can be compelled under any writ of subpoena to produce any document which he could not be compelled to produce on the trial of an action.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/ discovery or requiring the attendance of witnesses?

By virtue of section 23(1) of ACA, a court is able to intervene to compel the disclosure of documents. Section 23(1) provides that the court or judge may order that a writ of subpoena *ad testificandum* or of subpoena *duces tecum* shall be issued to compel the attendance before any tribunal of a witness wherever he may be within Nigeria. Thus where, under section 20(6) of ACA or Article 24(3) of the Arbitration Rules, any person refuses to produce documents requested by a party or by the tribunal, the court can compel the disclosure or production of documents.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

ACA and the Arbitration Rules do not provide detailed rules of taking evidence in arbitral proceedings. However, Articles 24 and 25 of the Arbitration Rules contain general provisions on written and oral testimony. The arbitral tribunal is free to determine the admissibility, relevance, materiality and weight of the evidence offered. In practice, where witnesses give evidence by written statements, it dispenses with the need for an examination-in-chief; witnesses simply adopt their written statements and are presented for cross-examination and re-examination. The IBA Rules of Evidence contains and is often resorted to for a detailed procedure in taking evidence. See, for example, Article 8.2 of the IBA Rules on the order of the presentation of witnesses. It is also important to note that in practice, witnesses in an arbitral proceeding in Nigeria are either sworn-in on the Bible (if they are Christians) or on the Quran (if they are Muslims) or are asked to make an affirmation.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

By section 20(6) of ACA, which provides that "*no person can be compelled under any writ of subpoena to produce any document which he could not be compelled to produce on the trial of an action*", it appears that the general rules on privileged documents will apply in arbitration. Generally, privileged communications include: any document or communication made between a legal practitioner (whether external or in-house counsel) and his client in the course of his engagement (see ***Abubakar v. Chuks*** *(2007) 18 NWLR (Part 1066) SC 386)*; documents or agreements made without prejudice between parties in the course of negotiations; and documents which, by the consent and agreement of parties, have been agreed not to be used in proceedings. Documents or communications made in furtherance of an illegal purpose or showing that a crime or fraud has been committed are not privileged. Parties may agree that a document which is ordinarily privileged should be tendered in evidence. In such cases, privilege is deemed to have been waived. Privilege is also deemed to be waived where a party calls his counsel (external or in-house) as a witness and questions are put to the counsel on privileged matters.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Section 26 of ACA sets out the legal requirements of an arbitral award. It provides that an arbitral award must be written, signed by the arbitrator (or a majority of them in the case of three arbitrators), state the date and place it was made, contain the reasons on which it is based and must be published to the parties. Also, an arbitral award must not contain decisions or deal with disputes or matters not submitted to arbitration, must be in accordance with the arbitration agreement and governing law, must be enforceable and must not be contrary to public policy. (See sections 48 and 52 of ACA.) ACA does not state that an award be signed on every page by the arbitrator(s), but, in practice, some arbitrators sign every page of the award for authenticity.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

An arbitral tribunal is properly empowered to clarify, correct, amend or make an additional award pursuant to the provisions of section 28 of the ACA. This power may be exercised *suo motu* or upon a request by a party.

It is germane to note that this power is limited to 30 days and is therefore not a power open to be wielded in perpetuity.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

In Nigeria, an arbitral award is final and binding. An award can only be challenged on limited grounds as stipulated in ACA. A party may apply to the court to set aside the award or to refuse the recognition and enforcement of the award on special grounds under sections 29, 30, 48 and 52 of ACA. Such grounds include:

- Incapacity of a party to the arbitration agreement.
- The arbitration agreement is not valid under the law which the parties have indicated should be applied or under Nigerian law.
- A party is not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case.
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.
- The award contains decisions on matters which are beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place.
- 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, the award was made.
- The subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria or the recognition or enforcement of the award is against the public policy of Nigeria.

Beyond these, an award cannot ordinarily be challenged in substance. See: ***Baker Marina (Nig.) Ltd. v. Danos & Curole Contractors Inc.*** *(2001) 7NWLR (Part) 712 p. 340;* ***Ebokan v. Ekwenibe & Sons Trading Co.*** *(2001) 2NWLR (Part) 696 p. 32 at 36;* and ***Ras Pal Gazi Const.Co. v. F.C.D.A.*** *(2001) 10NWLR Part 722 p. 559 at 564.*

In the case *of* ***Mutual Life and General Insurance Ltd v. Kodi Iheme*** (*2013) 2, CLRN, 68*, the court held that "*there must be an error of law on the face of the award to set aside an arbitral award*". This demonstrates that the Nigerian courts will not be eager to set aside awards where the parties have agreed to resolve their dispute by arbitration and abide by the decision of the arbitral tribunal.

Also, in the case ***NAEL v. NNPC*** (*supra*), the Court of Appeal justified the restrictions for setting aside an award by stating that "*the underlining principle of arbitration is to ensure that parties who have voluntarily elected independent umpires whom they trust to settle their matters should be bound by the decision of the arbitrator without resort to the courts*". The ACA provides for certain exceptions for the court to intervene in the "*interest of justice and fair play*".

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

By virtue of Article 30 of the Arbitration Rules and section 33 of ACA, parties may, by conduct or agreement, waive any ground of challenge that would otherwise apply as a matter of law. However, from the wording of section 33 of ACA, there are some mandatory provisions of ACA from which the parties cannot derogate. These include the existence of a valid arbitration agreement or a valid submission to arbitration and the formal validity of the award.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Nigerian courts are not inclined to set aside or refuse recognition of an award, unless on convincing proof of any or all of the grounds stipulated in ACA. Parties cannot by agreement expand the statutory grounds for the challenge of an award. Arbitration is a voluntary and statutorily recognised dispute resolution mechanism in Nigeria and once parties agree to resolve their dispute by arbitration, they are bound by the award of an arbitration tribunal. This is without prejudice to the right of the parties to compromise an award upon terms.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Generally, an award is not subject to appeal. However, an application for setting aside an award must be brought by the aggrieved party within three months of the date of the award. (See section 29 of ACA.) ACA does not stipulate the mode of commencing proceedings to set aside, i.e. whether by originating summons or by motion, etc. Consequently, the mode of commencement will be determined by the Rules of the Court to which the application is made. Under Order 39 Rule 4 of the High Court of Lagos State (Civil Procedure Rules) 2004, it is by motion on notice, while under Order 52 (15) of the Federal High Court Civil Procedure Rules 2009, it is by an originating motion. The court before which an application to set aside an arbitral award is brought may either suspend proceedings and remit the award back to the arbitral tribunal for reconsideration, or set aside the award.

See ***Triana Ltd v. U.T.B. Plc*** *(2009) 12 NWLR (Part 1155), p. 334.*

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Nigeria has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention is contained in Schedule 2 to the Arbitration and Conciliation Act 1988 Cap A18 Laws of the Federation of Nigeria 2004.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Nigeria is a party to some Regional Conventions concerning the recognition and enforcement of arbitral awards. See, for instance, the Economic Community of West African States (ECOWAS) Energy Protocol. Article 26 thereof provides for the settlement of disputes between a contracting state and an investor by the International Centre for Settlement of Investment Disputes (ICSID) if the investor's country and that of the contracting party are both parties to the ICSID Convention or a sole arbitrator or *ad hoc* arbitration tribunal established under the United Nations Commission on International Trade Law (UNCITRAL) Rules, or an arbitral proceeding under the Organisation for the Harmonisation of Trade Laws in Africa (OHADA). There is also the Treaty of ECOWAS (1993 revised Treaty). Article 16 thereof establishes an Arbitration Tribunal whose powers, status, composition and procedure were to be as set out in a subsequent protocol.

In 1989, the Regional Centre for International Commercial Arbitration Lagos (RCICAL) was established in Lagos, Nigeria under the auspices of the Asian African Legal Consultative Organisation (AALCO) as a non-profit, independent, international arbitral institution to provide, amongst other things, a neutral forum for dispute resolution in international commercial transactions. Its establishment is also geared towards encouraging the settlement of disputes arising from international trade and commerce and investments within the region where the contract was performed. The continued operation of the RCICAL in Nigeria was ratified by a treaty executed in April 1999 between Nigeria and the AALCO. The legal framework for the existence of the RCICAL in Nigeria is embodied in the Regional Act No. 39 of 1999. The RCICAL has an autonomous international character and enjoys diplomatic privileges and immunities under international law for the unfettered conduct of its functions. See the Diplomatic Immunities and Privileges (Regional Centre for International Commercial Arbitration) Order 2001. RCICAL renders assistance in the enforcement of awards made under its Rules. See Rules 35.6 and 35.8 of RCIAL Rules.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In practice, the courts in Nigeria will recognise and enforce an arbitral award in the absence of any valid and convincing ground for the setting aside or for the refusal of recognition and enforcement. A party applying for the recognition and enforcement of an arbitral award shall furnish the court with:

(i) the duly authenticated original award or a duly certified copy thereof;

(ii) the original arbitration agreement or a duly certified copy thereof; and

(iii) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.

If the application is brought in the Lagos State High Court, the application is by motion on notice stating the grounds with supporting affidavit and the above-mentioned documents. See Order 39 Rule 4 of the Lagos High Court Civil Procedure Rules 2012. Under Order 52 Rule 16 of the Federal High Court Civil Procedure Rules 2009, an application for the enforcement of an award may be made *ex parte,* but the court hearing the application may order it to be made on notice. The application shall be supported with an affidavit which shall:

(a) exhibit the arbitration agreement and the original award or certified copies;

(b) state the name, usual or last known place of abode or business of the applicant and the person against whom it is sought to enforce the award; and

(c) state as the case may require either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An award disposes of all disputes between parties that are submitted to arbitration. Thus, if a party brings a court action on the same subject matter that has been disposed of by arbitration and on the same cause of action, the court will dismiss the action on the ground that the issues are *res judicata* on the basis of issue estoppel. Issue estoppel arises where an issue had earlier on been adjudicated upon by a court of competent jurisdiction between the same parties. The law is that either party to the proceedings is estopped from raising that same issue in any subsequent suit between the same parties and the same subject matter. (***Oyerogba v. Olaopa*** *(1998) 13NWLR Part 583 p. 512.*) Issue estoppel also arises in respect of issues which ought to have been raised in the former suit, but which were not raised. It applies to issues raised, but not expressly decided; such issues are deemed to have been decided by implication and thus *res judicata*.

Issue estoppel has been held to extend to arbitration. (See ***Middlemiss v. Hartlepool Corporation*** *(1973) 1 A.E.R. 172.*) The question of whether an arbitral award will operate as *res judicata* has not been fully tested in Nigeria, but the provision of section 31 of ACA implies that an arbitral award has the same effect as the judgment of the court. See sections 31(1) and (3) which provide that an arbitral award shall be recognised as binding and may be enforced in the same manner as a court judgment or order to the same effect. In the case of ***Aye-Fenus Enterprise Ltd v. Saipem (Nigeria) Ltd*** *(2009) 2 NWLR (Part 1126)*, the court held that "*[b]y virtue of the provisions of section 34 of ACA, a court shall not intervene in any matter governed by the Act except where so provided in the Act. If, in arbitration proceedings, an issue is raised for decision and has been decided, that makes it final. The parties cannot be allowed thereafter to reopen it. The reason is that just as the parties would not be allowed to do so in the case of a judgment not appealed from, the point so decided is res judicata. The only jurisdiction conferred on the court is to give leave to enforce the award as a judgment unless there is a real ground for doubting the validity of the award*".

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

If an award is contrary to public policy it is a ground for setting aside or refusing the enforcement of an award under sections 48(2)(b)(ii) and 52(2)(b)(ii) of ACA. ACA does not define the concept of public policy and the concept has not been exhaustively defined, even by Nigerian case law. Generally, public policy is always at the root of the defence of illegality and the concept of breach of public policy connotes breach of Nigerian law or state policies. Nigerian courts may also resort to the standards of public policy as defined by international law, which include:

- That which has a *tendency to be injurious to the public, or is against the public good.* (See ***Egerton v. Brownlow*** *(1953) 4 HLC 1; and* ***Renusagar Power Co. Ltd. v. General Electric Co.*** *(1995) XX YBCA 681, para. 24.*)
  - (a) **Procedural public policy grounds**: fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of the law; manifest disregard of the facts; or annulment at place of arbitration.
  - (b) **Substantive policy grounds**: breach of mandatory rules; fundamental principles of law; or actions contrary to good morals and national interest/foreign relations.

  See *International Law Association Committee on International Commercial Arbitration, Public Policy as a bar to the Enforcement of International Arbitral Awards, London Conference Report (2000) 17–24.*
- Serious irregularities in the arbitration procedure and allegations of illegality. (***Soleimany v. Soleimany*** *(1998) 3 WLR 811; (1999)* QB 785 (CA).)
- Corruption or fraud – see ***Westacre Investments Inc v. Jugoimport – SPDR Holding Co. Ltd. and Others*** *(1999) 2 Lloyd's Rep. 65 (CA), (2000) QB 288 CA;* and ***European Gas Turbines SA v. Westman International Ltd.*** *Rev. Arb 359 (1994) XX YBCA 198 (1995).*
- The award of punitive damages.
- Breach of competition law – see ***Eco Swiss China Time Ltd. v. Benetton International NV*** *(1999) 2 All ER (Comm) 44.*

  See, generally, *Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kroll: Comparative International Commercial Arbitration 2003, p. 730–731.*

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitral proceedings in Nigeria are confidential and general confidentiality rules apply. Article 25(4) of the Arbitration Rules annexed as schedule 1 to the Arbitration and Conciliation Act provides specifically for the privacy of arbitration hearings when it states that hearings shall be held *in camera*, unless parties agree otherwise. In practice, the entire arbitral proceedings, not just hearings, are held *in camera*; only parties, their representatives and counsel are usually allowed to attend. This specifically is in relation to the privacy of arbitration.

The ACA, however, does not contain an express provision on confidentiality in respect of arbitral proceedings; but with regard to conciliation, Article 14 of the Third Schedule to ACA provides that the conciliator and the parties must keep confidential all matters

relating to the conciliation proceedings. However, the practice in arbitration is that the parties to the proceedings adhere to an implied obligation not to use or disclose information or documents from the arbitral proceedings and to hold the same as confidential. Some arbitration clauses, however, provide specifically for confidentiality in the arbitration.

Confidentiality extends to the settlement agreement, except where its disclosure is necessary for the purposes of implementation and enforcement. This explains why there are little or no reported arbitration cases in Nigeria. However, parties may, by agreement, waive confidentiality.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Usually, since arbitration is confidential, information disclosed in arbitral proceedings ought not to be disclosed to third parties except with the consent of the parties. However, just as there are exceptions to the rule of privileged evidence, certain circumstances may warrant the disclosure of such information; for instance, where a party is called upon by the court to make a disclosure of such matters or to produce documents relating to the arbitral proceedings, where such disclosure is necessary for the purpose of the enforcement of an award, to prevent the perpetuation of fraud or illegality, etc. Note that the award itself can be referred to or relied on in subsequent court proceedings. Once the matter gets into the court system, any documents exhibited in the court proceedings may become accessible to the public.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Generally, an arbitrator has a duty to abide by the terms of the arbitration agreement and of the substantive contract in rendering an award. ACA does not specify the measure of reliefs or damages which an arbitrator can award and an arbitrator can award a range of remedies such as injunctions, monetary compensation, general or special damages, declaratory relief, specific performance, interest, cost, and so on. The type of contract or the terms of the substantive contract or arbitration agreement, the law applicable to the same and evidence adduced in proof accordingly would determine how far the arbitrator can go and he must be careful not to exceed it or under- or over-compensate.

13.2 What, if any, interest is available, and how is the rate of interest determined?

ACA does not give an arbitrator express powers to award interest. However, an arbitrator has inherent powers to award interest on amounts successfully claimed based on the overriding principle of the award of interest, which presupposes that interest should be awarded to the claimant, not as compensation for the damage done, but for being kept out of money which ought to have been paid to him. (See ***N.B.N. Ltd. v. Savol W.A. Ltd.*** *(1994) 3 NWLR (Part 333) Page 435 at 463*; and ***R.E.A. v. Aswani Textile Industries*** *(1991) 2 NWLR (Part 176) 639 at 671.*)

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Section 49 of ACA provides that the arbitral tribunal shall award costs in its award. Costs include the fees of the arbitral tribunal, travel, administrative and other expenses incurred by the arbitrators, the cost of expert advice and of other assistance required by the arbitral tribunal, travel and other expenses of witnesses to the extent approved by the tribunal, reasonable costs of legal representation and assistance of the successful party that were claimed during the arbitral proceedings. The general practice is that costs follow the event and the unsuccessful party pays the costs, subject, however, to the circumstances of each case; for instance, the extent to which the other party has been guilty of a delay in the course of the arbitral proceedings. Article 40 of the Arbitration Rules gives the arbitral tribunal the power to apportion costs between the parties based on the circumstances of the case. ACA does not list all the circumstances that may affect apportionment of costs. However, the effect of sealed offers or settlement offers is one relevant factor which arbitrators generally consider. The High Court of Lagos State Civil Procedure Rules 2012 has expressly introduced the effect of settlement offers in the award of costs in judicial proceedings by the provision of Order 49(2) that where an offer of settlement made in the course of Case Management or ADR is rejected by a party and the said party eventually succeeds at trial but is awarded orders not in excess of the offer for settlement made earlier, the winning party shall pay the cost of the losing party from the time of the offer of settlement up to judgment. It is hoped that the proposed amendments to ACA would include this express provision.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

ACA does not provide that an award is subject to tax. Since an award may be enforced as a court judgment, the general rules of judgment debt are applicable to an award. Under Nigerian tax laws, certain services or transactions are taxable by law and an award becomes income to the receiving party which, under a taxable contract or service, is subject to tax. However, in practice, like judgment debts, awards are not usually taxed when enforced.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The rule against champerty and maintenance prohibits third parties, including lawyers, from funding claims or litigation with the aim of deriving some benefit from the outcome. ACA does not provide for maintenance and champerty, but Rule 51 of the Rules of Professional Conduct for Legal Practitioners 2007 (RPC) states that *"[a] lawyer shall not enter into an agreement to pay for, or bear the expenses of his client's litigation, but the lawyer may in good faith advance expenses (a) as a matter of convenience, and (b) subject to reimbursement"*. Rule 50 (3) of RPC provides that "*[e]xcept as provided in sub rule (1) of this rule, a lawyer shall not purchase or otherwise acquire directly or indirectly an interest in the subject matter of the litigation which he or his firm is conducting but he may acquire a lien granted by law to secure his fee and expenses"*. Rule 50(1) of RPC provides that a lawyer may enter into a contract with

his client for a contingent fee in respect of a civil matter provided that the contract is reasonable and is not vitiated by fraud, mistake or undue influence or contrary to public policy and there is a *bona fide* cause of action (in case of litigation). Rule 50(2) of RPC states that "*[a] lawyer shall not enter into an arrangement to charge or collect a contingent fee for representing a defendant to a criminal case*". Thus, contingency fees are legal in Nigeria except for criminal matters and provided the contingency fees are reasonable.

Note that by Rule 50(4) of RPC, a lawyer must first advise the client of the effect of the contingency arrangement and afford the client an opportunity to retain the lawyer under an arrangement whereby the lawyer would be compensated on the basis of a reasonable value of his service. In other words, contingency fee arrangements should be by the client's choice and should not be imposed on the client.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Nigeria ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States in August 1965. The Convention came into force in Nigeria in October 1966.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Nigeria is a party to a significant number of BITs. The International Centre for Settlement of Investment Disputes (ICSID) World Bank Group reports that presently, Nigeria has signed about 19 Bilateral Investment Treaties with 11 in force. The United Nations UNCTAD, however, reports that Nigeria has signed 31 BITs, 15 of them in force. For instance, there is the BIT between the Republic of Turkey and the Federal Republic of Nigeria Concerning the Reciprocal Promotion and Protection of Investments. Article VI thereof provides for submission of disputes to the ICSID, or to an *ad hoc* court of arbitration under the UNCITRAL Arbitration Rules or to the Court of Arbitration of the Paris International Chamber of Commerce. Others include the U.S.-Nigeria Trade and Investment Framework Agreement (TIFA), Nigeria-Egypt, Nigeria-France, Nigeria-UK, Nigeria-Germany BITs for the Promotion and Protection of Investments, and many others. *Nigeria is not a party to the Energy Charter Treaty, although Nigeria became an observer to the Charter in 2003.*

Domestically, the Nigerian Investments Promotion Commission Act allows the settlement of disputes under the ICSID. Section 26 provides that any dispute between a foreign investor and the Nigerian government shall be settled within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the investor's country are parties and where there is disagreement between the investor and the Federal Government as to the method of the dispute settlement to be adopted, the ICSID Rules shall apply.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Most of the investments treaties are in the English language, because English is the official language of Nigeria. However, a few of the BITs are in the official language of the other country with which Nigeria has signed the BIT.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

In Nigeria, section 308 of the 1999 Constitution of the Federal Republic of Nigeria provides immunity from court proceedings for the sovereign who is the executive arm of government. Thus, actions that are similar to this must be strictly construed in favour of the sovereign. The defence of state immunity does not, however, prevent Nigeria as a state or sovereign from agreeing to submit to the authority of an arbitral tribunal. As regards jurisdictional immunity, where Nigeria, as a sovereign state, has agreed to arbitrate, such agreement would be treated as a waiver of immunity. Generally, by virtue of the New York Convention which is domesticated in Nigeria as Schedule 2 to ACA, Nigerian courts have jurisdiction to recognise an arbitral award made under an agreement to arbitrate where the seat of arbitration is Nigeria. Similarly, by virtue of the New York Convention, where Nigeria has signed a valid agreement to arbitrate, an award against it may be recognised and enforced by courts in a foreign jurisdiction in which she has assets. Thus, a valid and binding agreement to arbitrate to which Nigeria is a party will also operate as a waiver of immunity from execution.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Whilst the ACA remains the federal legislation governing arbitration in Nigeria, a recent trend is the increasing insertion of arbitration clauses with the Lagos State Arbitration Law as applicable law. We therefore expect an increased relevance of the Lagos Arbitration Law in the future as disputes begin to arise on those contracts.

Oil and gas, maritime, construction and investment disputes are commonly being referred to arbitration. A noteworthy trend is that such disputes increasingly involve multi-parties and multi-contracts and thus impact on the principle of contractual consent in arbitration.

There is a pending Arbitration and Conciliation Bill currently at the Federal House of Representatives. It has already been passed by the Senate. The proposed Arbitration and Conciliation Bill seeks to improve on the largely antiquated extant ACA. The Bill will provide for interim measures to be granted by the court, the arbitral panel or by an emergency arbitrator. The Bill will also provide for multi-party arbitrations in terms of joinder of multiple parties or consolidation of references. The Bill will have provisions pertaining to arbitrator immunity where the panel acted in good faith in the discharge of its duties. A most interesting and controversial innovation would be the optional Arbitral Award Review Tribunal which is a system by which a dissatisfied party (if parties opted for it in the arbitration agreement) can apply for the review of the arbitral award delivered. It is hoped that the Bill will be passed soon.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The International Chamber of Commerce (ICC) Rules have been

modified to meet with current trends like cost and time effectiveness. For example, Article 24 of the new ICC Rules (2012) confers case management powers on the arbitral tribunal and gives the tribunal the discretion to employ various case management techniques with the aim of reducing time and cost whilst affording the parties better access to justice. The ICC Nigeria Commission on Arbitration (ICCN) launched the New ICC Rules in Lagos, Nigeria on 30 May 2012 in an event which formally presented the Rules to the Nigerian public and achieved capacity building of arbitrators, counsel, parties and their representatives on the Rules.

The Chartered Institute of Arbitrators, UK (Nigeria Branch) organises a programme of events annually to train its members on current arbitration issues. The Lagos Multidoor Court House (LMDC) has created special process tracks (such as the Banking Track which involves case management components and the profiling of suitable cases for referral to the LMDC) for effective dispute resolution. LMDC also organises a Lagos Settlement Week annually whereby cases which have been litigated for many years are identified and referred to the appropriate forum (arbitration or other ADR) for settlement. The Rules of the Lagos Regional Centre for Arbitration (adapted from the UNCITRAL Arbitration Rules of 1976) are modified to provide for the fixing of arbitrator(s) fees in accordance with the Centre's schedule of fees which are based on the amount in dispute, rather than on a daily-rated basis, in order to encourage the expeditious conduct of arbitration and to give the parties an indication of costs at the outset. Other modifications include the collection of deposits on account of fees and costs, ensuring compliance with the Rules and time limits. Likewise, the Lagos Court of Arbitration has its Schedule of Fees to guide parties as to the arbitral tribunal's fees and administrative charges for the arbitration.

There is a pending Arbitration and Conciliation Bill currently at the Federal House of Representatives. It has already been passed by the Senate. The proposed Arbitration and Conciliation Bill seeks to improve on the largely antiquated extant ACA to bring the ACA in line with the new trends in arbitration.

Also, the Chartered Institute of Arbitrators, Nigeria Branch on 6 July 2017 launched its Micro, Small and Medium Enterprises Scheme (MSME), which is intended to provide simple, cost-effective and timely resolution of commercial disputes in less than 90 days from the appointment of a sole arbitrator or as soon as practicable. The MSME Arbitration Scheme is applicable for the resolution of commercial disputes with a monetary value from N250,000.00 (two hundred and fifty thousand naira) to N5,000,000.00 (five million naira).

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She has also previously served as: General Manager HR/Corporate Services/Company Secretariat, African Petroleum Plc; Company Secretary/Legal Adviser, defunct Ivory Merchant Bank Limited; and Associate, Chike Chigbue & Co. (Temple Chambers). She is a: Member, International Bar Association; Member, International Trademark Association (INTA); Member, Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN); Member, Women in Management & Business; Member, International Federation of Women Lawyers (FIDA); and Member, Advertising Practitioners Council of Nigeria (APCON).

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Founded in 1947 by a leading Nigerian jurist who later became a Justice of the Nigerian Supreme Court, PUNUKA Attorneys and Solicitors is one of Nigeria's, and indeed Africa's, leading law firms. With its extensive work and reputation in commercial litigation, arbitration & ADR, capital markets and securities regulation, telecommunications, international trade and investment, government regulatory services, privatisation and consultancy, PUNUKA is a fully-integrated and multi-dimensional law practice. The firm consists of five Partners and over twenty Associates and provides services to a highly-diversified client base from its offices in the cities of Lagos, Abuja and Asaba. PUNUKA is dedicated to delivering the highest standard of services, providing quality legal advice and delivering effective solutions to medium- and large-scale clients across all business sectors within and outside Nigeria.

Sierra Leone

BMT LAW

Gelaga King

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The agreement must be in writing and must be signed by persons who are competent to enter into such agreement. If it is not embodied in a contract, then it should not be precluded by the governing contract, and the parties should specifically identify the contract in the agreement and state a clear intention that the agreement overrides any provision in the governing contract that might be inconsistent with the arbitration.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The agreement should stipulate the notice required to be given to the party allegedly in default. It should identify which rules will be applied to the arbitration, the number of arbitrators to be appointed and the seat of the arbitration. It should also stipulate the governing law.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Where an agreement complies with the provisions of the Arbitration Act, the Courts will generally give effect to it. In these circumstances, the High Court will stay proceedings brought before it unless there are good reasons for not doing so.

The Fast Track Commercial Court (FTCC) makes specific provision for Alternative Dispute Resolution. All claims filed in the FTCC are referred to a Judge for a pre-trial settlement conference within three days of the filing of a reply by the Defendant. The parties are encouraged to try to settle the matter and avoid going to trial if possible.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Arbitration is governed by Cap 25 of the Laws of Sierra Leone 1960 (the Arbitration Act).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The current Arbitration Act makes no provision for international arbitration proceedings. Parties are, nevertheless, able to elect international arbitration using internationally recognised rules such as those by the LCIA or the ICC. Sierra Leone is a signatory to UNCITRAL and The Investment Promotions Act 2004 provides for arbitration under the UNCITRAL rules, in the event of a dispute between an investor and the Government of Sierra Leone. The Public Private Partnership Act 2014 similarly provides for international arbitration, in the event of a dispute between a contracting authority and a private partner.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The current act is outdated and is not based on the UNCITRAL model. A draft Arbitration Bill based on UNCITRAL is expected to be enacted in the near future.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

There are currently no mandatory rules that govern international arbitration sited in Sierra Leone. This is likely to change in the near future. Cap 25 provides rules which govern domestic arbitration and this is currently a factor that parties consider when deciding on the seat of international arbitration.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

1. The Courts will not enforce matters that are illegal (such as fraudulent or corrupt agreements) or contrary to public policy.
2. Alternative Dispute Resolution is generally encouraged. Any claim filed in the FTCC is allocated to a Judge who will invite the parties for a pre-trial settlement conference within three

days of a defence being filed. The parties will be entreated to settle the issues instead of going to trial. Only if this fails will the dispute proceed to a trial. The Courts will generally give effect to arbitration clauses in contracts and it is common for Joint Venture Agreements to contain arbitration clauses. Commercial lease agreements and building and construction agreements usually contain an arbitration clause.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

No. Under Cap 25, this is currently a matter for the High Court.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Section 5 of Cap 25 enables the High Court to stay the proceedings and give effect to the arbitration agreement. Although Cap 25 does not extend to international agreements, the Court will give effect to the intention of the contracting parties if Court proceedings are issued in breach of an international arbitration agreement.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

If a party to an agreement raises an issue of jurisdiction or competence, Cap 25 requires it to be resolved by the High Court. A domestic arbitration tribunal cannot determine a challenge to its jurisdiction or competence. If an international arbitration stipulates the rules governing disputes and identifies Sierra Leone as the seat of the arbitration, then the Court is likely to have regard to the relevant rules in determining any preliminary challenges by one of the parties.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There are no circumstances in which national law allows an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Limitation Act 1961 prescribes limitation periods. For example, the limitation period for contractual disputes is six years.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

There is no effect.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

By considering the subject matter of the dispute, and by considering the validity of relevant clauses and giving effect to the clear written intention of the parties in dispute.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There are no mandatory laws that prevail over the law chosen by the parties. However, any assistance sought from the Courts must be compatible with domestic law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Domestic arbitration agreements must comply with Cap 25 to be valid and legal. The legality and validity of international arbitration agreements will be determined by the choice of law and seat stated in the agreement. The National Courts will give effect to the intention of the parties.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are none.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The parties are able to make an application to the High Court for it to provide arbitrator(s).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Section 6 of Cap 25 permits the Court to intervene if:

- The agreement provides for the appointment of a single arbitrator and all parties cannot agree on the choice of arbitrator.
- The appointed arbitrator refuses to act, is incapable of acting or dies and the agreement does not provide for the means of appointing a substitute or the parties do not appoint a substitute.
- The parties or two arbitrators must appoint an umpire or a third arbitrator and do not appoint him.
- The appointed umpire or third arbitrator refuses to act, is incapable of acting or dies and the agreement does not provide for the means of appointing a substitute or the parties do not appoint a substitute.

The Act does not state the procedure by which the Court appoints the arbitrator(s).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Arbitrators are under a duty to be independent, impartial and neutral. Potential conflicts should be disclosed and arbitrators should recuse themselves if conflicted.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

There are none. The parties are at liberty to determine what rules will govern the arbitration.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are none but the parties will be expected to have attempted to resolve matters amicably before commencing proceedings.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no particular rules that govern the conduct of local counsel in arbitral proceedings. However, counsel are bound by the Legal Practitioners Act 2000 as amended and the Legal Practitioners (Code of Conduct) Rules 2010 which regulates the conduct of all counsel authorised to practise.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Cap 25 empowers arbitrators to administer oaths, to make an award in whole or in part and to correct any clerical mistake or error in an award.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Legal Practitioners Act restricts the appearance of lawyers from other jurisdictions in legal matters. It is not clear that such restrictions do not apply to arbitration proceedings, as the act is silent on this issue.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

An arbitrator acting in the furtherance of his duties will be granted immunity.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes. Cap 25 enables the Court to deal with procedural issues. The matter has yet to be tested in respect of international arbitration but this is expected to be addressed in the new Arbitration Act.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The current Arbitration Act contains no provisions dealing with preliminary or interim relief. An International Arbitral Tribunal would not need to seek the assistance of the Court to award preliminary or interim relief in accordance with its rules. An arbitral tribunal must seek the assistance of the Court for enforcement of any such award.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The High Court is entitled to grant preliminary or interim relief in proceedings subject to arbitration. It is entitled do so if jurisdiction is challenged or the validity of the arbitration agreement is challenged. A request for relief can have an effect if the jurisdiction of the arbitration tribunal is challenged.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Applications are dealt with on the merits and the circumstances of the particular case.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Cap 25 (section 5) permits the High Court to stay proceedings if there is a valid arbitration agreement and it is satisfied that there is no cogent reason why the matter should not to be referred to arbitration. The applicant must be able and willing to take all the necessary measures to settle the matter by arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Cap 25 makes no provision for security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Cap 25 (section 13) permits the Courts to enforce domestic arbitral awards. Preliminary relief and interim measures ordered by arbitral tribunals in other jurisdictions can be registered with the High Court and may then be enforced as if they were judgments of the High Court of Sierra Leone. The procedure for the recognition and enforcement in Sierra Leone of judgments and orders issued in jurisdictions outside Sierra Leone is governed by the provisions of Cap 21 of the Laws of Sierra Leone (The Foreign Judgments (Reciprocal Enforcement) Act 1960) and Order 45 of the High Court Rules (Reciprocal Enforcement of Judgment). Orders from other jurisdictions are difficult to enforce as Sierra Leone is not a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. As a result, only foreign judgments from countries covered by Cap 21 can be enforced in Sierra Leone. Registration in the High Court is a mandatory precondition to enforcement.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Cap 25 (paragraph (f) of the Schedule) requires all parties and related persons to give evidence on oath or affirmation and to produce all relevant documentary material for examination by the arbitrator(s). Paragraph (g) of the Schedule stipulates that witnesses shall give evidence on oath or affirmation if the arbitrator(s) think(s) fit.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Cap 25 (section 9) enables witnesses to be summoned and documents to be produced by subpoena. Cap 25 (paragraph (f) of the Schedule) provides the tribunal with a wide discretion to order the parties to do anything which the arbitrator(s) require for the proper conduct of the arbitration.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Cap 25 (section 14) enables the National Courts to compel the attendance of witnesses before the tribunal and to compel the production of documents. The Court would need to be satisfied that the documents would be disclosable in a trial of the action.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Cap 25 (section 8) enables the arbitrator(s) to administer oaths or affirmations. Cross-examination is allowed.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Legal advice in contemplation of litigation and communications between client and counsel are privileged. Not all communications with outside counsel and/or in-house counsel attract privilege. The nature of the communication will determine whether it is privileged or not. Communications aimed at settling a dispute on a "without prejudice" basis are not admissible in Court proceedings.

Privilege may be expressly waived by the party to which the privilege attaches.

Under the Commercial and Admiralty Rules 2010, parties are encouraged to attend the pre-trial settlement conference with all the relevant documents, in the knowledge that any disclosure made at this stage will be without prejudice. However, if any settlement fails, then the pre-trial Judge will give directions as to the future conduct of the trial, including the disclosure of any documents.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The award must be signed by the arbitrator. Cap 25 does not state that reasons should be given but in practice they invariably are.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Cap 25 (section 8) enables the tribunal to correct clerical mistakes or errors in an arbitral award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Cap 25 (section 12) entitles the parties to challenge an arbitral award on the grounds of misconduct by the arbitrator or on the grounds that the award has been improperly procured.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Yes, they can.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they cannot.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Appeals can only be brought on one of the two grounds set out at question 10.1 above. Cap 25 (section 2) requires any appeal to be lodged with the High Court.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Not yet.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Under Cap 25 (section 23), arbitration awards are enforceable in the National Court, in the same manner as a judgment or order of the Court.

It is difficult to enforce awards from another jurisdiction as the only foreign judgments that can be enforced in Sierra Leone are those that are from countries that fall under Cap 21. These judgments must be registered pursuant to the High Court Rules 2007.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Cap 25 (paragraph (h) of the Schedule) makes an award final and binding. The fact that certain issues have been finally determined by an arbitral tribunal precludes those issues from being re-heard in a National Court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

There is no precedent of refusal of enforcement of an arbitral award on public policy grounds. The standard of proof required in civil proceedings is the balance of probabilities.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitral proceedings are usually confidential because the parties include a confidentiality clause in their agreement. If, however, any aspect of the arbitration clause or arbitral proceedings requires the assistance of the Court, it will be dealt with in open Court, as all Court proceedings are held in public.

In the case of an arbitration in the FTCC, all records of the arbitration including the award remain confidential and records will be returned to the parties once the case has been settled and will no longer be held on the Court file (Commercial and Admiralty Court Rules 2010).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings cannot be referred to and/or relied on in subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The tribunal cannot make an award that the Courts would not be able to. Subject to this, there are no limits to the type of remedies that are available.

13.2 What, if any, interest is available, and how is the rate of interest determined?

If the agreement contains an interest clause, then it will usually be given effect. Nevertheless, the Courts have the power to award interest at such a rate as they think fit.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Cap 25 (paragraph (i) of the Schedule) gives arbitrator(s) a wide discretion to award fees and/or costs in whole or in part and on such terms as they think fit.

The general rule is that the successful party will be awarded its costs.

Cost calculation

Typically, arbitral tribunals base their calculation of costs on the parties' respective cost submissions.

Factors considered

The arbitrator or arbitral tribunal will consider factors such as the:

- Amount of the dispute.
- Complexity of the dispute.
- Parties' respective costs submissions.
- Allocation of costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

This is case-specific. The successful party may have to declare it on their tax returns.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no restrictions on third parties funding claims but the source of the money must be legitimate and comply with the anti-money laundering regulations.

Contingency fees are prohibited by the Legal Practitioners Act 2000 as amended.

There are no professional funders active in the market, either for litigation or arbitration but insurance cover may be available and it is a matter for the individual insurance companies. However, this is not a widely used method of litigation funding.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, it has.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Sierra Leone is party to three BITs, with: Germany (1965); the UK (1981, revised in 2000); and China (2001, not yet in force).

Sierra Leone is a member of the Organisation of Islamic Cooperation (OIC). The agreement for the protection, promotion and guarantee of investments among Member States of OIC contains standard provisions on the treatment of foreign investments and provides for disputes to be resolved through conciliation or arbitration.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

No, it does not.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Courts follow customary international law and distinguish between sovereign acts and non-sovereign acts. Immunity will be granted in respect of sovereign acts (acts done by a state in its capacity as sovereign) but not in respect of non-sovereign acts such as those relating to the commercial activities of a state. (*The Bank of Credit & Commerce vs The Charge D'Affaires of the Republic of the Ivory Coast Embassy in Sierra Leone Acting for and on behalf of the Republic of Ivory Coast* [MISC. APP. No. 3/82] [p.79–102] Supreme Court, Sierra Leone, 21 September 1983.)

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

A draft Arbitration Act has been prepared. It is modelled on UNCITRAL and will bring Sierra Leone in line with current international standards.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

See above.

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BMT LAW
Barristers & Solicitors

BMT is one of Sierra Leone's premier corporate law firms. The firm has three partners and six associates and is recognised for its integrity and for providing professional legal services of the highest calibre. It draws on its knowledge of the local investment environment and an in-depth understanding of the socio-political climate to advise domestic and international clients on a diverse range of legal matters.

BMT recognises that in the world today clients, whatever their size and status, need swift decisive resolutions. We provide clients with robust and effective representation through litigation including arbitration and mediation, advisory, negotiation, crisis management and dispute settlements.

The firm prides itself on its commitment to uncompromising professional diligence which affords paramount importance to clients' needs. The firm has a significant wealth of experience and specialist expertise that covers all aspects of domestic and international law.

Chapter 53

South Africa


John Bell


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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Section 1 of the Arbitration Act 42 of 1965 ("Arbitration Act") defines an 'arbitration agreement' as "*a written agreement providing for the reference to arbitration of any existing or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not*".

Chapter II, Article 7 of the International Arbitration Act, 15 of 2017 ("International Arbitration Act") defines an arbitration agreement 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*".

As such, an arbitration agreement must:

1. be in writing; and
2. identify the existing or future dispute relating to a matter specified in the contract.

Though the arbitration agreement must be in writing, it need not be signed. Oral arbitration agreements are not invalid but are regulated only by common law, presenting substantial difficulties in relation to enforcement.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The following additional elements should be included:

1. where an arbitrator is not expressly named provision should be made for selecting one;
2. the seat of the arbitration;
3. the parties' choice of law, in respect of both the governing law as well as the law of the arbitration agreement; and
4. the rules for the arbitration proceeding, which are, in practice, usually adopted or adapted from those of a specified institution or administering body (i.e. the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), or the Arbitration Foundation of Southern Africa ("AFSA")).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Following the principle of *pacta sunt servanda*, South African courts are generally loathe to set aside an arbitration agreement. The presumption is that such an agreement is binding, with the onus to prove otherwise on the party seeking to avoid arbitration. A court would only set aside an arbitration agreement on 'good cause shown', which has, in the past, been taken by South African courts to include allegations of fraud or misconduct on the part of the arbitrator. In practice, arbitration agreements are rarely set aside. Importantly, South African law does not endorse the principle of severability, where the contract is invalid the arbitration clause will also be invalid. Notable exceptions are where the contract was terminated by repudiation or due to its voidability, in which cases the arbitration clause may be severed, surviving termination.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act and International Arbitration Act underpin and support the arbitration process and are the primary points of departure for enforcement.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Domestic arbitrations are governed by the Arbitration Act, and international arbitrations and their enforcement are governed by the recently enacted International Arbitration Act.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The International Arbitration Act states in its preamble that the purpose of the Act is to "*provide for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law, into South African law*".

In addition, Section 3 of the International Arbitration Act states that the object of the Act is, *inter alia*, to adopt the Model Law for use in international commercial disputes.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Chapter V, Article 19 of the International Arbitration Act states that the parties may agree the rules and procedure to be followed failing which the arbitrator may do so.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The Arbitration Act provides that the following disputes or causes of action cannot be resolved by way of arbitration:

1. matrimonial causes or any matters incidental thereto; and
2. matters relating to the status of a person.

At common law, arbitration may not be pursued in criminal matters. Furthermore, disputes pertaining to a possible contravention of competition legislation may not be arbitrated.

In insurance-related claims, notwithstanding any contrary provision of a policy or agreement relating thereto, the owner of a domestic policy is entitled to enforce his or her rights against an insurer in a court of competent jurisdiction and may not be compelled by a policy or agreement to refer a dispute directly to arbitration. However, this statutory restriction does not extend to disputes relating to the quantification of any such claims.

The Protection of Investment Act prescribes domestic mediation as a first step to an investment dispute, provided the investor and the Government can agree on the appointment of the mediator. An alternative for investors is to approach the domestic courts. As mentioned above, exhaustion of local remedies is required before the Government can be approached to consent to international investment arbitration.

The arbitrability of a dispute may be challenged under the Arbitration Act. If the allegation is that the particular dispute is not arbitrable, the party seeking to avoid arbitration may apply to the court for an order setting aside the arbitration agreement, declaring that the dispute shall not be referred to arbitration, or declaring that the arbitration agreement shall cease to have effect with reference to any dispute referred.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

In relation to the Arbitration Act, there is no legislated concept of 'competence-competence'. The parties may, on submission to arbitration, agree that the 'competence-competence' principle will apply. The rules of all three major administered arbitration institutions in South Africa do allow for such competence. Absent any such provision in the adopted procedural rules, an arbitrator will ordinarily rule on the question of his or her jurisdiction as a matter of practicality. But, a party may apply to have any award set aside if, in so doing, the arbitrator exceeded his or her powers, which includes exceeding his or her jurisdiction.

In terms of Chapter IV, Article 16 of the International Arbitration Act, an arbitral tribunal possesses the ability to rule on the question of its own jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Generally, a party to court proceedings contending that the dispute is arbitrable will raise a special plea to stay court proceedings. The party seeking to avoid the arbitration agreement may, in terms of section 3(2) of the Arbitration Act, apply to court, on good cause shown for an order:

1. setting aside the arbitration agreement;
2. that the particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
3. that the arbitration agreement shall cease to have effect with reference to any dispute referred.

An applicant who applies under section 3 for a matter not to be referred to arbitration bears an equally heavy onus to the party who resists a special plea that the proceedings should be stayed and the matter be referred to arbitration. Parties do not waive the right to arbitrate by participating in court proceedings.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Where one of the parties contests the validity of the agreement containing the arbitration agreement and alleges that the arbitrator has no jurisdiction, and the arbitrator declines to proceed with the arbitration, one of the parties may apply to the court for a declaratory order.

In terms of section 33(1) of the Arbitration Act, should a party be of the opinion that the tribunal's decision as to its own jurisdiction is grossly irregular or that it has exceeded its powers, the court may, on the application of either party, review and set the award aside. The tribunal's decision may, however, not be appealed unless an appeal provision has been specifically agreed by the parties.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There are no circumstances under which South African law allows an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Generally, there are no limitation periods for the commencement of arbitration, save as may be contractually stipulated. The usual prescriptive periods for the prosecution of claims as provided for in the Prescription Act, 68 of 1969 ("Prescription Act") may still apply and are not excluded because the dispute is referred to arbitration. The Prescription Act provides that a contractual claim is extinguished by prescription if the creditor fails to enforce the claim within three

years of the date on which the debt became due. The debt is not deemed to be due until the creditor has knowledge of the identity of the debtor or could have acquired such knowledge by the exercise of reasonable care. A referral to arbitration, where the creditor claims payment of a debt, interrupts the prescriptive period. Prescription of a debt is substantive in nature, in that the creditor's right to the payment of the debt is extinguished, rather than the right to seek enforcement.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

For arbitrations constituted under the Arbitration Act, insolvency proceedings will not terminate the arbitration agreement unless the agreement provides otherwise. Under section 5 of the Arbitration Act, the referral to arbitration will be treated as any other court proceedings would by the liquidator.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Usually, the law applicable to the substance of the dispute is agreed by the parties in the arbitration agreement. In the absence of prior agreement, the tribunal will determine which substantive law applies in accordance with the applicable principles of private international law, as applied at the seat of arbitration in relation to contractual choice of law.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Usually, the law applicable to the substance of the dispute is agreed by the parties in the arbitration agreement. In the absence of prior agreement, the tribunal will determine which substantive law applies in accordance with the applicable principles of private international law, as applied at the seat of arbitration in relation to contractual choice of law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

In the absence of prior agreement, the tribunal will determine which substantive law applies in accordance with the applicable principles of private international law, as applied at the seat of arbitration in relation to contractual choice of law.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

No. There are no statutory requirements or restrictions in relation to an arbitrator's independence, neutrality, nationality, formal qualifications or expertise, and the parties are at liberty to agree on an arbitrator as they see fit. This notion is endorsed by Chapter III, Article 11 of the International Arbitration Act.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If a parties' chosen method for selection fails, section 12 of the Arbitration Act provides that the court has the power, in certain circumstances, to appoint an arbitrator/tribunal or to remove an arbitrator on good cause. The rules of arbitration institutions, to the extent that they are applicable, will also usually provide for a default selection procedure.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

As above, if the selection mechanism fails for any reason, the court may, upon application by a party to the arbitration agreement, appoint an arbitrator in the circumstances provided for in section 12 of the Arbitration Act and Chapter III, Article 11 of the International Arbitration Act.

In terms of section 13(2)(a) of the Arbitration Act, a court may at any time, on good cause shown and on the application of a party to the reference, set aside the appointment of an arbitrator or remove such person from office.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

No formal rules of evidence find application in arbitration proceedings and the arbitrator is bound simply to abide by the standards of natural justice, as are reflected in the Arbitration Act and Model Law. Arbitrators generally deal with conflicts by way of full disclosure, in the ordinary course. Where an arbitrator is nominated through a specific arbitration body, the procedure for disqualifying an arbitrator will be specified in that institution's rules.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Again, no formal rules of evidence find application in arbitration proceedings. The process is subject only to the rules of natural justice. The procedure will usually be determined by the rules of the arbitration institution administering the arbitration. In the absence of a set of rules, the parties are free to agree on any set of procedural rules, including the formal rules of court or other rules set out specifically for purposes of arbitration.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

As above, and in the absence of agreed rules which determine the procedural steps in the arbitration, there are no particular procedural steps that are required by law, other than those set out in sections 14 to 22 of the Arbitration Act. However, the Arbitration Act contains

provisions regarding the need to give adequate notice of arbitration proceedings and how to proceed in the eventuality that a notified party fails to participate. It also deals with summoning witnesses to testify and to disclose documents.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no rules specifically governing the conduct of local or foreign counsel in a domestic arbitration, albeit that both members of the Law Society of South Africa as well as the General Bar Council would remain accountable for their professional conduct to their respective professional bodies.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

An arbitrator's powers and obligations are determined by the Arbitration Act, International Arbitration Act, the common law and the terms of reference to arbitration. Among other things, a tribunal may, in the absence of contrary provisions in the arbitration agreement and on the application of any party to the reference:

1. require any party to make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection;
2. require any party to allow the inspection of any goods or property involved in the dispute;
3. appoint a commissioner to take the evidence of any person in South Africa and forward such evidence to the tribunal;
4. from time to time, determine where and when the arbitration proceedings shall be held;
5. administer oaths to the parties/witnesses giving evidence;
6. examine the parties/witnesses appearing/summoned to give evidence;
7. inspect any goods or property; and
8. make interim awards.

The obligations of the tribunal include the duty to:

1. act fairly;
2. make an award which is final, certain and legal;
3. make an award in the presence of both parties, unless agreed otherwise;
4. make an award at the proper place and within the timeframe specified in the arbitration agreement;
5. attend all proceedings;
6. dispose of every question/issue submitted;
7. not exceed the submissions of the parties in determining any issue, procedural or substantive;
8. decide which party should bear the costs of the proceedings;
9. execute the award together at the same time and place and in the presence of the parties (if the award is made by more than one arbitrator);
10. not hear the evidence of a party/witness in the absence of the other party;
11. give notice of proceedings;
12. make an award in accordance with the ordinary law;
13. not receive secret information from one of the parties;
14. receive all evidence;
15. keep a record of the proceedings; and
16. not depart from a stated intention.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

In South Africa, only admitted lawyers who have been admitted by the High Court of South Africa to practise law may appear in court. Such restrictions do not, however, apply to arbitration proceedings in South Africa and, as such, foreign nationals can act as counsel or arbitrators in arbitrations.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Section 9 of the International Arbitration Act provides for arbitrator immunity unless any act or omission of an arbitrator is shown to have been done in bad faith.

The Arbitration Act does not have any express terms on arbitrator immunity.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Where local courts intervene in the proceedings, section 21 of the Arbitration Act empowers the courts to make orders in respect of any matters specified in the section including:

1. security for costs;
2. discovery of documents and interrogatories;
3. examination of witnesses;
4. submission of evidence by affidavit;
5. security for the amount in dispute;
6. substituted service; and
7. appointment of a receiver.

In addition, in terms of section 20, a tribunal may, on application by a party or of its own volition, refer any question of law arising in the course of the reference in the form of a special case for the opinion of a court or for the opinion of counsel. This must be before it makes a final award and on the application of any party to the reference or if the parties to the reference so agree. An opinion subsequently provided by the court/counsel is final and binding.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Section 26 of the Arbitration Act allows an arbitration tribunal to issue an interim award at any time within the period allowed for the making of an award. The nature of the interim relief that the arbitrator is capable of providing is not specified and may cause difficulties but is said to include: document discovery; furnishing of security for costs; inspection orders; interim custody orders or asset preservation orders; interim interdicts; and orders securing the amount claimed in the dispute.

Chapter IVA, Article 17 of the International Arbitration Act also empowers an arbitral tribunal to grant interim relief.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

After the institution of arbitration proceedings, the court may, upon application:

1. provide an opinion on any question of law arising during the course of the proceedings, which shall be binding and not subject to appeal;
2. order the discovery of documents or interrogatories;
3. order any party to furnish security for costs;
4. order the inspection, interim custody, preservation or sale of goods or property;
5. grant an interim interdict or similar relief; and
6. make an order securing the amount in dispute in the reference.

The court's powers do not derogate from the tribunal's powers to make orders in respect of any such matters such as it may be authorised to decide upon.

Chapter II, Article 9 of the International Arbitration Act also makes allowance for a court to grant interim measures though these measures are not listed.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In practice, the courts may make orders for interim relief in terms of section 21 of the Arbitration Act, provided that the order falls within the scope of the section.

With respect to Chapter II, Article 9 of the International Arbitration Act, no practice has yet been established given the International Arbitration Act was only passed in December 2017.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

There are no reported cases in which a South African court has issued an "anti-suit injunction" in aid of arbitration in another jurisdiction. There are diverging opinions as to whether a South African court would have jurisdiction to grant an interdict prohibiting a party from instituting proceedings in a non-South African jurisdiction. Apart from the specific remedy contemplated in section 6 of the Arbitration Act, a party would also be entitled to raise a special defence of *lis pendens* if it is able to demonstrate that there are already pending proceedings between the same parties in another forum (including an arbitral forum) based on the same cause of action and subject-matter, which may result in the dismissal or at least the suspension of the secondary proceedings pending the outcome of the prior proceedings.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The Arbitration Act does not specifically empower the tribunal to make an order for security for costs. As above, the scope for interim relief from the tribunal in section 26 is vaguely phrased. The rules of most administering bodies allow for this relief. In the absence of agreement, the parties would have to apply to court for such an order. In terms of section 21(1) of the Arbitration Act, a court has the power to make an order as to security for costs. Most sets of South African procedural rules, however, will bridge this gap.

Chapter IVA, Article 17(2)(e) of the International Arbitration Act empowers an arbitral tribunal to order security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The Arbitration Act defines an award as including an interim award, so enforcement of interim relief is no problem in practice.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

As above, the parties are not bound by formal rules of evidence in conducting arbitration proceedings. While sections 14 to 22 of the Arbitration Act and the Model Law incorporated into the International Arbitration Act govern the powers of the arbitral tribunal in relation to procedure and the procurement of evidence, the Arbitration Act does not specify any particular rules to which the arbitral tribunal is bound in establishing the facts of the case. In the absence of agreement to the contrary, an arbitrator will ordinarily apply South African law of evidence. It is up to the parties to determine what evidence should be led, whether expert evidence is necessary and, if so, the nature of the expert evidence required.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

An arbitrator generally has the same authority to order the disclosure of documents as a court. If the arbitration agreement does not stipulate the rules for the conduct of the arbitration proceedings, then in terms of section 14 of the Arbitration Act, the arbitrator may require the parties to:

1. make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection;
2. deliver pleadings or statements of claim and defence, give particulars of their claim or counterclaim, and allow any party to amend its pleadings or statements of claim or defence;
3. allow the inspection of any goods or property involved in the reference, which is in the possession or under the control of the parties;
4. appoint a commissioner to take the evidence of any person in South Africa or abroad and to forward such evidence to the tribunal in the same way as if he or she were a commissioner;
5. appointed by the court;
6. subject to any legal objection, examine the parties appearing to give evidence in relation to the matters in dispute and require them to produce books, documents or things that may be required and that could be compelled on the trial of an action;
7. subject to any legal objection, examine any person who has been summoned to give evidence and require the production of any book, document or thing that such person has been summoned to produce; and

8. with the consent of the parties or on an order of court, receive evidence given by affidavit; and inspect any goods or property involved in the reference.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/ discovery or requiring the attendance of witnesses?

The right of a court to intervene in matters of disclosure and to compel disclosure is provided for in section 21 of the Arbitration Act. In practice, however, the arbitrator directs all disclosure process and the courts are approached only where third parties unrelated to the arbitration must be compelled to produce documents.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

There are no laws, regulations or professional rules which apply to the production of written and/or oral witness testimony. There is no requirement that witnesses must be sworn in before the tribunal, although section 14 (b)(ii) of the Arbitration Act empowers the arbitrator to administer oaths/affirmations. The usual (but not invariable) practice is that witnesses are sworn in. Increasingly, witness statements stand as evidence in chief. Cross-examination is always allowed.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

There are no rules of privilege specific to arbitration proceedings. The common law rules of privilege are those which are applicable in litigation. In South Africa, 'legal professional privilege' provides that all communications between a legal advisor and a client are privileged if the legal advisor, acting in a professional capacity at the time, provides the client with legal advice in confidence for purposes of pending or contemplated litigation, or for the purposes of obtaining legal advice. Privilege may be claimed by in-house counsel and foreign lawyers. Privilege may also be waived expressly or by implication. In making a decision regarding implied waiver of privilege, courts will have regard to the requirements of fairness and consistency. The Arbitration Act refers to privilege in section 22 as being applicable to a witness subpoenaed to give evidence or to produce physical evidence before a court of law.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

The formal requirements, in terms of sections 23 to 25 of the Arbitration Act, for an award are the following:

1. the award must be in writing;
2. the award must be made within the period prescribed by the Arbitration Act (four months) or by the arbitration agreement or within any extended period allowed by the parties to the court; and
3. the award must be published by the tribunal or parties or their representatives being present having been summoned to appear.

Reasons need not be given for the award and the award need not be reviewed by any other body.

According to Chapter VI, Article 31, of the International Arbitration Act, an award shall:

1. be made in writing;
2. be signed by the arbitrator(s);
3. state the reasons upon which it is based;
4. state the award's date; and
5. state the judicial seat of the arbitration.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Section 30 of the Arbitration Act and Chapter VI, Article 33 of the International Arbitration Act empowers an arbitrator to correct clerical mistakes and patent errors arising from an accidental slip or omission in any award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

In terms of section 28 of the Arbitration Act, an award is final and not subject to appeal unless the arbitration agreement provides otherwise.

An award may be set aside in terms of section 33 of the Arbitration Act, upon application by either of the parties on notice, in instances where:

1. any member of the arbitration tribunal has misconducted himself in relation to his or her duties as arbitrator or umpire;
2. an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings;
3. an arbitration tribunal has exceeded its powers; and
4. an award has been improperly obtained.

Chapter VI, Article 34 of the International Arbitration Act makes provision for the setting aside of an award in instances where:

1. a party to the arbitration agreement referred to in article 7 was under some incapacity; and
2. the arbitration agreement is invalid.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

In terms of section 28 of the Arbitration Act, an award is final and not subject to appeal unless the arbitration agreement provides otherwise.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

If the arbitration agreement provides for an appeal, the parties could, by agreement, expand the scope of the appeal. However, arbitration agreements that provide for an appeal generally do not expand the scope of appeal beyond the grounds applicable in appeals from the High Court to the Supreme Court of Appeal.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Where the arbitration agreement provides for an appeal, the procedure will be determined by the arbitration agreement of the parties or by the rules of the arbitration body administering the arbitration.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The Enforcement of Foreign Arbitral Awards Act 40 of 1977 gave effect to the New York Convention. It provided that any division of the High Court was competent to make a foreign arbitral award an order of court – a 'foreign arbitral award' being one:

1. which was made outside South Africa; or
2. whose enforcement was not permissible in terms of the Arbitration Act, but which was not in conflict with the Recognition and Enforcement of Foreign Arbitral Awards Act.

However, the above Act has been repealed by the International Arbitration Act which now governs the recognition and enforcement of foreign arbitration arbitral awards in accordance with Chapter VIII, Article 35 of the International Arbitration Act and its incorporation of the Model Law which states that an arbitral award, irrespective of the country in which it is made, shall be recognised and binding.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Other than the New York Convention, South Africa has not signed any conventions concerning the recognition and enforcement of arbitral awards.

In 1997, South Africa acceded to the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of the Hague Conference on Private Law, subject to certain reservations and declarations. South Africa's accession to this convention facilitates the obtaining of evidence abroad for use in litigation and arbitration. South Africa has not yet ratified the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. However, ratification of this convention was recommended by the SALRC in its 1998 report on International Commercial Arbitration. According to the SALRC, ratification will create the necessary legal framework to encourage foreign investment and further economic development in South Africa.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Differing legislative requirements apply in respect of the validity and enforcement of domestic and foreign arbitral awards.

Both local and foreign arbitral awards must, on application, be made orders of court as provided for in terms of section 31(1) and section 31(3) of the Arbitration Act and section 16 of the International Arbitration Act (along with Article 8 of the Model Law as incorporated into the International Arbitration Act).

For local awards, it must be proven that the dispute was submitted to arbitration in terms of an arbitration agreement, that the arbitrator was appointed and that there was a valid award in terms of the reference.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

When an award has been made, the matter becomes *res judicata* if there has been full and final adjudication precluding the subsequent ventilation of the same dispute in a court. However, under South African law, arbitration awards have no legal effect on third parties.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The courts do not easily set aside awards on the basis that they offend public policy. The mere fact that foreign awards are made on a basis not recognised in South Africa does not necessarily mean that they are contrary to public policy. Whether an award is contrary to public policy will depend on the facts of each case.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Arbitration Act does not automatically render arbitration proceedings confidential, although the parties are free to import such a clause by way of agreement. Even if the clause is not expressly provided for, such a term is implied in South African law following English precedent. The Arbitration Foundation of South Africa ("AFSA") and the Association of Arbitrators procedural rules specifically ensure the confidentiality of the arbitration proceedings and the final award.

Section 11(2) of the International Arbitration Act makes arbitration proceedings in which the parties are not public bodies confidential.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

A party who discloses confidential arbitration-related information is in breach of the confidentiality provisions such as may be express or implied, except where such disclosure is for the purposes of court proceedings as may arise from the arbitration.

Whether information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings between the same parties will depend on whether the subsequent proceedings arise from or relate to the initial arbitration. In practice, a party might be able to compel disclosure of such documentation through the subsequent disclosure process.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Arbitration Act and International Arbitration Act impose no limits on the types of remedy (including damages) that are available, but damages under South African law are limited to the actual damages suffered. Punitive damages are not recognised by South African law. Whether an award arising from arbitration proceedings conducted in terms of the substantive law of another jurisdiction providing for punitive damages is to be construed as contrary to public policy will depend on the facts of each case. Specific performance may be awarded by a tribunal, providing that the tribunal is suitably mandated to make such an award under the terms of reference.

13.2 What, if any, interest is available, and how is the rate of interest determined?

On the question of interest, one needs to distinguish between foreign and domestic awards.

In relation to domestic awards, section 29 of the Arbitration Act provides that, where an award provides for the payment of a sum of money, such sum shall, unless the award provides otherwise, carry interest as from the date of the award and at the same rate as a judgment debt. The rate of interest on outstanding sums of money has not been agreed by the parties, the Prescribed Rate of Interest Act 55 of 1975 shall apply. Since 1 March 2016, the applicable rate of interest is 10.25 per cent *per annum*, calculated daily without compounding.

In relation to foreign awards, Chapter VI, Article 31 of the International Arbitration Act provides the arbitral tribunal may award interest on such basis as the tribunal considers appropriate.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Generally, the party which is substantially successful is entitled to be awarded costs in the absence of special circumstances.

In terms of section 35(1) of the Arbitration Act, unless otherwise provided in the arbitration agreement, the award of costs in connection with the reference and award is at the discretion of the arbitrator/tribunal. If costs are awarded, directions must be given as to the scale on which they are to be taxed.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award is generally not subject to tax but there is a great deal of complexity in relation to this issue and the treatment of income and expenditure in respect of certain awards. Awards in respect to payments due to employees, for example, constitute gross income for the purposes of calculating income tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no restrictions on third-party funding *per se*. In *PricewaterhouseCoopers Inc and others v National Potato Co-operative Limited*, the Supreme Court of Appeal held that an agreement to finance litigation in exchange for a part of the proceeds is in keeping with the right of access to justice. It is not in itself champertous. A funding agreement will only be an abuse of process if it lacks good faith. There is generally no obligation on a party to disclose the existence of third-party funding in order to bring the case. The *PricewaterhouseCoopers* case has opened the way to more innovative funding of expensive litigation in South Africa, and this is an area that is gaining momentum.

The Contingency Fees Act, 66 of 1997 provides for two forms of contingency fee arrangements, namely a "no-win, no-fees" arrangement, allowing the attorney to claim fees as agreed with the client upon successful completion of the matter, and secondly, an arrangement in terms of which the attorney may claim fees not exceeding double the normal fee and further provided that for claims sounding in money, the fee may then also not exceed 25 per cent of the total amount awarded, which amount shall not, for purposes of calculating such excess, include any costs.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

No, South Africa has not signed this convention.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

South Africa is a party to the Multilateral Investment Guarantee Agency ("MIGA"), ratified on 2 March 1994. South Africa is also party to approximately 40 BITs that provide for arbitration pursuant to the rules of the additional facility of the International Centre for Settlement of Investment Disputes ("ICSID") of 1978. In addition, South Africa is a party to the Southern African Development Community ("SADC") Protocol on Finance and Investment, 2006.

As noted in question 2.2 above, the South African Government is in the process of terminating BITs in favour of a general framework for the settlement of investment disputes in the form of the new Protection of Investment Act (as at date of writing, yet to commence). When a date has been set for its commencement, the Protection of Investment Act will provide a legal framework for investments and address the legal protection of investors in line with the requirements of the South African Constitution. All investments will have to be made in compliance with South Africa's laws and the Act makes reference to the state's right to regulate in the public interest. This may include redressing socio-economic inequalities, upholding constitutional rights, promoting beneficiation and protecting the environment. The Protection of Investment Act will also regulate international arbitration. The South African Government to consent to international investment law arbitration, this is subject to the exhaustion of domestic remedies first. In addition, if the Government consents to international arbitration, the Protection of Investment Act will require the arbitration be state-to-state arbitration (between South Africa and the home state of the applicable investor) as opposed to an investor-state arbitration (between the foreign investor and the host state, for example, South Africa).

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

South Africa does have language which is common to some, but not all BITs. For example, reference is made in some of its BITs to "most favoured nation". As mentioned above, however, BITs are being terminated in favour of the Protection of Investment Act, which will provide greater uniformity to state-to-state arbitrations, and in particular, will require an exhaustion of domestic remedies before a matter can be referred to arbitration.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Under the Foreign States Immunities Act 87 of 1981, a foreign state shall not be immune from the jurisdiction of the courts in South Africa in proceedings relating to, *inter alia*, a commercial transaction entered into by the foreign state, or an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in South Africa. In addition, if a foreign state has agreed in writing to arbitration, then that state will not be immune from the jurisdiction of the courts in relation to any proceedings that arise from the arbitration.

The Government of South Africa is obliged to honour judgment debts as granted against it. The provisions of the State Liability Amendment Act 14 of 2011 regulate the enforcement and execution of judgments against the state. A state attorney is obliged to inform the relevant Government department of the existence of a court order sounding in money against it. This must be done within seven days of the final court order having been granted. The department then has 30 days in which to settle the money owed. If payment is not effected within the stipulated time period, the creditor may then apply for a writ of execution against the moveable property of the state. The Sheriff of the court ought to attach moveable property that is not crucial for service delivery and does not threaten life if it is removed. The attached property may be sold by a Sheriff of the court within 30 days of the date of attachment.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

There are a number of issues which suggest a reluctance on the Government's part to embrace international commercial arbitration unreservedly. An often cited example is the Protection of Investment Act (which was enacted on 15 December 2015 but which is not yet in force). In short, the Act will limit the ability of investors to engage in arbitration against the South African Government. Investors first have to exhaust local remedies, after which the state can decide whether it wishes to consent to arbitration. Investors are limited to engaging with Government in a non-binding mediation process, and/or "*approaching any competent court independent tribunal or statutory body*". This fettering of the right to choose international arbitration has been criticised as diminishing the security of foreign investments and has led commentators to question South Africa's commitment to international arbitration.

In relation to other developments, what is most encouraging is the advent in recent years of the China-Africa Joint Arbitration Centre ("CAJAC"). This centre has its main operational centres in Johannesburg and Shanghai and has been established primarily to resolve both trade and investment disputes which may arise between nationals, legal entities and authorities of China and Africa as a whole. The centre is supported by AFSA and the China Law Society, which enjoys substantial Government support in China. The establishment of this body will serve to foster the desirability of using South Africa as an international arbitration centre.

Also, and in a further step towards creating an international arbitration hub in South Africa, AFSA has created AFSA International, which will administer all international arbitrations, not just those falling within the scope of CAJAC. AFSA International will use the UNCITRAL Rules, in line with the Bill, and seeks to establish South Africa as a hub for international arbitrations in Africa. It is understood that substantial progress is being made towards the readiness of CAJAC and AFSA International to take on international arbitration disputes.

Another recent development to be taken into account is the promulgation of the International Arbitration Act.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Save the promulgation of the International Arbitration Act, no recent steps have been taken.

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United Arab Emirates

International Advocate Legal Services

Sarah Malik

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The UAE has three different arbitration regimes: onshore UAE; the Dubai International Financial Centre (DIFC) freezone; and the Abu Dhabi Global Market (ADGM) freezone. On 14th June 2018 Federal Law No. 6 of 2018, the UAE's first stand-alone onshore arbitration law came into force ('The FAL'). An arbitration agreement must be entered into by a person with the legal capacity to dispose of his rights or, if on behalf of a company, by a representative. An arbitration agreement must be in writing.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The seat of arbitration, number of arbitrators, language of arbitration, institution, applicable law, governing law of the contract and the scope of dispute.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The Court of Cassation being the highest court of the UAE has judgments that enforce arbitration agreements. However, stray judgments in respect of enforcement are issued on occasion. The FAL sets outs provisions relating to enforcement and the approach that will be adopted by the national courts remains to be seen. The DIFC Court is arbitration-friendly.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Federal Law No. 6 of 2018 on Arbitration governs enforcement in the UAE. The DIFC has its own Arbitration Law – DIFC Law 1 of 2008 ('The DIFC Arbitration Law'). The ADGM has Arbitration Regulations from 2015 ('The ADGM Regulations').

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The FAL applies to any arbitration conducted in the UAE unless the parties have agreed to the application of another law, provided that the agreed law does not conflict with the public order and morality of the State. The FAL applies to international commercial arbitration conducted abroad if the parties have chosen the FAL as the governing law. The FAL applies to any arbitration arising from a dispute concerning a legal relationship governed by the State unless excepted by a special provision.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The FAL is based largely on the UNCITRAL Model Law. There are significant differences in respect of the grounds for challenge of an award as the FAL has additional grounds to UNCITRAL. There is a requirement that arbitration proceedings must be executed by an individual with specific authority to agree to arbitration.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The New York Convention applies in the UAE and the UAE acceded to the New York Convention in 2006. Unless the parties to an international arbitration have expressly adopted the FAL or it concerns a dispute in respect of a legal relationship governed by the State, the FAL is not applicable to international arbitration proceedings.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Under UAE law, disputes that involve labour law cannot be the subject of arbitration. Only the UAE courts may adjudicate disputes arising between a principal and an agent regarding a commercial

agency agreement. Criminal matters, family law matters and public policy matters cannot be the subject of arbitration. The DIFC Law and ADGM Regulations do specifically not exclude subject matters but regulate only civil and commercial matters.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The FAL recognises the principle of competence-competence. An Arbitral Tribunal may rule on its own jurisdiction and this is the same in the DIFC and ADGM regimes.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Under the Civil Procedure Code, prior to the enactment of the FAL, if a party did not raise the existence of an arbitration agreement at the first hearing before a national court, the court would deem the right to arbitrate to have been waived. UAE courts generally decline to entertain claims brought forward in breach of an arbitration agreement, although there are stray decisions from the lower courts. Under Article 8 of the FAL, a national court is obliged to dismiss any action covered by an arbitration agreement so long as the existence of the arbitration agreement is raised before any other plea is made. However, if a court decides that the arbitration agreement is invalid or unenforceable, it may hear the case.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Under the FAL, if a Tribunal rules as a preliminary point that it has jurisdiction to hear a matter, a party may within 15 days of the ruling ask the national court to decide the matter. The court must decide the issue within 30 days of a request being filed and the court's decision is unappealable.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The ADGM Regulations refer to the joinder of third parties. The DIFC Law is silent. The FAL sets out that the Tribunal shall have the power on the application of any party or a third party, to allow for the third party to intervene or be joined to an arbitration if the third party is a party to the arbitration agreement. This is subject to ensuring all the concerned parties are given the right to be heard in respect of any such application.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The legal provisions relating to limitation periods are set out in the Civil Procedure Code and apply to arbitration. The limitation period largely depends on the subject matter of the arbitration and is usually between 10–15 years.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

This not governed by any existing legislation in the UAE. There are no rules that prevent the continuation of arbitration proceedings in such circumstances.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The FAL provides that the parties to the arbitration are at liberty to choose the law to be applied to the subject matter of a dispute arising between them provided it does not conflict with the mandatory rules in force in the UAE. If the parties do not specify the applicable law, a Tribunal should apply the substantive rules of the law most closely connected with the dispute.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The mandatory law of the seat in the UAE will prevail where UAE law mandatorily applies to resolve the dispute. A reading of Article 4(1) of the FAL in conjunction with Article 53(1)(c) suggests that the authority of a company representative to agree arbitration shall be determined on the basis of the law applicable to the company.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The FAL sets out provisions relating to capacity to enter into an arbitration agreement and the form and autonomy of the agreement in relation to any arbitration conducted in the UAE, unless the parties have agreed another law.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The FAL sets out that an arbitrator cannot: be a minor or bankrupt (unless he has been discharged); have a conviction for a crime involving moral turpitude or breach of trust; and cannot be on the board of trustees of the administrative body of the institution administering the arbitration. The DIFC Arbitration Law and ADGM Regulations do not impose restrictions.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The FAL sets out the procedure to be followed if the parties are unable to agree on the appointment of an arbitrator(s). In an arbitration involving a sole arbitrator, within 15 days of a party submitting a written request to the other party requesting the appointment, the institution may, on the request of a party, appoint an arbitrator.

In cases of an arbitration with three arbitrators, if the appointed arbitrator of each party fails to appoint the third arbitrator within 15 days of the appointment of the last arbitrator, the appointment shall be made, upon request of either party, by the institution.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Under the FAL, in cases where the parties do not appoint an arbitrator in accordance with the procedures specified in the arbitration agreement, or in the absence of an agreement, the court may appoint the entire Tribunal on the request of either party. The DIFC Arbitration Law and ADGM Regulations allow a competent court to assist in the event parties are unable to agree on the appointment of an arbitrator.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Most of the arbitration institutions in the UAE have express provisions requiring arbitrators' independence, neutrality or impartiality.

Article 9(1) of the Dubai International Arbitration Centre Rules provides there is a continuing duty on an arbitrator to disclose any circumstances that may arise during the course of an arbitration that are likely to give rise to justifiable doubts in relation to independence and impartiality.

Article 11 of The Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) Rules provides that a nominated arbitrator shall raise any facts which might affect his neutrality or independence. Following an appointment, and throughout the exercise of duties, the arbitrator shall disclose to the parties without delay any circumstances which may affect his neutrality or independence, unless previously disclosed upon appointment.

Article 5(4) of the DIFC-LCIA Rules contains a similar provision.

Article 10(4) of the FAL sets out that when a person is approached in connection with the possible appointment as an arbitrator, he/she shall disclose in writing anything likely to give rise to doubts in relation to impartiality and independence. The Article also sets out that an arbitrator shall without delay throughout the proceedings disclose any such circumstances to parties.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The FAL makes limited reference to the procedure of arbitration and applies to all UAE seated arbitrations. The institutions have their own procedures that parties follow.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The FAL sets out limited procedures that are applicable in arbitration proceedings in the UAE and these relate to the qualification, appointment and decision-making procedure of the Tribunal. Each party has the right to be treated equally and given a full opportunity to present their case. Article 23 of the FAL states that subject to the limited procedures set out, the parties are free to agree on the procedure to be followed. The DIFC Arbitration Law and ADGM Regulations give the Tribunal procedural freedom but require parties are treated equally.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Federal Law No. 23 of 1991 is the key legislation which governs the legal profession onshore in the UAE and it governs the conduct of Counsel in arbitration proceedings sited elsewhere as long as Counsel is representing by way of a Power of Attorney stating that he/she is the registered lawyer. The same law does not govern Counsel from other countries in arbitral proceedings in the UAE unless they are registered with the Legal Affairs Department or Ministry of Justice.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Under the FAL, in the event parties have not chosen the applicable law, the Tribunal has the power to determine the law. The Tribunal has the power to order interim and provisional measures and the Tribunal may continue arbitration proceedings where issues fall outside its jurisdiction. The Tribunal has the power to seek assistance of the court. The Tribunal has the power to assess costs of arbitration although there is no explicit reference to legal costs and it remains to be determined whether legal costs can be awarded.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Only local lawyers are allowed to appear in local onshore Dubai courts; however, no such restriction exists in arbitration proceedings in the UAE.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The DIFC Arbitration Law and the ADGM Regulations set out that no arbitrator is liable to any person for any act/omission relating to an arbitration unless there has been damage caused by conscious and deliberate wrongdoing. In the UAE, arbitrators are generally given the same immunity from suit that judges enjoy unless they have acted criminally. Article 257 of the UAE Penal Code provides for criminal liability of arbitrators if they do not act impartially and this extends to the DIFC and the ADGM regimes as a Federal Law.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The FAL provides that national courts can deal with procedural issues such as appointing an arbitrator if needed, deal with jurisdictional challenges, order witnesses to appear, order third-party disclosure

and order sanctions. Article 18 of the FAL provides that there is a general jurisdiction of the court to consider arbitration issues.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Article 21 of the FAL provides that an Arbitral Tribunal may award interim measures and issue provisional orders which are:

i) Orders to preserve essential evidence.

ii) To take necessary measures to protect goods that constitute a part of the dispute subject matter.

iii) To preserve the assets.

iv) To restore or maintain *status quo* pending determination of the dispute.

v) To take action to prevent/refrain from action likely to cause imminent harm or prejudice to the arbitration process.

The assistance of the court is not a necessity. The DIFC and ADGM regimes give powers to the Tribunal to order interim measures considered necessary.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Pursuant to Article 18 of the FAL, a court may, at the request of a party or the Arbitral Tribunal, order interim or conservatory measures as may be considered necessary before or during an arbitration. Taking such measures does not affect the jurisdiction of the Tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Allowing for interim relief is a new provision under the FAL and it remains to be seen how the UAE national courts will approach this. It is envisaged that the national courts will support the arbitral proceedings in terms of ordering interim measures.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The UAE courts do not issue anti-suit injunctions. They accept the notion that it is the right of a party to file claims before whichever national court they believe has jurisdiction to deal with the dispute.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Pursuant to Article 21 of the FAL, a Tribunal may order security for costs if required. The same applies in the DIFC and ADGM.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

This remains to be seen for the UAE courts as the provision allowing for this is novel. The UAE courts have rarely granted such relief in the past.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The FAL provides that an Arbitral Tribunal has the discretion to determine the rules of evidence to be followed. The arbitral institutions have their own rules.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The Arbitral Tribunal is afforded discretion to determine the rules of evidence but there is no specific power in law to order discovery/disclosure and oblige a witness to attend arbitral proceedings.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

The FAL provides that the Arbitral Tribunal, using its own discretion or at the request of the parties can seek assistance from the court to order witnesses to appear before the Arbitral Tribunal to give evidence or adduce documents or evidentiary materials. The Chief Justice of the court can impose sanctions if a witness does not appear or answer questions at the Tribunal, and can order third-party disclosure.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Article 41 of Federal Law No. 10 of 1992 promulgating the Law of Proof in Civil and Commercial Transactions and Article 211 of the Civil Procedure Code requires that witnesses must be placed under oath. The FAL allows for witness evidence to take place using video conferencing and telephone. This means that witnesses no longer need to attend a hearing in person to give evidence or be cross-examined.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

In the UAE, there is no concept of legal privilege nor is there protection for "without prejudice" correspondence. Article 42 of the Federal Advocacy Law No. 23 of 1991 (as amended) stipulates that an attorney is under a duty to maintain the confidentiality of any

information entrusted to him by his clients or that came to his or her knowledge in the course of his or her profession and that disclosure is only permitted if such disclosure aims to prevent committing a crime. The Federal Code of Ethics Decree No. 666 of 2015 states that any information designed to be shared solely with the attorney, either communicated by the client or a third party, must be kept confidential. The DIFC and ADGM regimes recognise the concept of privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 41 of the FAL provides the requirements of an arbitral award are:

i) it should be in writing;

ii) in proceedings with more than one arbitrator, the award should be issued by majority opinion. If conflicting opinions rule out a majority, then the presiding arbitrator issues the award, unless otherwise agreed by the parties. In such cases, the dissenting opinions should be noted in writing/enclosed and form an integral part of the award;

iii) it needs to be signed by the arbitrators – signatures of the majority of arbitrators are sufficient provided that the reason for any omitted signature is stated;

iv) it should state the reasons upon which it is based unless the parties have agreed otherwise; and

v) it should include the names and addresses of the parties, the names of the arbitrators, their nationalities and addresses, the text of the agreement, a summary of the parties' claims, statements and documents, the order made and the reasons on which the award is based and the date and place of issue of the award.

Under the DIFC Arbitration Law, the award must be in writing and signed by the arbitrators.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The Arbitral Tribunal can interpret any obscurity or ambiguity in the award on the request of a party. The Arbitral Tribunal can on its own initiative or on the request of a party correct any material errors in its awards that include clerical and computation errors.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Article 53 of the FAL sets out an exhaustive list upon which parties may challenge an award and the grounds accord with international standards and are derived from the UNCITRAL Model Law. The FAL has eight grounds to challenge an award and the UNCITRAL Law has six.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

No, there is no provision to enable this.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, there is no provision to enable this,

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

In the DIFC and ADGM arbitral awards are final and not subject to appeal but can be challenged using Model Law Grounds.

Under Article 54 of the FAL, there is a 30-day limit to challenge the validity of a final award before a relevant UAE Appeal Court. A challenge may be made outside the 30 days if the challenge is before the Appeal Court hearing an application for ratification of an award.

An appeal may be made against an Order of the Appeal Court ratifying an award and the appeal must be made within 30 days of notification of the Appeal Court Order.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The UAE ratified the New York Convention in 2006.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The UAE has signed the:

i) Arab Convention on Judicial Co-operation between States of the Arab League in 1983 (Riyadh Convention).

ii) Agreement of Execution of Judgments, Delegations Judicial Notifications in the Arab Gulf Cooperation Council Countries 1996 (GCC Treaty).

iii) Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (ICSID).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Article 52 of the FAL provides that an arbitral award made in accordance with the FAL is binding on the parties and enforceable as a judicial ruling, although for enforcement, a decision confirming the award must be obtained from the court.

Article 55 of the FAL provides that to enforce the award, the requesting party should submit a request for confirmation and enforcement with the Chief Justice of the court together with: the original award or a certified copy thereof; a copy of the agreement; and if the award is not issued in Arabic, an attested Arabic translation of the arbitral award and a copy of the minutes of deposit of the award in court.

It is envisaged that the national courts will support the FAL in terms of enforcement of awards. The DIFC Courts are supportive of international arbitration and enforce awards.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The FAL provides that an arbitral award made in accordance with the FAL shall be binding on the parties, shall constitute *res judicata* and shall be enforceable as a judicial ruling.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The court on its own initiative can set aside the award if it finds that the award is in conflict with the public order and morality of the State.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The FAL provides that hearings are to be held in private unless agreed otherwise by the parties. Awards are confidential and may not be published in whole or in part except with the written consent of the parties. Publication of judicial rulings dealing with an arbitral award are allowed. The DIFC and ADGM regimes set out that information relating to arbitral proceedings shall be kept confidential unless disclosure is required by a court.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The general rule is that arbitration proceedings are confidential and subject to the arbitration agreement and/or the terms of reference.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

UAE law does not recognise punitive damages and any remedies that concern rights in a public register, and property rights would not be enforceable as they would be against public policy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Under UAE law, simple interest may be awarded and this is usually between 9–12 per cent on the total amount awarded. In contrast to the practice before the UAE courts, the Tribunal may award compound interest, rather than just simple interest.

Under the DIFC Arbitration Law and the ADGM Regulations there are no restrictions in relation to interest.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Under Article 46 of the FAL, the Tribunal has the power to award costs of the arbitration, although the law is silent on the award of parties' costs. The institution rules usually allow for recovery of costs.

Under the DIFC and ADGM regimes, the Tribunal must set out the costs in the award and these include legal costs. 'Costs follow the cause' is applied in the DIFC.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

TPF is usually available only for those claims that have a good chance of succeeding. Currently, only minimal regulations apply to TPF and the only direction which deals with TPF is within the DIFC Freezone Practice Direction 2 of 2017 which is not applicable in the UAE onshore national courts.

Contingency fee arrangements are illegal in the UAE as set out in Law No. 6 of 2013.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The UAE entered into the ICSID Convention on 22nd January 1982.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The UAE is party to 61 Bilateral Investment treaties out of which 37 are in force and 24 are signed but not enforced as of now. The UAE is also a signatory of 22 multi-party investment treaties.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

There are no significant applicable terms used.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Article 41 of the UAE Constitution provides that every person shall have the right to submit complaints to the competent authorities including the judicial authorities, concerning the abuse or infringement of rights and freedoms. As such, no entities are immune from being sued in the UAE. However, there are specific procedures that may have to be followed to sue certain governmental entities.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The FAL came into force on 14th June 2018 and its application remains to be seen.

Article 257 of the Penal Code which imposes criminal liability on arbitrators who do not act impartially has caused concern in relation to arbitrations seated in the UAE.

The DIFC Courts are generally arbitration-friendly and enforce foreign awards. The DIFC Courts have been used as conduit jurisdiction to recognise awards in the absence of any assets/connection of the debtor in the DIFC, and the award is then enforced in the UAE as a court judgment. This has caused upset in the Dubai onshore courts which see this as usurping their jurisdiction.

A Judicial Tribunal was set up under Decree 19 of 2016 to deal with jurisdictional conflicts between the DIFC Courts and the onshore Dubai Courts. The Tribunal decisions generally advocate that the enforceability of UAE-seated awards (onshore Dubai) should only be assessed by the UAE national courts and not by the DIFC Courts.

The onshore Dubai Courts are now generally enforcing foreign awards in line with New York Convention, although rogue judgments do appear.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

DIAC are introducing new rules in 2018; the DIFC-LCIA issued comprehensive rules in 2016.

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Zambia

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

According to the provisions of Section 9 of the Arbitration Act No. 19 of 2000 ("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.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Section 2 of the Act defines an arbitration agreement, whether in writing or not, 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 essential ingredient of an arbitration agreement is that it should state that "disputes will be settled by way of arbitration". The agreement must state the parties, the method of appointment of the members of the arbitral tribunal and the number. It must also state the rules to be applied to the arbitration. In Zambia, by virtue of the provisions of Section 8 of the Act, the United Nations Commission on International Trade Law (UNCITRAL) Model Law (United Nations Document A/40/17, Annex 1) as adopted by the United Nations Commission on International Trade Law on 21st June 1984 apply. If the arbitration is not held in Zambia, Articles 8, 9 and 10 of the UNCITRAL rules do not apply. These respectively relate to an arbitration and substantive claim before court, applications for interim measures by the court and the number of arbitrators.

The other essential element an arbitration agreement must have is a statement on the national law to be applied.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The position of Zambian law is settled as far as the jurisdiction of the High Court is concerned in matters where a contract embodies an arbitration clause. 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."***

Further, Rule 4 of the Arbitration (Court Proceedings) Rules, 2001 Statutory Instrument No. 75 of 2001 provides as follows:

"4.(1) An application, under section ten of the Act to the High Court, Industrial Relations Court or the Lands Tribunal for the stay of legal proceedings which are the subject of an arbitration agreement shall be made by summons in the same proceedings to the Registrar of the court or, if the proceedings are pending before a Judge, to a Judge.

(2) An application referred to in sub-rule (1) shall be supported by an affidavit-

(a) exhibiting a copy of the arbitration agreement;

(b) stating all the facts necessary for seeking a stay of the proceedings;

(c) giving particulars of any arbitration proceedings pending; and

(d) stating the names of any arbitrator or proposed arbitrator.

(3) The Summons together with a copy of affidavit in support, shall be served on all parties to the legal proceedings either by way of personal service or by letter sent by post to the address as shown in the proceedings or to the last known addresses of the parties at least ten days before the return day.

(4) A party served with summons under sub-rule (3) may, within four days after service, file an affidavit in opposition or in answer and serve a copy thereof upon the other party at least two clear days before the return day.

(5) Additional affidavits may only be filed in the proceedings with the leave of the Court or a Judge.

(6) If an application appears to the Registrar proper for the decision of Judge, the Registrar may refer the application to a Judge and the Judge may either dispose of the application or refer it back to the Registrar with such directions as the Judge may think fit.

(7) A person affected by a decision, order, or direction of the Registrar may appeal therefrom to a Judge at Chambers and the appeal shall be by notice in writing to attend before the Judge without a fresh summons, within Seven days after the decision, order or direction complained of, or such further time as may be allowed by the Judge or the Registrar; and unless otherwise ordered, there shall be allowed at least two clear days between service of the notice of appeal and the return day."

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 *Leonard Ridge Safaris Limited v Zambia Wildlife Authority (2008) Z.R. 97*.

In the case of *Konkola Copper Mines Plc v NFC Africa Mining 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.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The legislation applicable in Zambia with respect to arbitration is the Arbitration Act No. 19 of 2000, by virtue of the provisions of Section 8 of the Act, the United Nations Commission on International Trade Law (UNCITRAL) Model Law (United Nations Document A/40/17, Annex 1) as adopted by the United Nations Commission on International Trade Law on 21st June 1984 ("the Act") and by virtue of Section 31 of the Act, the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Investments Disputes Convention Act, Chapter 42, Volume 4 of the Laws of Zambia, which domesticates the Convention on the Settlement of Investment disputes between the International Centre for Settlement of Investment Disputes, the Arbitration (Court Proceedings) Rules contained in Statutory Instrument No. 75 of 2001 and the Arbitration (Code of Conduct and Standards) Regulations contained in Statutory Instrument No. 12 of 2007.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes. The Arbitration Act incorporates the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Arbitration Act is based on the UNCITRAL Model Law. The Arbitration Act provides interpretation guidelines with respect to the application of the UNCITRAL Model Law and thus provides as follows in Section 2 (3):

> *"In interpreting this Act, an arbitral tribunal or a court may refer to the documents relating to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st June, 1985 set out in the First Schedule and, subject to the other provisions of this Act, to the documents of the Commission's working group, namely the travaux preparatoires; and in interpreting the provisions of the First Schedule, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application."*

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

International Arbitration is defined on the basis of Article I (3) of the UNCITRAL Model Law as, if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States;

(b) one of the following places is situated outside the State in which the parties have their places of business:

  (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; or

  (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Section 8(2) of the Arbitration Act provides that where the place of arbitration (international arbitration) is not Zambia, then Articles 8, 9, 35 and 36 of the UNCITRAL Model Law apply in mandatory terms. This is with respect to reference of arbitration of matters before a court, applications for interim measures to a court, recognition and enforcement and grounds for refusing recognition or enforcement.

In addition, Section 16 (6) of the Arbitration Act states that in an international arbitration interest on an award may be awarded based on the law applicable to the arbitration.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Any dispute which the parties have agreed to submit to arbitration may be determined by arbitration; however, Section 6 of the Arbitration Act provides the following restrictions of matters which are not capable of determination by arbitration:

(a) an agreement that is contrary to public policy;

(b) a dispute which, in terms of any law, may not be determined by arbitration;

(c) a criminal matter or proceeding except insofar 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 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.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The arbitrator, pursuant to the provisions of Article 16 of the UNCITRAL Model Law applicable to Zambia as stated earlier by virtue of the provisions of Section 8, may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The approach by the Zambian courts, as stated in the answer to question 1.3 above, with respect to a party who commences court proceedings despite having provisions for arbitration, is that the court will either on application of a party or on its own motion refer the matter to arbitration.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

According to Article 16 (3) of the UNCITRAL Model Law, any party may, within 30 days after having received notice of the ruling, apply to the Zambian High Court for a ruling on the jurisdiction. The decision of the High Court on the jurisdiction shall not be subject to appeal. While such a request to the High Court is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The position of the Zambian Courts is set out in the 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.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Arbitration Act does not provide for a limitation period for the commencement of arbitrations; however, it is our view that the general law of limitation of actions applies in the same way as other civil actions. Since arbitration derives from the contract or agreement, it is fair to say that the Law Reform (Limitations of Actions) Act, Chapter 72, Volume 6, of the Laws of Zambia, which extends the English Limitation Act of 1939, applies to arbitration. The English Limitation Act of 1939 places a six (6) year limitation on contractual liability. Alternatively, the parties may opt by agreement to incorporate a time limit.

The Zambian courts would consider the limitation period based on their decisions on ordinary limitation of action matters relating to contracts.

The Zambian courts by virtue of Section 10 of the High Court Act apply the principles of English law and equity. The Zambian courts will therefore also be guided by the principles of English law on limitation of action in arbitration.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

If a party is a company registered under the provisions of the Companies Act Chapter 388, Volume 21 of the Laws of Zambia, the provisions of Section 276 provide that where any action or proceeding against the company is pending, a company or creditor may apply to the court to stay or restrain further proceedings in the action or proceeding, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

This is determined by the parties in accordance with their choice of law. Article 28 of the UNCITRAL Model Law is applied and the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Under Article 28(2) of the UNCITRAL Model Law, where the parties fail to designate the law applicable to the substantive dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. The court will only apply the principle of *ex aequo et bono* or as *amiable compositeur* (decision making according to principles of equity) if the parties are agreeable.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The Arbitration Act No. 19 of 2000.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to agree on a procedure of appointing the arbitrator or arbitrators under the provisions of Section 12(2) of the Arbitration Act and Article 11(2) of the UNCITRAL Model Law.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties fail to agree on the appointment of an arbitrator, under

the provisions of Section 12(3) of the Arbitration 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 ("CIArbZB").

5.3 Can a court intervene in the selection of arbitrators? If so, how?

If there is still deadlock between the parties or the two arbitrators with regard to the appointment after reference to either ZAA or CIArbZB, a request may be made to the court to take the necessary measures. A decision by the High Court on the appointment of an arbitrator by the court is not subject to appeal. This procedure is set out under the provisions of Section 12(4) of the Arbitration Act and Article 11 (4) and (5) of the UNCITRAL Model Law as read with Rule 10 of the Arbitration (Court Proceedings) Rules.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

An arbitrator under the provisions of Article 12(1) and (2) of the UNCITRAL Model Law requires that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Further, an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

Failure by an arbitrator to be independent, neutral and/or impartial during the proceedings and disclosure of potential conflicts of interest may result in a challenge. A challenge will only arise if circumstance exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties.

The Arbitration (Code of Conduct and Standards) Regulations contained in Statutory Instrument No. 12 of 2007 in Regulations 1, 2 and 3 provide further duties for an arbitrator to act fairly/impartially, give disclosure of any interest or relationship which may affect his or her impartiality and also conflict of interest.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The legislation applicable in Zambia with respect to the procedure of arbitration is the Arbitration Act No. 19 of 2000, the Arbitration (Code of Conduct and Standards) Regulations contained in Statutory Instrument No. 12 of 2007, the United Nations Commission on International Trade Law (UNCITRAL) Model Law (United Nations Document A/40/17, Annex 1), as adopted by the United Nations Commission on International Trade Law on 21st June 1984, by virtue of the provisions of Section 8 of the Arbitration Act and the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, by virtue of Section 31 of the Arbitration Act.

These laws and rules apply to all arbitrations in the Zambian jurisdiction.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are procedural steps set out in the Arbitration Act No. 19 of 2000, the UNCITRAL Model Law and the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no specific rules that govern the conduct of counsel; however, the Legal Practitioners Act governs the conduct of counsel practising in Zambia, whether before the courts of law, administrative tribunals, commissions of inquiry and arbitrations.

Section 42(1) of the Legal Practitioners Act precludes counsel from other jurisdictions acting as advocates in any cause, matter or civil proceeding in Zambia.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

They are subject to the Arbitration Act, the Arbitration (Code of Conduct and Standards) Regulations contained in Statutory Instrument No. 12 of 2007, and the UNCITRAL Model Law. These pieces of legislation impose on the arbitrator the following duties:

a) to act fairly and impartially;
b) to give the parties full disclosure of any circumstances that may affect impartiality and/or independence or which might reasonably raise doubts as to the arbitral proceedings;
c) not establish a relationship with any of the parties in a matter related to the arbitration which may give rise to a conflict of interest;
d) to take reasonable steps to ensure that the parties understand the arbitration process before the arbitration commences;
e) to accord all parties the right to appear in person and to be heard after due notice of the time and place of the hearing;
f) allow any party the opportunity to be represented by counsel;
g) conduct the arbitration with reasonable dispatch and attend hearings and participate in deliberations; and
h) where there is more than one arbitrator, to accord each other an opportunity to participate in all aspects of the proceedings.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are restrictions from the standpoint of the Legal Practitioners Act; however, it is not expressly stated that lawyers from other jurisdictions cannot appear in an arbitration in Zambia.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Section 28 of the Arbitration Act provides that an arbitrator, who performs any function in connection with arbitral proceedings, is not liable for anything done or omitted in good faith in the discharge or purported discharge of the function of an arbitrator. Witnesses enjoy similar protection as witnesses appearing before a court of law.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Article 5 of the UNCITRAL Model Law provides that no court shall intervene except as provided by law. The circumstances when the court will be asked to intervene are:

a) determination of the jurisdiction of an arbitrator after the ruling by the arbitrator on the jurisdiction Article 16(3) of the UNCITRAL Model Law;

b) application for court assistance to take evidence (this is under Article 16(3) of the UNCITRAL Model Law);

c) grant interim measures of protection under Section 11 of the Arbitration Act;

d) executory assistance in the exercise of any power conferred upon the arbitral tribunal under Section 14 of the Arbitration Act;

e) appointment of an arbitrator if there is a deadlock (Section 11 of the Arbitration Act 12(4), (5) and (6));

f) application to set aside arbitral awards interim or final; and

g) recognition and enforcement of awards.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitrator, under the provisions of Section 14 of the Arbitration Act, has the power to order interim and other measures, these include the power:

(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 assistance of a court, but is at liberty to seek assistance.

The procedure to make applications to court is governed by the Arbitration (Court Proceedings) Rules contained in Statutory Instrument No. 75 of 2001.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The court pursuant to Section 11 of the Arbitration Act may grant the following preliminary or interim relief:

(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.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The courts will grant interim relief 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 Limited 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.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions are yet to be tested in the Zambian jurisdiction; however, it is sufficient 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 which extends the principles of English common law and equity.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The national courts and the arbitral tribunal can grant costs pursuant to the provisions of Section 11(2)(b) and Section 14(2)(b) of the Arbitration Act.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The courts enforce these orders in the same way they enforce

ordinary court orders. With respect to foreign jurisdictions, this is subject to the recognition and registration of foreign orders.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Article 19 of the UNCITRAL Model Law is applied. 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 power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Under Section 14(2) of the Arbitration Act, the arbitrator may make:

(a) any order it considers appropriate to compel the attendance of a witness before it to gives evidence or produces documents;

(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.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

The court can intervene when the arbitral tribunal seeks its assistance.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

These depend on the rules adopted by the arbitral tribunal.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The rule on privilege is the same as under English common law. It exists with respect to the client-lawyer relationship. This also extends to doctor-patient and priest-congregant relationships. Diplomatic and parliamentary privileges also exist.

The rule with respect to client-lawyer relationships is that the privilege is for the client and can only be waived by the client.

Once privilege is raised, evidence cannot be adduced.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Under the provisions of Section 16(1), the award shall be made in writing and shall be signed by the arbitrator or arbitrators; 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.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The power to clarify, correct or amend an arbitral award is provided for in Article 33 of the UNCITRAL Model Law, which provides:

(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.

(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.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

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 arbitration can be separated from those not so submitted, only that part of the award which contains decision 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.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

No, they cannot.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, they cannot.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Rule 23 of the Arbitration (Court Proceedings) Rules contained in Statutory Instrument No. 75 of 2001 provides for the setting aside of an arbitral award. The term appeal is not used in Zambian legislation. The application to set aside has to be made by originating summons supported with an affidavit to a judge of the High Court. 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),* the High Court held that "the setting aside of an award should not be used as a means to review the arbitral tribunal on the merits".

In the case of S*avenda Management Ltd v Stanbic Bank Zambia Appeal No. 002/2015* at page J24 of the judgment, the judges 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 alter arbitral decisions.*"

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Zambia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, as stated above, has been domesticated into Zambian legislation by virtue of Section 31 of the Arbitration Act.

The Investments Disputes Convention Act, Chapter 42, Volume 4 of the Laws of Zambia has domesticated the Convention on the Settlement of Investment Disputes Between States and Nationals of other States.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Zambia has ratified the SADC Protocol on Finance and Investment (Investment Protocol) and the COMESA Treaty and the Investment Agreement for the COMESA Common Investment Area (CCIA Agreement).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The courts regularly recognise and enforce arbitration awards. An example is the case of *U and M Mining Ltd v Konkola Copper Mines PLC*.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

There has been no decision with respect to *res judicata*; it is likely that the courts will apply the same general principles of estoppel and *res judicata* applied in the court proceedings. Once a matter is determined by arbitration it cannot be reheard by a court.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

In the case *Zambia Telecommunications Co. Ltd. v Celtel Zambia Ltd SCZ No. 34 of 2008*, the Supreme Court set aside an award on 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 arbitral 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.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Regulation 7 of the Arbitration (Code of Conduct and Standard) Regulations 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.

Regulations 25 and 26 of the Arbitration (Court Proceedings) Rules 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.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The information cannot be disclosed unless under the exceptions set out in Regulation 7 the Arbitration (Code of Conduct and Standard) Regulations referred to in the answer to question 12.1 above.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no limits. The damages are akin to those issued by the courts.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Arbitration awards carry interest as may be determined by the arbitral tribunal. The Judgment Act is used as a guide which caps the interest to the current lending rate as determined by the Bank of Zambia. See Section 16(6)(b) of the Arbitration Act.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Parties are entitled to recover costs. The general practice is that costs are awarded in favour of the successful party. Section 16(5) of the Arbitration Act provides that unless the parties agree otherwise the costs and expenses of an arbitration including the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and other expenses related to the arbitration, shall be fixed and allocated by the arbitral tribunal in its award.

Where the award is silent on the costs and expenses of the arbitration, each party shall bear their own costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The costs can, in default agreement of the parties, be subject to taxation before the taxing master of the High Court.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Yes. There are restrictions of third parties funding claims. Rule 8 of the Legal Practitioners' Practice Rules, 2002 Statutory Instrument No. 51 of 2002 proscribes contingency fees.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

This has been domesticated through the enactment of The Investments Disputes Convention Act, Chapter 42, Volume 4 of the Laws of Zambia which domesticates the Convention on the Settlement of Investment disputes between the International Centre for Settlement of Investment Disputes.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Zambia has bilateral investment treaties with the Belgium-Luxemburg Economic Union (2001), China (1996), Cuba (2000), Egypt (2000), Finland (2005), France (2002), Germany (1996), Ghana (2001), Italy (2014), Mauritius (2015), the Netherlands (2003), Switzerland (1994) and the United Kingdom (2009).

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

These vary from treaty to treaty. The term "most favoured nation" with respect to trade treaties is frequently used.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Proceedings against the State are subject to the State Proceedings Act, Chapter 71, Volume 6, of the Laws of Zambia which grants the State immunity against execution.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Arbitration 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.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

A number of training programmes have been held under the auspices of the Chartered Institute of Arbitrators Zambia Branch to bring arbitrators up to speed with current international trends in arbitration.

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Chambers and Partners describe Mr. Jalasi as follows:

"Peers praise Joseph Jalasi for his "excellent tax advice and litigation practice."

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Mr. Silwamba is the principal partner and is 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.

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Chambers and Partners describe Mr. Silwamba as follows:

"Eric Suwilanji Silwamba maintains a prestigious reputation in the field of dispute resolution. Market sources praise him as "the most active, creative and vigorous" litigator in Zambia and commend him for his contributions to "ground-breaking decisions."

Eric Silwamba, Jalasi and Linyama Legal Practitioners

Eric Silwamba, Jalasi and Linyama Legal Practitioners is a Zambian law firm. The firm has been in existence for over 30 years as Eric Silwamba and Company. In 2013 it was rebranded to Eric Silwamba, Jalasi and Linyama Legal Practitioners following the admission to partnership of Joseph Jalasi and Lubinda Linyama. It has over the years developed to the level of being among the top law firms in Zambia. The renowned *Chambers and Partners* (www.chamberandpartners.com) describes the firm as follows:

"This well-known team maintains a solid foothold in the Zambian market, and continues to be a popular choice for dispute resolution. Key areas of focus include public law litigation, IP matters, commercial agreements and shareholder agreements. It has experience in advising clients from the mining, construction, agricultural and retail sectors. Sources say: "It's a very professional firm with gravitas in the market."

"This firm enjoys a highly regarded reputation in public law litigation. Other key areas of expertise include intellectual property, commercial agreements and shareholder agreements. Market observers say: "They have a solid practice and represent several multinational clients."

The World Legal 500 (https://shar.es/1jV6dc) describes the firm as follows:

"'Heavyweight litigation' firm Eric Silwamba, Jalasi and Linyama Legal Practitioners is strong in administrative, constitutional and tax-related matters. 'Noted practitioner' Eric Silwamba is 'well known for his court skills'. The firm also has expertise in commercial, mining, banking and finance work."

North American Overview

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I. Introduction

A. Commercial Arbitration Climate

Both the United States and Canada have arbitration-friendly legal regimes, as well as experienced arbitration counsel and arbitrators. In addition, both countries host a number of important arbitral institutions. The United States is home to: the American Arbitration Association ("AAA") and its international arm, the International Centre for Dispute Resolution ("ICDR"); JAMS; the International Institute for Conflict Prevention & Resolution; the New York International Arbitration Center (which does not administer arbitrations, but does provide arbitration hearing facilities); and the International Chamber of Commerce ("ICC"). In Canada, arbitral institutions include: the ADR Institute of Canada; the British Columbia International Commercial Arbitration Centre ("BCICAC"); the Canadian Commercial Arbitration Centre; the ICC; and Arbitration Place.

B. Investment Arbitration Climate

Both the United States and Canada are signatories to a number of free trade agreements and bilateral investment treaties ("BITs").[1] Chapter 11 of the North American Free Trade Agreement ("NAFTA") between the United States, Canada and Mexico provides for arbitration of investor-State disputes.[2] BITs – known as Foreign Investment Promotion and Protection Agreements ("FIPAs") in Canada – also typically provide for arbitration of disputes.[3]

II. Arbitration in the United States and Canada

A. U.S. Arbitration Framework

1. *Basic Framework*

The Federal Arbitration Act ("FAA") is the starting point for U.S. arbitration law.[4] The FAA "declare[s] a national policy favoring arbitration".[5] The FAA applies to arbitrations related to interstate and foreign commerce and maritime transactions.[6] State arbitral law is preempted by the FAA, but continues to apply to areas on which the FAA is silent.

The FAA consists of three chapters. Chapter 1 contains general provisions.[7] Importantly, it recognises the validity of written arbitration agreements[8] and provides judicial procedures for confirming and challenging arbitration awards.[9] Chapter 2 implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), subject to two reservations: the New York Convention only applies to (i) awards made in other signatory nations (a reciprocity requirement); and (ii) disputes that are deemed "commercial" under U.S. law.[10] The New York Convention thus provides the basic framework for domestic enforcement of most international arbitral awards. Chapter 3 of the FAA implements the Inter-American Convention on International Commercial Arbitration (the "Panama Convention").[11] The Panama Convention supersedes the New York Convention where a majority of the parties are citizens of eligible Panama Convention signatory countries.[12]

2. *Requirements and Procedures*

As stated, the FAA applies only to written arbitration agreements involving interstate, foreign and maritime commerce. Such agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".[13] Accordingly, courts must look to state contract law to determine the validity of an arbitration agreement. However, arbitration provisions are considered to be "severable" from the remainder of a contract such that, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance".[14]

The FAA does not provide many default rules, leaving the procedures for conducting arbitrations largely to the parties. The FAA does, however, set out a procedure for appointing an arbitrator in the absence of agreement by the parties.[15] It also gives arbitrators the power to summon witnesses and to enlist the aid of U.S. courts in compelling their attendance.[16]

3. *Kompetenz-Kompetenz*

Kompetenz-kompetenz refers to a tribunal's authority to rule on questions related to the scope of its own jurisdiction (*i.e.*, questions of "arbitrability"). Under U.S. law, questions about whether an arbitration agreement is valid and covers the dispute at issue are presumptively for the court to decide.[17] The exception is where the parties have agreed to grant the arbitrator the authority to decide such questions of arbitrability. This decision must, however, be established by "clea[r] and unmistakabl[e]" evidence; "silence or ambiguity" is not sufficient.[18] So-called "procedural" questions, on the other hand – *i.e.*, whether "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate" have been met – are presumptively for the arbitrator to decide.[19]

4. *Enforcement and Vacatur*

The grounds for vacating an arbitral award in the U.S. are very narrow. The FAA provides that arbitral awards may only be vacated upon a showing that: (i) "the award was procured by corruption,

fraud, or undue means"; (ii) "there was evident partiality or corruption in the arbitrators"; (iii) "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or (iv) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made".[20] The FAA also allows courts to modify or correct arbitral awards where there was a material miscalculation or mistake, the arbitrators have ruled on a matter not submitted to them, or there is a problem of form with the award not affecting the merits.[21]

Before 2008, courts held that arbitration awards could also be set aside if the arbitral tribunal acted in "manifest disregard of the law". In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court held that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification".[22] Federal circuit courts split on whether the "manifest disregard" standard survived after *Hall Street*. In *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, the Supreme Court declined to "decide whether 'manifest disregard' survives our decision in *Hall Street* . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."[23] The Fifth, Eighth and Eleventh Circuits have held that "manifest disregard" is no longer available as a ground for *vacatur*,[24] but the Second, Fourth, Sixth, Seventh and Ninth Circuits continue to apply it.[25] The First, Third and Tenth Circuits have acknowledged uncertainty as to whether "manifest disregard" survives and avoided its application by holding that the stringent standard, if available, has not been met on the facts.[26] The circuits that continue to apply "manifest disregard" require proof of a clearly established legal principle that the arbitrator wilfully ignored.[27]

B. Canadian Arbitration Framework

1. *Basic Framework*

Legislative authority in Canada is divided between the federal Parliament and provincial legislatures. Unlike in the U.S., however, provincial, rather than federal, legislation governs most commercial arbitrations. As such, parties wishing to arbitrate international disputes in Canada typically must look to provincial, rather than federal, law.

Fortunately, in the context of international commercial arbitration, there are few differences across provinces because the federal government[28] and all Canadian provinces and territories[29] have adopted the UNCITRAL Model Law on International Commercial Arbitration with minor modifications. They have done so either by appending the Model Law as a schedule to provincial legislation,[30] reproducing it as a stand-alone statute (in some cases with minor variations),[31] or, in the case of Quebec (Canada's only civil law jurisdiction), by incorporating it in the Code of Civil Procedure.[32]

Canada is also a signatory to the New York Convention,[33] which has been implemented through both federal[34] and provincial legislation.[35] Unlike the U.S., Canada did not adopt the reciprocity reservation in the New York Convention, meaning that arbitral awards issued in jurisdictions that are not otherwise Contracting States may be enforced in Canada under the New York Convention. The federal government[36] and common law provinces[37] have, however, limited the application of the New York Convention to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial" in accordance with Article I(3) of the New York Convention. The Quebec Code of Civil procedure contains no such limitation and provides that "[c]onsideration may be given" to the New York Convention in interpreting the rules for recognition and enforcement of arbitration awards made outside Quebec.[38]

2. *Requirements and Procedures*

Procedural requirements for international commercial arbitration in Canada generally conform to the default rules in the Model Law. There are, however, certain important differences across provinces.

Most provincial statutes in Canada were enacted before the 2006 amendments to the Model Law and are based on the original 1985 text.[39] While both versions of the Model Law require arbitration agreements to be in writing, the 2006 amendments provide that "[a]n arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means".[40] The 2006 amendments to the Model Law also updated the definition of "in writing" to expressly include electronic communications, including "data messages" and "electronic mail".[41] The 2006 amendments also contain provisions addressing applications for interim measures and preliminary orders.[42]

In 2014, the Uniform Law Conference of Canada recommended reform to provincial arbitration legislation, including the adoption of the 2006 Model Law amendments in each province.[43] In 2017, Ontario repealed and replaced its international commercial arbitration legislation with a new act that appends the Model Law, as amended in 2006.[44] As a result, the 2006 Model Law amendments have the force of law in Ontario, but not in other common law provinces.[45] The new Ontario legislation also abrogated the effect of a 2010 Supreme Court of Canada decision, which held that foreign arbitral awards are subject to Canadian statutes of limitation, which vary by province, when brought to Canadian courts for recognition and enforcement.[46] The Ontario act provides that an application under the New York Convention or Model Law for recognition or enforcement shall be made within 10 years of the date of the award or the date on which the proceedings concluded.[47] As a result, different limitation periods may apply depending on the province where recognition and enforcement is sought.

The Model Law on which provincial legislation is based contains default rules for the composition of the arbitral tribunal – one chosen by each party, and the third chosen by the first two appointed arbitrators – unless the parties have agreed otherwise.[48] Upon request of a party, courts may intervene to appoint arbitrators if parties do not follow their chosen procedures or if a vacancy is not filled.[49] The parties may challenge the appointment of an arbitrator only if there exist justifiable doubts as to her impartiality or qualifications, and may seek the court's intervention in doing so.[50] Parties may modify these and other rules by agreement.

In accordance with the Model Law, arbitrators in Canada have the discretion to request the production of documents. The IBA Rules on the Taking of Evidence in International Commercial Arbitration often serve as a guide.[51] Article 27 of the Model Law also provides for court assistance in collecting evidence.[52]

3. *Kompetenz-Kompetenz*

The Model Law provides that the arbitral tribunal may rule on its own jurisdiction,[53] and enumerates specific grounds on which a stay of court proceedings in favour of arbitration may be refused.[54] The Supreme Court of Canada has embraced the *kompetenz-kompetenz* principle, holding that "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator".[55] The only exceptions are where the jurisdictional challenge "is based solely on a question of law" or "a question of mixed law and fact . . . [which] require[s] only superficial consideration of the documentary evidence in the record", in which case the jurisdictional challenge may be resolved by the court.[56] Even if one of the exceptions applies, the court must "be satisfied

that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding" and may "allow the arbitrator to rule first on his or her competence" where it is "best for the arbitration process".[57]

In recognition of the *kompetenz-kompetenz* principle, Canadian courts have held that a stay of court proceedings must be granted in favour of arbitration as long as it is "arguable" that the conditions under Article 8(1) of the Model Law have been met.[58] Thus, "[w]here it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then . . . the stay should be granted and those matters left to be determined by the arbitral tribunal".[59]

4. *Enforcement and Vacatur*

The Model Law sets out the grounds for setting aside international arbitration awards, which include a party's legal incapacity, defective notice, a tribunal acting outside its authority and improper composition of the tribunal.[60] Both the Model Law and New York Convention set out grounds on which courts may refuse recognition and enforcement of a foreign award. These grounds are identical to the Model Law grounds for setting awards aside, with the addition that recognition and enforcement may be refused if the party against whom the award is invoked furnishes proof that "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, the award was made".[61] Furthermore, an award may be set aside, or recognition or enforcement refused, where: (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the state; or (ii) the award is in conflict with the public policy of the state.[62]

Canadian courts have strictly adhered to the enumerated grounds in the Model Law and New York Convention and held that there is no authority to review international arbitration awards for mere errors of law, for instance.[63] Further, Canadian courts have held that there is a discretion to refuse to recognise and enforce an award even if one or more of the enumerated grounds for recognition and enforcement have been met, based on the permissive language in Article 34(2) of the Model Law.[64]

Canadian courts have construed the public policy provisions of the Model Law and New York Convention very narrowly. For instance, Ontario courts have held that the public policy ground "should be narrowly construed and should apply only where enforcement would violate our 'most basic notions of morality and justice,'"[65] such as where "the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts".[66]

III. Recent Developments

A. United States

1. *The Consumer Financial Protection Bureau's Proposed Rule Banning Mandatory Arbitration Clauses from Preventing Class Action Lawsuits Revoked*

In May 2016, the Consumer Financial Protection Bureau ("CFPB") issued a proposed rule for the public aimed at preventing mandatory arbitration clauses from blocking class actions in contracts of consumer financial products and services. The proposed rule would have required that companies that include arbitration clauses in their contracts: (1) include specific language provided by the CFPB that makes clear that the arbitration clauses cannot be used to stop consumers from being part of a class action in court; and (2) submit to the CFPB any claims filed and awards issued in arbitration. The proposed rule would have applied to most consumer financial products and services that the CFPB oversees, and in particular products and services related to markets that involve lending, storing and moving or exchanging money.[67]

The CFPB's proposed rule was issued in the wake of the Supreme Court's December 2015 ruling in *DIRECTV, Inc. v. Imburgia*.[68] The services agreement between DirectTV and its customers included a binding arbitration provision with a class arbitration waiver, which specified that the entire arbitration provision was unenforceable if the "law of your state" made class action waivers unenforceable, but also declared the arbitration clause was governed by the FAA. At the time that the respondents entered into the services agreement, the California Supreme Court's ruling in *Discover Bank v. Superior Court*,[69] which provided that class arbitration waivers were unenforceable, was still in effect. In *AT&T Mobility LLC v. Concepcion*,[70] the Supreme Court held that the *Discover Bank* rule was pre-empted by the FAA. In a 6-3 decision authored by Justice Breyer, a majority of the Court in *Imburgia* held that the arbitration agreement was enforceable.[71] A dissent, authored by Justice Ginsburg and joined by Justice Sotomayor,[72] noted that the majority's decision, along with the Supreme Court's previous decisions, "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws".[73]

On November 1, 2017, President Trump signed a joint resolution passed by Congress disapproving the proposed CFPB rule. The CFPB published official notice removing the proposed rule from the Code of Federal Regulations on November 22, 2017.[74]

2. *U.S. Supreme Court Finds Class Action Waivers in Employment Arbitration Agreements Enforceable*

On May 21, 2018, the U.S. Supreme Court held that employment arbitration agreements with class action waivers requiring individual arbitration are enforceable under the FAA, notwithstanding Section 7 of the National Labor Relations Act (the "NLRA"),[75] which protects employees' rights to engage in concerted activities.[76]

By way of background, in 2012, the National Labor Relations Board (the "NLRB") ruled that mandatory arbitration agreements that effectively bar class or collective actions violate employees' rights to engage in "concerted action".[77] Following the NLRB's ruling, federal appellate courts began issuing conflicting opinions regarding the enforceability of mandatory class action waivers in employment arbitration agreements, with the Sixth, Seventh and Ninth Circuits following the NLRB's approach,[78] and the Second, Fifth and Eighth Circuits rejecting it.[79]

In *Epic Systems*, the Supreme Court considered two questions: (1) whether the FAA's "savings clause", which allows courts to hold arbitration agreements unenforceable "upon grounds as exist at law or in equity for the revocation of any contract", applies;[80] and (2) whether the NLRA's guarantee of the right to engage in concerted activity overrides the FAA's requirement that arbitration agreements be enforced. The majority opinion held that neither precluded class action waivers in employment contracts.

As to the first question, the Supreme Court held that the "savings clause" did not apply, reasoning that the clause only allowed for the invalidation of arbitration agreements on grounds that exist for the revocation of "any" contract, that is, generally applicable contract defences such as fraud, duress or unconscionability.[81] As to the second question, the Supreme Court held that Section 7 of the NLRA did not contain language that would permit the Supreme Court to infer a congressional command to displace the FAA and outlaw arbitration with respect to employment contracts containing

class action waivers. Specifically, the majority held that Section 7 of the NLRA concerns employees' rights to organise unions and bargain collectively, not class or collective action procedures.[82]

Justice Ginsburg issued a dissent, arguing that collective and class actions to enforce workplace rights should be deemed "concerted activities" protected by the NLRA. Justice Ginsburg predicts that the "inevitable result" of the majority decision will be the "underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers".[83]

Open questions remain as to what types of employee-based actions fall under the purview of *Epic Systems*. For instance, Justice Ginsburg noted in her dissent that the majority opinion does not "place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group-wide basis" that are brought under Title VII of the Civil Rights Act of 1964 or other laws that address class-based employment discrimination.[84]

Thus, much remains to be seen as to the full extent of *Epic System*'s impact on class action waivers and what claims, if any, remain outside the scope of such waivers in employment arbitration agreements.

3. *Fourth Circuit Clarifies When Awards are "Mutual, Final, and Definite"*

As discussed above, one of the grounds for *vacatur* under the FAA is that the award was so "imperfectly executed" that a "mutual, final, and definite award upon the subject matter submitted was not made".[85] However, authority on when an award is "mutual, final, and definite" has been limited to date.

In *Norfolk Southern Railway Company v. Sprint Communications Company L.P.*,[86] the Fourth Circuit addressed the "mutual, final, and definite" ground for *vacatur*. The parties entered into a Licence Agreement that mandated a panel of three appraisers to resolve disputes on amounts due in the event that the parties' individual appraisers did not agree.[87] The majority decision of the appointed appraisers expressly "reserve[d] . . . assent without prejudice or time limitation subject to [certain] extraordinary appraisal assumptions".[88] The majority decision led to further disputes, which were arbitrated before an AAA panel. The Fourth Circuit held that the majority decision of the appointed appraisers was not "mutual, final, and definite" under the FAA.[89] The reservation of assent "without prejudice or time limitation" was fatal to any finding of finality; the appraiser "did not merely base his assent on certain assumptions, but rather *reserved the right to withdraw* his assent if his assumptions proved to be incorrect".[90] The Fourth Circuit held that this reservation "cannot be squared with any conception of 'finality'".[91] The Fourth Circuit remanded the case back to the district court and instructed the parties to return to arbitration and obtain a "final" arbitration award.

4. *Developments in Delegation of Arbitrability to Arbitrators*

The Supreme Court has recently granted certification in *Oliveira v. New Prime, Inc.*[92] In part, *Oliveira* involves the question of a court's power to determine whether the FAA applies where the parties have delegated questions of arbitrability to the arbitrator.[93]

As discussed above, the default rule under the FAA is that courts are presumed to have jurisdiction to determine questions of arbitrability, the one exception being where the parties have clearly delegated such authority to the arbitrator. The question raised in *Oliveira* is whether courts must first determine whether the agreement is governed by the FAA or whether that question itself is reserved for the arbitrator, where questions of arbitrability are reserved for the arbitrator.

The First Circuit discussed two other decisions, one from the Eighth Circuit and one from the Ninth Circuit. The Eighth Circuit held that the arbitrator must determine questions of arbitrability, which included whether the FAA applied at all.[94] The Ninth Circuit, on the other hand, explained that because "a district court's authority to compel arbitration under the FAA exists only where the Act applies, a district court has no authority to compel arbitration . . . where Section 1 exempts the underlying contract from the FAA's provisions".[95]

The First Circuit was persuaded by the Ninth Circuit's reasoning and further explained that the determination of whether the FAA governs "does not entail any consideration of whether [the parties] have agreed to submit a dispute to arbitration" but rather "it raises the 'distinct inquiry' of whether the district court has the authority to act under the FAA".[96] Thus, it held that whether exemptions from the FAA apply "is an antecedent determination that must be made by the district court before arbitration can be compelled under the FAA".[97]

In recent years, courts have treated delegation clauses in arbitration provisions liberally, giving arbitrators power to address questions of their own jurisdiction in a growing number of cases. The Supreme Court's decision in this case may have broad implications for this practice, at least in situations where the applicability of the FAA itself is in question.

B. Canada

1. *Class Action and Arbitration Legislation*

In recent years, Canadian courts have grappled with the interplay between class action and arbitration legislation, particularly in the context of consumer claims. On one hand, the provincial class action legislation provides that the court must certify a putative class action where the requirements for certification have been met.[98] On the other hand, both the domestic and international arbitration legislation in each province provides that court actions shall be stayed where parties have agreed to arbitrate their disputes, with certain exceptions,[99] and Canadian courts have consistently held that consensual arbitration should be endorsed and encouraged as an alternative dispute resolution mechanism.[100] The Supreme Court of Canada has generally resolved this tension in favour of arbitration and has recently held that any restriction of the parties' freedom to arbitrate must be found in clearly expressed legislation.[101]

The debate over the interplay between class action and arbitration legislation started with parallel putative class actions in British Columbia and Ontario against a payday loan company. In each province, the plaintiffs alleged that arbitration agreements in their standard form loan agreements were "inoperative" or "invalid" within the meaning of the provincial domestic arbitration legislation because the class action statutes required the court to certify where the statutory criteria are met.[102] The British Columbia and Ontario Courts of Appeal both held that whether a stay of a putative class action should be granted on the basis of a mandatory arbitration clause should be decided in the context of determining whether a class action is the preferable procedure for resolving the dispute, one of the statutory criteria for class certification in common law Canada.

Subsequently, in two cases from Quebec decided in 2007, the Supreme Court of Canada held that proposed class actions against Dell Computers and Rogers Wireless could not proceed in the face of mandatory arbitration clauses, ruling that arbitration is a substantive right that ousts the court's jurisdiction.[103] In *Dell*, the Supreme Court expressly endorsed the *kompetenz-kompetenz* principle, as discussed above.[104] Following *Dell* and *Rogers*, the British Columbia and Ontario courts came to different conclusions on the effect of the Supreme Court's decisions – decided in part based on the Quebec Civil Code – on the interplay between the provincial class action and arbitration legislation in each province.

The B.C. Court of Appeal ordered a stay of a consumer class action against another cell phone company for alleged overbilling,[105] while Ontario courts certified an Ontario class action against Dell for the sale of allegedly defective notebook computers.[106]

In the 2011 decision in *Seidel v. Telus*,[107] a majority of the Supreme Court of Canada held that statutory claims for unfair billing practices against a cell phone provider based on British Columbia's consumer protection legislation could proceed despite a mandatory arbitration clause in the cell phone contracts. The decision was based on the wording of the British Columbia consumer protection legislation, which, according to the majority, "manifest[ed] a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to 'private and confidential' mediation/arbitration".[108] While permitting the statutory claims to proceed in court, the majority made clear that "[t]he choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature" and that "[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause".[109]

Recent decisions have demonstrated the willingness of Canadian courts to enforce arbitration agreements in a range of putative class proceedings in the absence of express legislative restrictions on the parties' freedom to arbitrate. For instance, in *Heller v. Uber Technologies Inc.*,[110] the Ontario Superior Court stayed a putative class action on behalf of Uber drivers alleging that the drivers were employees within the meaning of Ontario employment legislation and entitled to certain statutory employment benefits. The Court held that agreements between the drivers and Uber included an agreement to arbitrate in the Netherlands and stayed the action pursuant to the Ontario *International Commercial Arbitration Act, 2017*, which adopts the Model Law.[111] The Court held that "the plain meaning of the words of the [provincial employment statute] do not preclude resort to arbitration" and that the "issue of whether employment claims are arbitrable is an issue subject to the competence-competence principle . . . to be determined in the first instance by the arbitrator".[112]

2. *Canada-European Union Trade Agreement*

On October 30, 2016, Canada and the European Union signed the Comprehensive Economic and Trade Agreement ("CETA"). CETA will establish an Investment Court System ("ICS") to replace the investor-State arbitration provisions in previous bilateral investment agreements between EU Member States and Canada. On September 21, 2017, CETA entered into force provisionally, making most of the agreement (but not the ICS) applicable.[113] The agreement, including the ICS dispute resolution provisions, will enter into force fully and definitively once ratified by all EU Member States.[114]

The ICS will be a permanent arbitral tribunal to resolve disputes arising from the breach of obligations under CETA.[115] The tribunal will comprise 15 members appointed by a joint committee for a fixed term: five members will be Canadian nationals; five will be nationals of EU Member States; and five will be nationals of third-party countries.[116] Cases will be presided over by three members of the tribunal.[117]

The ICS will combine the transparency of national courts with the expediency of arbitration. Like a court, the tribunals' hearings will be open to the public, unless the tribunal determines that there is a need to protect confidential information.[118] Documents such as expert reports and witness statements will be made publicly available.[119] CETA provides that all members of the tribunal must possess the qualifications for appointment to judicial office in their home countries, or otherwise be "jurists of recognised competence",[120] and are subject to strict ethics and conflicts of interest rules.[121] The rules specify a mechanism to challenge an arbitrator on the basis of a conflict of interest,[122] and the documents related to the challenge of an arbitrator are made publicly available.[123] There is also an appeal mechanism for the review of awards based on errors in the application of law, "manifest errors" in the appreciation of facts, including domestic law, or on the grounds set out in Article 52(1) of the International Centre for Settlement of Investment Disputes ("ICSID") Convention, such as corruption, a "serious departure from a fundamental rule of procedure", or failure to state reasons, among other grounds.[124]

In order to benefit from the efficiency of an arbitral forum, the rules permit the tribunal to expeditiously dismiss claims that are "manifestly without legal merit"[125] or "unfounded in law".[126] The tribunal is generally required to issue an award within 24 months of the date a claim is submitted, failing which it is required to provide the parties with reasons for the delay.[127] Costs are generally borne by the unsuccessful party.[128]

The ICS reflects a number of features to safeguard the sovereignty of States subject to its jurisdiction and protect their power to regulate in the public interest. For example, it limits the grounds on which an investor can challenge a State[129] and does not provide the tribunal with the power to grant injunctive relief,[130] avoiding the possibility that a government may be forced to change legislation or policy in response to investor suits. The tribunal's final award is limited to monetary damages or restitution, and it cannot award punitive damages.[131] Moreover, although it can order interim measures to protect certain rights of parties to a dispute, such as orders relating to the preservation of evidence, the tribunal cannot generally grant orders of attachment.[132]

CETA's ICS provisions are among its most controversial, and nearly derailed efforts to sign the treaty.[133] However, its proponents not only fought to preserve the ICS as an important feature of CETA, but are looking to apply its model beyond CETA, with ambitions of establishing a "Multilateral Investment Court" open to all countries that subscribe to its underlying principles.[134] This reflects a view of the ICS as not only a specialised forum for trade disputes arising from CETA, but as an "important and radical change" in dispute resolution more broadly.[135] Canada and the EU are committed to expeditiously implementing the Multilateral Investment Court "once a minimum critical mass of participants is established".[136]

IV. Conclusion

The United States and Canada are each home to mature and arbitration-friendly legal regimes. Although the laws regarding arbitration continue to evolve, the United States and Canada remain important sites of international arbitration.

Acknowledgment

The authors would like to acknowledge Byron Shaw for his invaluable assistance in the preparation of this chapter.

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Endnotes

1. *See* Office of the U.S. Trade Representative, *Free Trade Agreements*, http://www.ustr.gov/trade-agreements/free-trade-agreements (listing free trade agreements to which the United States is a party); Global Affairs Canada, *Trade and Investment Agreements*, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&_ga=2.112356812.93491933.1523285118-835169481.1520885063 (listing free trade agreements to which Canada is a party).
2. *See* Final Text of NAFTA, Ch. 11 § B, https://www.nafta-sec-alena.org/Default.aspx?tabid=97&language=en-US. On May 18, 2017, the U.S. government under President Trump formally notified Congress of its intention to initiate negotiations related to NAFTA with Canada and Mexico, which were ongoing at the time of publication. *See* Office of the United States Trade Representative, North American Free Trade Agreement (NAFTA), https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta; Government of Canada, North American free trade agreement (NAFTA) – Information on consultations, http://www.international.gc.ca/trade-commerce/consultations/nafta-alena/info.aspx?lang=eng.
3. *See* Global Affairs Canada, *Trade and Investment Agreements*, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&_ga=2.112356812.93491933.1523285118-835169481.1520885063.
4. 9 U.S.C. § 1 *et seq.*
5. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20–21 (2012) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).
6. *See* 9 U.S.C. § 1.
7. 9 U.S.C. § 1 *et seq.*
8. 9 U.S.C. § 2.
9. 9 U.S.C. §§ 9, 10.
10. 9 U.S.C. § 201 *et seq.*; *see also* UNCITRAL, *Status: Convention on the Recognition & Enforcement of Foreign Arbitral Awards*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
11. 9 U.S.C. § 301 *et seq.*
12. 9 U.S.C. § 305.
13. 9 U.S.C. § 2.
14. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006).
15. 9 U.S.C. § 5.
16. 9 U.S.C. § 7.
17. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).
18. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).
19. *Howsam*, 537 U.S. at 85 (emphasis omitted).
20. 9 U.S.C. § 10.
21. 9 U.S.C. § 11.
22. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).
23. *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010).
24. *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).
25. *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567–69 (7th Cir. 2015); *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012); *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121–22 (2d Cir. 2011); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418–19 (6th Cir. 2008).
26. *Raymond James Fin. Servs., Inc. v. Fenyk*, 780 F.3d 59, 63–65 (1st Cir. 2015); *Bellantuono v. ICAP Secs. USA, LLC*, 557 F. App'x 168, 173–74 (3d Cir. 2014); *Schafer v. Multiband Corp.*, 551 F. App'x 814, 818–19 (6th Cir. 2014).
27. *See Renard*, 778 F.3d at 567–68; *Wachovia Secs.*, 671 F.3d at 483; *Biller*, 668 F.3d at 665; *Jock*, 646 F.3d at 121 n.1; *Coffee Beanery*, 300 F. App'x at 418; *see also Raymond James Fin. Servs.*, 780 F.3d at 64; *Bellantuono*, 557 F. App'x at 174; *Schafer*, 551 F. App'x at 819–20.
28. Commercial Arbitration Act, R.S.C. 1985, c 17 (Can.).
29. International Commercial Arbitration Act, R.S.B.C. 1996, c 233 (Can. B.C.); International Commercial Arbitration Act, R.S.A. 2000, c I-5 (Can. Alta.); The International Commercial Arbitration Act, S.S., c I-10.2 (Can. Sask.); The International Commercial Arbitration Act, C.C.S.M., c C.151 (Can. Man.); International Commercial Arbitration Act 2017, S.O. 2017, c 2, Sched. 5 (Can. Ont.); Code of Civil Procedure, c C-25.01, Article 649 (Can. Que.); International Commercial Arbitration Act, R.S.N.B. 2011, c 176 (Can. N.B.); International Commercial Arbitration Act, R.S.P.E.I. 1998, c I-5 (Can. P.E.I.); International Commercial Arbitration Act, R.S.N.S. 1989, c 234 (Can. N.S.); International Commercial Arbitration Act, R.S.N.L. 1990, c I-15 (Can. Nfld.); International Commercial Arbitration Act, R.S.Y. 2002, c 123 (Can. Yukon); International Commercial Arbitration Act, R.S.N.W.T. 1988, c I-6 (Can. N.W.T.); International Commercial Arbitration Act, R.S.N.W.T. 1988, c I-6 (Can. Nu.).
30. Alberta, Manitoba, Ontario, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland and the Northwest and Nunavut Territories.
31. British Columbia, Saskatchewan and Yukon Territory.
32. Code of Civil Procedure, c C-25.01, Article 649 (Can. Que.) ("[if] international trade interests, including interprovincial trade interests, are involved in arbitration proceedings, consideration may be given, in interpreting this Title, to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments".) Article 649 also provides that recourse may be had to documents related to the Model Law, including the Report of the United Nations Commission on International Trade Law on its eighteenth session held in Vienna from 3 to 21 June 1985 and the Analytical Commentary on the draft Model Law contained in the report to the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law. *Id.*
33. New York Arbitration Convention, Contracting States, http://www.newyorkconvention.org/countries.
34. United Nations Foreign Arbitral Awards Convention Act, R.S.C., 1985, c 16 (2nd Supp.) (Can.).
35. Most provinces have implemented the New York Convention in their international commercial arbitration statutes listed in note 29 above. British Columbia, Saskatchewan and the Yukon Territory enacted separate statutes implementing the New York Convention. *See* Foreign Arbitral Awards Act, R.S.B.C. 1996, c 154 (Can. B.C.); The Enforcement of Foreign Arbitral Awards Act, 1996, c E-9.12 (Can. Sask.); Foreign Arbitral Awards Act, R.S.Y. 2002, c 93 (Yukon).
36. United Nations Foreign Arbitral Awards Convention Act, R.S.C., 1985, c 16, s. 4(1) (Can.).

37. Foreign Arbitral Awards Act, R.S.B.C. 1996, c 154, s. 3 (Can. B.C.); International Commercial Arbitration Act, R.S.A. 2000, c I-5, s. 2(2) (Can. Alta.); The Enforcement of Foreign Arbitral Awards Act, 1996, c E-9.12, s. 5 (Can. Sask.); The International Commercial Arbitration Act, C.C.S.M., c C.151, s. 2(2) (Can. Man.); International Commercial Arbitration Act 2017, S.O. 2017, c 2, Sched. 5, s. 2(1) (Can. Ont.); International Commercial Arbitration Act, R.S.N.B. 2011, c 176, s. 3(2) (Can. N.B.); International Commercial Arbitration Act, R.S.P.E.I. 1998, c I-5, s. 2(2) (Can. P.E.I.); International Commercial Arbitration Act, R.S.N.S. 1989, c 234, s. 3(2) (Can. N.S.); International Commercial Arbitration Act, R.S.N.L. 1990, c I-15, s. 3(2) (Can. Nfld.); Foreign Arbitral Awards Act, R.S.Y. 2002, c 93, s. 3 (Yukon); International Commercial Arbitration Act, R.S.N.W.T. 1988, c I-6, s. 4(2) (Can. N.W.T.); International Commercial Arbitration Act, R.S.N.W.T. 1988, c I-6, s. 4(2) (Can. Nu.).
38. Code of Civil Procedure, c C-25.01, Article 652.
39. UNCITRAL Model Law on Int'l Commercial Arbitration, Article 7(2) (1985), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
40. UNCITRAL Model Law on Int'l Commercial Arbitration, Article 7(3) (as amended in 2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
41. *Id.*, Article 7(4).
42. *Id.*, Articles 17A-J.
43. Uniform Law Conference of Canada, Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation (March 2014), http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/926-international-commercial-arbitration-act/2233-international-commercial-arbitration-final-report-and-commentary.
44. International Commercial Arbitration Act, 2017, S.O. 2017, c 2, Sched. 5 (Can. Ont.).
45. In Quebec, the Code of Civil Procedure provides that the Model Law "and its amendments" may be given consideration in international commercial arbitrations. *See* Code of Civil Procedure of Quebec, c C-25.01, Article 649 (Can.).
46. *Yugraneft Corp. v. Rexx Mgmt. Corp.*, 2010 SCC 19, ¶¶ 14–34 (Can.).
47. International Commercial Arbitration Act, 2017, S.O. 2017, c 2, Sched. 5, s. 10 (Can. Ont.).
48. Model Law, Articles 10–11.
49. *Id.* Articles. 11(3)–(4).
50. *Id.* Articles 12, 13.
51. *See IBA Rules on the Taking of Evidence in International Arbitration*, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.
52. Model Law, Article 27.
53. *Id.*, Article 16.
54. *Id.*, Article 8(1).
55. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, ¶ 84 (Can.).
56. *Id.* at ¶ 85.
57. *Id.* at ¶ 86.
58. *See, e.g., Haas v. Gunasekaram*, 2016 ONCA 744 at ¶ 15 (Can.); *Dancap Productions Inc. v. Key Brand Entertainment, Inc.*, 2009 ONCA 135 at ¶¶ 32–33 (Can.); *Gulf Canada Resources Ltd. v. Arochem Int'l Ltd.* (1992), 66 B.C.L.R. (2d) 113 at ¶¶ 39–40 (Can. B.C.C.A.).
59. *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 at ¶ 40 (Can. B.C.C.A.).
60. Model Law, Article 34(2)(a).
61. *Id.*, Article 36(1)(a)(iv). *See also*: New York Convention, Article V(1)(e).
62. Model Law, Article 36(1)(b); New York Convention, Article V(2).
63. *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 47 B.C.L.R. (2d) 201 (Can. B.C.S.C.), *aff'd* [1991] 1 W.W.R. 219 (Can. B.C.C.A.), *leave to appeal refused*, [1990] S.C.C.A. No. 431 (Can.); *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (1999), 45 O.R. (3d) 183 (Can. Ont. S.C.), *aff'd* (2000), 49 O.R. (3d) 414 (Can. Ont. C.A.), *leave to appeal refused*, [2000] S.C.C.A. No. 581 (Can.); *1552955 Ontario Inc. v. Lakeside Produce Inc.*, 2017 ONSC 4933 at ¶ 79 (Can.).
64. *Popack v. Lipszyc* (2016), 129 O.R. (3d) 321 (Can. Ont. C.A.); *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939 at ¶ 102 (Can.).
65. *Belokon v. The Kyrgyz Republic et al.*, 2015 ONSC 5918 at ¶ 43 (Can.), *aff'd*, 2016 ONCA 981 (Can. Ont. C.A.), *leave to appeal refused sub. nom. Entes Indus. Plants Constr. & Erection Contracting Co. Inc. v. Kyrgyz Republic*, 2017 CanLII 36656 (Can.) and 2017 CanLII 36653 (Can.), *quoting Schreter v. Gasmac Inc.*, [1992] O.J. No. 257 (Can. Ont. Ct. J. (Gen. Div.)). *See also Depo Traffic v. Vikeda International*, 2015 ONSC 999 at ¶¶ 45–47 (Can.).
66. *Schreter v. Gasmac Inc.*, [1992] O.J. No. 257 at ¶ 50 (Can. Ont. Ct. J. (Gen. Div.)).
67. Consumer Financial Protection Bureau, *CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court*, May 5, 2016, https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/ ("CFPB Press Release").
68. 136 S. Ct. 463 (2015).
69. 36 Cal. 4th 148.
70. 563 U.S. 33.
71. *Id.* at 471.
72. Justice Thomas wrote his own short, dissenting opinion, holding that the FAA does not apply to proceedings in state courts. *Id.*
73. *Id.* at 477.
74. Final Rule, Arbitration Agreements, Consumer Financial Protection Bureau, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/arbitration-agreements/ (last visited Apr. 4, 2018).
75. 29 U.S.C. § 157.
76. *Epic Sys. Corp. v. Lewis*, 584 U.S. -- (2018). The case was consolidated under *Epic Systems* from appeals arising out of the Fifth, Seventh and Ninth Circuits. *See Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).
77. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2288 (2012).
78. *N.L.R.B. v. Alternative Entm't, Inc.*, 858 F.3d 393, 405 (6th Cir. 2017); *Lewis*, 823 F.3d at 1157; *Morris*, 834 F.3d at 983–84.
79. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013); *Murphy Oil*, 808 F.3d at 1018; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013).
80. 9 U.S.C. § 2.
81. *Epic Sys.*, slip op. at 7.
82. *Id.* at 11.
83. *Id.* at 26 (Ginsburg, J., dissenting)
84. *Id.* at 29.

85. 9 U.S.C. § 10(a)(4).
86. *Norfolk S. Rwy. Co. v. Sprint Comm'cns Co. L.P.*, 883 F.3d 417 (4th Cir. 2018).
87. *Id.* at 420.
88. *Id.*
89. *Id.* at 423.
90. *Id.*
91. *Id.*
92. *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017), *cert. granted sub nom. New Prime Inc. v. Oliveira*, No. 17-340 (2018).
93. The parties disputed whether the contract was governed by the FAA, which exempted "contracts of employment of transportation workers from the Act's coverage". *Id.* at 9.
94. *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).
95. *In re Van Dusen*, 654 F.3d 838, 843 (9th Cir. 2016).
96. *Oliveira*, 857 F.3d at 14.
97. *Id.* at 15.
98. *See, e.g.,* Class Proceedings Act, R.S.B.C. 1996, c 50, s. 4 (Can. B.C.); Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5 (Can. Ont.). The class proceedings legislation in all other common law provinces is very similar. The requirements for certification – called "authorization" in Quebec – are somewhat different, and are set out in Article 575 of the Quebec Code of Civil Procedure. *See* C.C.P., Article 575.
99. The grounds on which a stay may be refused in domestic arbitration legislation differ by province. For instance, British Columbia's domestic arbitration legislation contains grounds similar to Article 8(1) of the Model Law, providing that "the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed". Arbitration Act, R.S.B.C. 1996, c 55, s. 15(2) (Can. B.C.). By contrast, Ontario's domestic arbitration legislation provides that the court may refuse a stay where a party entered into the agreement while under legal incapacity, the arbitration agreement is invalid, the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law, the motion was brought with undue delay or the matter is a proper one for default or summary judgment. Arbitration Act, 1991, S.O. 1991, c. 17, s. 7(2) (Can. Ont.).
100. *Seidel v. TELUS Comm'cns Inc.*, [2011] 1 S.C.R. 531 at ¶ 89 (Can.) (Lebel, Deschamps, Abella and Charron JJ., dissenting, but not on this point).
101. *Id.* at ¶ 2.
102. *See, e.g., MacKinnon v. Nat'l Money Mart Co.* (2004), 203 B.C.A.C. 103 (Can. B.C.C.A.); *Smith v. Nat'l Money Mart Co.* (2005), 258 D.L.R. (4th) 453 (Can. Ont. C.A.), *leave to appeal refused*, [2005] S.C.C.A. No. 528 (Can.).
103. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 (Can.); *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921 (Can.).
104. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at ¶¶ 84–85 (Can.).
105. *MacKinnon v. Nat'l Money Mart Co.* (2009), 304 D.L.R. (4th) 331 (Can. B.C.C.A.); *Seidel v. TELUS Communications Inc.* (2009), 267 B.C.A.C. 266 (Can. B.C.C.A.).
106. *Griffin v. Dell Canada Inc.*, (2009), 72 C.P.C. (6th) 158 (Can. Ont. S.C.), *reconsideration denied*, (2009), 76 C.P.C. (6th) 173 (Can. Ont. S.C.), *aff'd* (2010), 98 O.R. (3d) 481 (Can. Ont. C.A.), *leave to appeal refused*, [2010] S.C.C.A. No. 75 (Can.). *See also Wellman v. TELUS Comm'cns Company*, 2017 ONCA 433 (Can.).
107. [2011] 1 S.C.R. 531 (Can.).
108. *Id.* at ¶ 2.
109. *Id.* at ¶ 2.
110. 2018 ONSC 718 (Can.).
111. S.O. 2017, c. 2, Sched. 5 (Can. Ont.).
112. *Heller*, 2018 ONSC 718 at ¶ 65 (Can.).
113. European Commission on Trade, *In Focus: Comprehensive Economic and Trade Agreement (CETA)*, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723.
114. *Id.*
115. European Commission on Trade, *CETA chapter by chapter*, Article 8.18, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.
116. *Id.*, Article 8.27.
117. *Id.*
118. *Id.*, Article 8.36.
119. *Id.* (referring to documents under Article 3(2) of the UNCITRAL Transparency Rules).
120. *Id.*, Article 8.27.
121. *Id.*, Article 8.30.
122. *Id.*, Article 8.30.
123. *Id.*, Article 8.36.
124. *Id.*, Article 8.28.
125. *Id.*, Article 8.32.
126. *Id.*, Article 8.33.
127. *Id.*, Article 8.39.
128. *Id.*, Article 8.39.
129. *Id.*, Article 8.10; *see also* European Commission on Trade, *CETA explained*, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/.
130. CETA Chapters, Article 8.34.
131. *Id.*, Article 8.39.
132. *Id.*, Article 8.34.
133. *See, e.g.,* Paul Waldie, *Investment Court System a sticking point for CETA critics*, The Globe and Mail, Oct. 26, 2016, http://www.theglobeandmail.com/news/world/international-court-a-sticking-point-for-ceta-critics/article32540551/.
134. Government of Canada Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada & the European Union and its Member States, s. 6(i), http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/jii-iic.aspx?lang=eng.
135. *Id.*
136. *Id.*

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Bermuda

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Other than requiring that arbitration agreements be in writing, Bermuda's arbitration statutes do not require any specific form or format. Agreements may take the form of a clause contained in a contract or a separate agreement signed by the parties or they can be evidenced by an exchange of letters or other means of communication. Additionally, an arbitration clause contained in a separate document can be incorporated by express reference.

1.2 What other elements ought to be incorporated in an arbitration agreement?

There are no other elements that must be incorporated in an arbitration agreement, but, given the existence of two arbitration regimes in Bermuda (see the response to question 2.1 below), it is advisable that the arbitration agreement specify which statute is to apply. For example, an arbitration clause in a reinsurance agreement between Bermuda companies (including a captive insurer) may be deemed to be subject to Bermuda's domestic statute – despite the contract having an "international flavour" – unless the parties stipulate that the international statute is to apply.

The arbitration agreement will dictate the scope of the arbitral panel's jurisdiction. Accordingly, although there are no rules regarding the contents of the agreement, care should be taken to ensure it is broad enough to encompass all matters of dispute that may potentially arise between the parties.

In addition, the parties may wish to consider including provisions in the agreement relating to the number of arbitrators, their qualifications, and the procedure for appointing them. The parties may also wish to consider whether to adopt a particular set of procedural rules to govern any arbitrated dispute. It is also open to the parties to include in the arbitration agreement provisions relating to interim measures that may be sought, including jurisdiction for the tribunal to order security for costs.

It is common for Bermuda arbitration clauses to include a provision regulating awards of costs (e.g. "the costs of the arbitration shall be at the sole discretion of the arbitral tribunal, who may direct to whom and by whom and in what manner they shall be paid"). Arbitration clauses in Bermuda insurance policies sometimes contain provisions designed to bind to arbitration third parties asserting rights in relation to the policy (e.g. subrogating insurers, liquidators or direct claimants) or to require the insured to cooperate in obtaining the dismissal of court proceedings brought against the insurer by other insurers seeking a contribution or indemnity.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

There is a well-established body of Bermudian authority affirming the strong policy grounds upon which arbitration agreements will be upheld in Bermuda. The Bermuda court will act "robustly" where necessary, including by issuing an anti-suit injunction, to restrain a party from acting in violation of an arbitration agreement. As Kawaley CJ held in *Buchanan v Lawrence* [2012] SC (Bda) 38 Civ., *"[i]t is clear that the UNCITRAL Model Law [which is incorporated into the 1993 Act] imposes a very strong policy in favour of arbitration"*.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

There are two different arbitration regimes in Bermuda. The Arbitration Act 1986 ("the 1986 Act") governs the arbitration of domestic disputes, while the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act"), which incorporates into Bermuda law the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), applies to "international commercial arbitrations". This chapter will focus on arbitration under the 1993 Act.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The 1986 Act governs domestic arbitrations, while the 1993 Act governs international arbitrations. In general terms, the statutes differ in that the 1986 Act is similar to the English Arbitration Acts 1950–1979, whereas the 1993 Act adopts the Model Law. A notable difference between the two statutes relates to the scope for appeal, which is very narrow under the 1993 Act, but broader under the 1986 Act. Other differences include a prohibition in the 1986 Act against provisions that purport to fetter the arbitral tribunal's jurisdiction to award costs (no such restriction applies to the 1993 Act) and the retention in the 1986 Act of the traditional role of the "umpire" as a passive observer who participates only where the two "arbitrators" cannot agree.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes. Section 23 of the 1993 Act adopts the Model Law (save for certain differences as regards the enforcement of arbitration awards).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

There are no mandatory rules governing international arbitration proceedings, save that Article 18 of the Model Law requires that the parties must be treated equally and given a full opportunity to present their respective cases. Article 19 of the Model Law provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceeding and that, failing such agreement, the tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

There are generally no restrictions on the subject matters that may be referred to arbitration in Bermuda, save that there is some scope for argument as to the arbitrability of insolvency, minority shareholder, and partnership disputes. Whether a dispute is "arbitrable" is a question of the scope and terms of the arbitration agreement (*Lenihan v LSF Consolidated Golf Holdings Ltd* [2007] Bda LR 49). Both the 1986 Act and the 1993 Act apply to arbitrations to which the Crown is a party.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. The tribunal may rule on its own jurisdiction, and on objections with respect to the existence or validity of an arbitration agreement. For these purposes an arbitration clause contained in a contract is treated as an agreement independent of the other terms contained in the contract.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The Bermuda court will act robustly to enforce an arbitration agreement, including by granting an anti-suit injunction against a party who commences proceedings in breach of an arbitration agreement. The Bermuda court has the power to grant injunctive relief regardless of whether the litigation has been commenced in Bermuda or outside Bermuda, and any party who takes steps in connection with the court proceedings in violation of the anti-suit order may be held in contempt of court. The most recent reported example of an anti-suit injunction being granted by the Bermuda Court in support of an arbitration agreement is the case of *Ironshore Insurance Ltd et al v MF Global Assigned Assets LLC* [2016] Bda LR 127.

An action commenced before a court in Bermuda in breach of an arbitration agreement will be stayed by the court at the request of a party to the action who has not submitted to the court's jurisdiction (for example, by entering a defence). Proceedings were stayed pursuant to Article 8 of the Model Law in *Raydon Underwriting Management Co Ltd v North American Fidelity & Guarantee* [1994] Bda LR 65. Under Article 8 the Bermuda court will not refer the matter to arbitration if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Article 16 of the Model Law provides that the arbitral tribunal may rule on issues going to its jurisdiction. This includes its competence to hear objections with respect to the existence or validity of the arbitration agreement that purportedly gives it power to act. It may also determine questions about the principal agreement in which the arbitration clause is embedded. To this extent, Bermuda law recognises the doctrine of *Kompetenz-Kompetenz*. The tribunal can address the issue as a preliminary question or in its final award on the merits. If the tribunal rules as a preliminary matter that is has jurisdiction, any party may request, within 30 days of receiving notice of the award, that the Bermuda Supreme Court decide the matter. The court's decision is binding and cannot be appealed. Where the tribunal rules on questions of jurisdiction and competence in any award, it is open to a party to seek to have the award set aside on the grounds that it deals with a dispute not contemplated by the arbitration agreement, or contains decisions on matters beyond the scope of the submission to arbitration, or that either the composition of the tribunal or its procedure was not in accordance with the parties' agreement.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Parties can only be compelled into arbitration by consent, and subject to the terms of the applicable arbitration agreement. Non-parties to that agreement cannot be compelled to arbitrate, no matter how relevant they may be to the dispute.

This question often arises in the context of insurance coverage disputes, where the policyholder enters into separate insurance policies (each containing a separate arbitration agreement) with multiple insurers within a "tower" of insurance. Where multiple coverage disputes arise between the policyholder and its insurers, the policyholder is unable to compel the insurers into a single consolidated proceeding even if the disputes involve common questions of fact and law. Likewise, a policyholder wishing to pursue an alternative claim against its insurance broker (e.g. for negligence in negotiating the policy) will not be able to join the broker to the arbitration proceedings with the insurer, unless the broker is also a party to the arbitration proceedings.

It is not uncommon for a third party to assert rights under an insurance policy that contains an arbitration clause even though such party is not a party to the policy or to the arbitration clause. Examples include a claimant asserting a "cut through" right directly against the insurer (e.g. pursuant to a "direct action" statute),

assignees of the policyholder (including liquidating trusts in bankruptcy proceedings), an insurer exercising rights of subrogation or a co-insurer seeking a contribution from another insurer. In all of these cases, the target insurer will, generally, be able to insist that its rights under the policy be determined through arbitration notwithstanding that the third party was not an original party to the arbitration clause (see, for example, *ACE Bermuda Insurance Ltd. v Continental Casualty Co* [2007] Bda LR 8, [2007] Bda LR 38).

Bermuda has also recently enacted legislation entitled the Contracts (Rights of Third Parties) Act 2016, pursuant to which parties to a contract may decide to confer contractual rights on third parties, subject to the terms and conditions of the contract (including, for example, any arbitration clause).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Section 35 of the Limitation Act 1984 ("the 1984 Act") prescribes that the limitation provisions which apply for commencing court proceedings in Bermuda also apply to arbitrations. In Bermuda the limitation period for cases founded on a contract or in tort is six years from the date upon which the relevant cause of action accrued.

Time stops running for limitation purposes once arbitration proceedings are commenced. Under Article 21 of the Model Law, arbitral proceedings are deemed to commence on the date when one party to the arbitration serves on the other party a notice requiring it to appoint or agree to the appointment of an arbitrator. Where the arbitration agreement provides that reference is to be made to a person named or designated in the agreement, the proceedings are deemed to commence when one party to the arbitration serves on the other party a notice requiring it to submit the dispute to the person so named or designated. In the case of domestic arbitrations, section 41 of the Arbitration Act 1986 similarly provides that an arbitration shall be deemed to commence when one party to the arbitration agreement serves on the other party a notice requiring it to appoint or concur in appointing an arbitrator.

The courts of Bermuda have not addressed whether questions as to limitation are questions of substance or procedure. However, this issue often arises in arbitration proceedings involving "Bermuda Form" insurance policies, where the substantive law is that of New York and the procedural law is that of Bermuda. Section 51 of the 1993 Act expressly refers to and sets out the part of the 1984 Act dealing with foreign limitation periods, the effect of which is that (subject to certain exceptions) the law relating to the limitation of actions is treated as a matter of substance rather than a matter of procedure, and is thus ordinarily governed by the *lex causae*.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Where a winding-up order is made against a company under the Bermuda Companies Act 1981, no arbitration can be commenced or proceeded with against it without the court's express permission.

In the insurance context, it is possible that the insolvency of the policyholder will give rise to a statutory assignment to a third-party claimant of the policyholder's rights under the Third Parties (Rights Against Insurers) Act 1963 with the result that the third party becomes subject to any arbitration clause.

A moratorium imposed by foreign insolvency proceedings involving a party to a Bermuda arbitration has no automatic effect on the Bermuda arbitration (although it may be contended in the foreign jurisdiction that pursuing the Bermuda arbitration or seeking anti-suit relief from the Bermuda court is a breach of the moratorium, as a matter of foreign law). In certain circumstances, the Bermuda court may have jurisdiction to recognise and assist the foreign proceedings, exercisable at the request of foreign courts or foreign insolvency officeholders, by imposing a moratorium in Bermuda on actions brought by or against the party subject to the foreign proceedings, including the arbitration. Where foreign court proceedings engage the insolvency jurisdiction of the foreign court, the Bermuda court will limit its interference to matters arising under the contract and it is unlikely to seek to restrain resolution of insolvency questions (e.g. priority, proof of claim, subordination, etc.) by the foreign court. The Supreme Court of Bermuda has recently considered some of these issues in the case of *Ironshore Insurance Ltd et al v MF Global Assigned Assets LLC* [2016] Bda LR 127.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Article 28 of the Model Law prescribes that the arbitral tribunal will determine the dispute between the parties in accordance with the rules of law chosen by them. It provides that any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state, and not its conflict of law rules. Where the parties do not expressly identify the law applicable to the substance of the dispute, the tribunal will do so having regard to the conflict of laws rules it considers applicable. This will generally involve the application of the conflict of law rules of Bermuda, which involves inferring the parties' intentions as regards governing law from the circumstances, or applying an objective test of which system of law has the closest and most real connection with the subject-matter of the contract.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The parties to an arbitration agreement have broad scope to agree the law that will govern their dispute. There are no Bermuda laws that specifically prohibit the arbitration of disputes, such as statutes in certain US states that purport to void arbitration clauses in certain insurance policies.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

There is no presumption under the 1993 Act or the Model Law (as there is under the 1986 Act) that a contract providing for arbitration in Bermuda will be governed by Bermuda law. In the case of most commercial agreements that include an agreement to refer future disputes to arbitration, it will be presumed that the law governing the reference agreement is the same as the proper law of the agreement. Nevertheless, the "separability" of the arbitration agreement from the agreement in which it is embedded creates a potential for the law of the arbitration agreement to differ from the proper law of the agreement. The context in which this is most likely to arise in Bermuda arbitration is in the case of disputes over "Bermuda Form" insurance policies, which are governed by (modified) New York

law, but are subject to arbitration in Bermuda under Bermuda law (if not in London under English law).

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are no limits to the parties' autonomy to select the tribunal save as stipulated in the arbitration agreement. The parties are free to specify the number of arbitrators, the qualifications they should possess, as well as the procedure for their selection. Prospective candidates are required under Article 12 of the Model Law to disclose any circumstances likely to give rise to justifiable doubts about their impartiality and independence. The Model Law prevents one party objecting to the appointment of an arbitrator by reason of his nationality unless the parties have agreed otherwise.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The Model Law provides the parties with autonomy to agree a procedure for appointing the arbitral panel and this may include express provision in the arbitration agreement for a default procedure. Articles 11(3) and (4) make express provision for the appointment of an arbitral tribunal where the parties have failed to agree on a procedure, or where a party fails to perform its obligations under an agreed procedure.

Where a party fails to act as required, either under the agreed procedure, or under the default procedure, or a third party fails to perform any function entrusted to it under the agreed procedure, any party can ask the Supreme Court of Bermuda to take the necessary steps, unless the agreed procedure provides another means of securing the appointment. The court's decision on such an application cannot be appealed. There are a number of reported and unreported decisions in which the Supreme Court has shown itself ready to make appointments in default pursuant to the 1993 Act (as well as pursuant to the 1986 Act, including in the recent case of *S v T* [2018] SC Bda 9 Civ). The English High Court has also recently determined applications to appoint third arbitrators in two "Bermuda Form" insurance arbitrations being held in London, in the case of *Guidant LLC v Swiss Re International SE et al* [2016] EWHC 1201 (Comm).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. Where the parties fail to agree to the appointment of a sole arbitrator, or two party-appointed arbitrators fail to agree on a third, or an appointing institution fails to make an appointment, Articles 11(3) and (4) of the Model Law will apply. This enables any party to ask the Supreme Court of Bermuda to make the appointment. There is no right of appeal from the court's decision. In addition, Article 12 of the Model Law provides that an arbitrator may be challenged if circumstances exist which give rise to justifiable doubts as to his impartiality and independence. A party may only challenge an arbitrator appointed by him, or in whose appointment he has participated, on the basis of reasons he becomes aware of after the appointment. The procedure for challenging an arbitrator is set out at Article 13 of the Model Law. This requires the objecting party to act expeditiously once it becomes aware of the constitution of the tribunal or becomes aware of a relevant circumstance.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Article 18 of the Model Law provides that each party is to be treated with equality and given a full opportunity to present its case. It follows, therefore, that the arbitrators must remain impartial and independent throughout the proceedings. See also the response to question 5.3 above in connection with the power to challenge an arbitrator for lack of independence and impartiality. The English High Court has recently dismissed an application for the removal of an arbitrator in a "Bermuda Form" insurance arbitration that was being conducted under the provisions of the UK's Arbitration Act 1996, concluding that there were no justifiable doubts about the arbitrator's impartiality and independence, in the case of *H v L* [2017] EWHC 137 (Comm), a decision which was recently upheld by the English Court of Appeal in *Halliburton Company v Chubb Bermuda Insurance* Ltd [2018] EWCA Civ 817. This decision is not binding in Bermuda, but it is likely to be treated as persuasive. The recent Privy Council decision in *Almazeedi v Penner & Anor (Cayman Islands)* [2018] UKPC 3 is also relevant to an understanding of the law regarding disclosure of potential conflicts of interest for arbitrators, although principally addressing the position of a judge.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Save for the requirement that the parties be treated equally and each be given the opportunity to present its case, there are no mandatory rules governing the arbitration procedure under either the 1993 Act or the Model Law in Bermuda.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties are free to agree the procedure to be followed by the arbitral tribunal. Failing such agreement, the tribunal may conduct the arbitration in such manner as it considers appropriate. Article 23 of the Model Law provides for the filing of statements of claim and defence. Generally, Bermuda arbitrations tend to adopt procedures influenced by English and Bermudian civil procedure rules, where the parties first exchange statements of case followed by documentary disclosure and then the exchange of fact and expert witness statements.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The conduct of counsel admitted to the Bermuda Bar is governed by the Barristers' Code of Professional Conduct 1981.

(i) These rules also govern the conduct of counsel from Bermuda in arbitral proceedings sited elsewhere.

(ii) The Code of Conduct does not govern the conduct of counsel from countries other than Bermuda in arbitration proceedings sited in Bermuda, who would likely be subject to professional conduct rules in their home jurisdiction.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators must treat each party with equality and give them a full opportunity to present their case (Article 18 of the Model Law). Arbitrators are also required to give the parties proper notice in advance of any hearing or meeting (Article 24(2)) and remain under a continuing duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Ordinarily, professional and immigration restrictions apply to the appearance of lawyers from other jurisdictions in Bermuda. However, these are relaxed in relation to international commercial arbitrations. Section 37(3) of the 1993 Act permits a foreign legal practitioner to act on behalf of a party in arbitral proceedings to which that Act applies without restriction. This includes appearing as counsel before the tribunal. The Bermuda Government's 2015 Work Permit Policy also makes clear that lawyers visiting Bermuda in connection with international arbitrations are exempt from the normal requirements to obtain a work permit provided they remain in Bermuda for no longer than 21 days.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Section 33 of the 1993 Act provides that no arbitrator shall be subject to service of process in any civil matter relating to a dispute in respect of an arbitration under the 1993 Act. Section 34 of the Act goes on to provide that an arbitrator cannot be liable for any act or omission in his capacity as an arbitrator in connection with an arbitration conducted under the Act, although he may be held liable for the consequences of any conscious or deliberate wrongdoing.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The jurisdiction of the court to deal with procedural issues is limited. The court may intervene to:

- grant an interim measure of protection (Article 9);
- appoint an arbitrator where either the agreed mechanism or the default mechanism provided for by the Model Law has failed (Articles 11(3) and 11(4));
- respond to a challenge to the appointment of an arbitrator (Article 13(3));
- decide whether the appointment of an arbitrator should be terminated (Article 14);
- decide on the jurisdiction of a tribunal following a preliminary ruling on the question by the tribunal (Article 16(3));
- assist in the taking of evidence (Article 27); or
- set aside an award (Article 34(2)).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Article 17 of the Model Law provides that (unless the parties agree otherwise) the tribunal may request a party to take such interim measure of protection as it considers necessary in respect of the subject-matter of the dispute. The tribunal may require any party to provide appropriate security in connection with such measure.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Article 9 of the Model Law provides that a party may request that the Bermuda court make an order for an interim measure of protection. Section 35(5) of the 1993 Act provides that the court may make orders:

- for the preservation, interim custody or sale of goods that are the subject-matter of the arbitration;
- to secure an amount in dispute in the arbitration;
- for the detention, preservation or inspection of any property or thing which is the subject of the arbitration or as to which any question may arise therein, and authorising for any such purpose any person to enter upon or into any land or building in the possession of any party to the arbitration, or authorising any samples to be taken or any observations to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence;
- for interim injunctions; or
- for the appointment of a receiver.

Section 35(5) states that it shall not be taken to prejudice any power which may be vested in an arbitrator of making orders with respect to any of the listed matters.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The Bermuda court will take the steps necessary to give effect to an arbitration agreement, and assist the arbitral tribunal as required.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

There is a well-established body of authority affirming the strong policy grounds upon which arbitration agreements will be upheld by the Bermuda court through an anti-suit injunction, including *International Risk Management Group Limited v Elmwood Insurance Limited and others* [1993] Bda LR 48 and *Skandia International Insurance Company and others v Al Amana Insurance and Reinsurance Company Limited* [1993] Bda LR 30. Where proceedings are commenced in breach of a valid and binding arbitration clause, the presumption is that an injunction will normally be granted unless the other party can show "strong reasons" why it should not (see *ACE Bermuda Insurance Ltd v Continental Casualty Co* [2007] Bda LR 8 and [2007] Bda LR 38).

The Bermuda court may enforce arbitration agreements regardless of whether the seat of the arbitration is Bermuda or elsewhere, as in *IPOC International Growth Fund Ltd v OAO CT Mobile* [2007] Bda LR. 43, where the Court of Appeal for Bermuda upheld a first instance decision preventing a Bermudian entity from pursuing foreign proceedings in breach of Swedish and Swiss arbitration agreements.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

There is no express provision under either the 1993 Act or the Model Law that allows an arbitral tribunal to order security for costs or the Bermuda court to make such an order in support of an arbitration; nor are there any reported authorities addressing this issue.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The Bermuda court will take the steps necessary to give effect to an arbitration agreement, and assist the arbitral tribunal as required.

As set out above, section 35(5) of the 1993 Act provides that the court has, for the purpose of and in relation to an arbitration, the same power of making orders in respect of the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration, securing the amount in dispute in the arbitration, detaining, preserving or inspecting any property which is the subject of the arbitration, or issuing interim injunctions or appointing receivers, as the court has for the purpose of court proceedings, without prejudice to the arbitrator's power to make similar such orders.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Under Article 19, the parties are free to agree the rules of evidence that apply to arbitral proceedings in Bermuda. Section 35(2) of the 1993 Act provides that the tribunal may receive any evidence that the tribunal considers relevant and, unless the parties have otherwise agreed, shall not be bound by rules of evidence applicable in Bermuda. Article 18 empowers the tribunal to determine the admissibility, relevance, materiality and weight of evidence.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Apart from the overriding requirement that an arbitrator must treat each party with equality and give each party a full opportunity to present its case (Article 18 of the Model Law), there are no limitations on the arbitrator's authority to order the disclosure of documents by the arbitrating parties. An arbitrator does not have authority to compel disclosure from a third party without the assistance of the court.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Article 27 of the Model Law permits the arbitral tribunal to request assistance from the Bermuda court in relation to the taking of evidence. In practice, this will apply only to the taking of evidence from non-parties. Section 35 of the 1993 Act also enables a party to issue a subpoena to compel the production of documents or to compel the attendance of a witness. The court may also make orders in respect of the examination on oath of any witnesses, and can issue a request for the examination of a witness outside of the jurisdiction.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Section 35 of the 1993 Act provides that, unless the parties agree otherwise, every agreement to arbitrate in Bermuda contains an implied term that the arbitral tribunal has the power to examine witnesses on oath or affirmation and also the power to administer oaths to, or take affirmations of, witnesses in the arbitration. However, it is not customary for witnesses to be examined on oath and typically a witness' direct testimony is elicited through a written witness statement.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The scope of privilege as applied by arbitration tribunals is a complex subject, particularly in an international context. It is generally accepted that the rules of privilege that apply in litigation also apply to arbitrations. Bermuda law recognises two types of privilege: legal professional privilege and litigation privilege. Whether a communication with counsel attracts privilege will depend on the nature of the communication (i.e. whether it falls within either category of privilege). The privilege belongs to the client and may be waived by the client either intentionally or unintentionally. Difficult issues can arise in "Bermuda Form" arbitrations concerning the existence and scope of privilege; for example, the extent to which the arbitral tribunal should uphold a claim for privilege under a foreign law that would not be recognised under Bermuda law.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 31 sets out the requirements as to the form and contents of an arbitral award, namely: (i) the award shall be made in writing and shall be signed by the arbitrator or arbitrators; (ii) in arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated; (iii) the award shall state the reasons upon which it is based, unless the parties have agreed otherwise; and (iv) the award shall state its date and the place of arbitration and the award shall be deemed to have been made at that place. There is no requirement that the arbitrators sign every page of the award.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Article 33 empowers the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature. If agreed by the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the award. In addition, if requested by a party, the arbitral tribunal may make an additional award as to claims made in the arbitral proceedings but omitted from the award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

There is no right of appeal of arbitration awards under the 1993 Act on the merits. The exclusive recourse against an arbitral award is to have it set aside (Article 34). An application can be made to the Court of Appeal for Bermuda where the applicant can show: (i) a party to the arbitration agreement was under an incapacity; (ii) the arbitration agreement was invalid; (iii) a party was not given proper notice of the appointment of an arbitrator, or of the proceedings, or was otherwise unable to present its case; (iv) the award deals with a dispute outside the scope of the arbitration agreement; (v) the arbitral tribunal, or the procedure it adopted, was not in accordance with the agreement of the parties; (vi) the court finds that the subject-matter of the dispute is not capable of settlement in arbitration by the law of Bermuda; or (vii) the award offends public policy. Section 27 of the 1993 Act declares (without limiting the generality of other grounds for challenge) that an award is in conflict with the public policy of Bermuda if the making of the award was induced or affected by fraud or corruption.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The grounds for challenging an award under the 1993 Act are very narrow and it is unlikely that the parties could further narrow the bases for challenge by agreement. Nevertheless, arbitration provisions in "Bermuda Form" policies typically provide that the parties waive any right to appeal to the fullest extent permitted.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, not under the 1993 Act. If parties to a Bermuda arbitration wish to have broader grounds for challenge, they could expressly incorporate the 1986 Act into their arbitration agreement as it affords wider bases for appeal.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The procedure for an application to set aside an award is also set out in Article 34. The application must be made within three months of the date upon which the applicant receives the award. The court has discretion to suspend its hearing on the application to give the arbitral tribunal an opportunity to correct the error that has given rise to the application to set aside the award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The New York Convention was extended to Bermuda by the United Kingdom on 14 November 1979. A reservation has been entered limiting the application of the Convention to the recognition and enforcement of awards made by a territory of another Contracting State, i.e. with regard to reciprocity. Convention Awards are enforceable under Part IV of the 1993 Act, and a full text of the Convention is annexed to the 1993 Act as Schedule 3.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

A party seeking to enforce a Convention Award may do so either by action or by leave of the court. Entering judgment by leave is likely to be the preferred route for enforcement. The Court of Appeal in *LV Finance Group Ltd v IPOC International Growth Fund Ltd* [2006] Bda LR 67 suggested that it is difficult to imagine why a party would choose not to follow this route. The alternative procedure may be adopted where the award is incapable of being converted into a judgment, for example, because of incompleteness or uncertainty or because it is oral.

The party seeking to enforce the award must demonstrate that the award is a *prima facie* one that the court is bound to recognise by virtue of section 40(2) of the 1993 Act. In this regard, that party must produce: (i) an authenticated original of the award or a certified copy of it; (ii) the original arbitration agreement or a certified copy of it; and (iii) where either the award or arbitration agreement is in a language other than English, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

In *Sampoerna Strategic Holdings Ltd v Huwaei Tech Investments Co Ltd* [2014] CA Civ (Bda) 2, the Court of Appeal for Bermuda acknowledged there may be rare cases where enforcement of a Convention Award will be refused on public policy grounds. However, it will only do so where enforcement would "shock the conscience" or be "clearly injurious to the public good" or otherwise "violate the forum's most basic notion of morality and justice". Recently, in *Leap Investments Ltd. v Emerging Markets Special Solutions 3 Ltd.* [2015] Bda LR 38 the Court of Appeal for Bermuda stayed enforcement proceedings in respect of a foreign arbitration award on the basis that the award was subject to annulment proceedings in the foreign jurisdiction.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The principle of *res judicata* applies to arbitration and therefore issues that have been finally determined by an arbitral tribunal cannot be re-heard in the Bermuda court. The application of this principle was affirmed by the Privy Council (on an appeal from Bermuda under the 1993 Act) in *Associated Electric & Gas Insurance Services Ltd. v European Reinsurance Co. of Zurich* [2003] 1 WLR 1041.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The court has discretion not to enforce an award where it is shown that: (i) one or more of the parties to the arbitration agreement was under some incapacity; (ii) the arbitration agreement pursuant to which the award was purportedly made was invalid; (iii) the party against whom the award was made was not given proper notice of the appointment of the arbitrator or the commencement of proceedings or was otherwise unable to present his case; (iv) the award deals with issues outside the scope of the arbitration agreement; (v) there were procedural irregularities; (vi) the award is not yet final; (vii) the subject-matter of the dispute is incapable of determination by arbitration in the country where the arbitration took place; or (viii) recognition or enforcement would be contrary to the public interest of that country (section 42 of the 1993 Act, Article 36 of the Model Law and Article V of the New York Convention).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Generally, arbitration proceedings under the 1993 Act are private and confidential as a matter of Bermuda law. This has been affirmed by both the Privy Council in the *Associated Gas* case (see question 11.4) and by the Supreme Court of Bermuda in *Ace Bermuda Insurance Ltd. v Ford Motor Company* [2016] Bda LR 1. The obligation of confidentiality is not absolute and there are narrow exceptions, e.g. disclosure of the award to found an issue estoppel.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes, but only with the agreement of the parties or with leave of court. It is arguable that a witness may be impeached by reference to a testimony given in prior arbitration proceedings if the court grants leave to adduce the transcript of the prior testimony.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The arbitral tribunal must determine an appropriate remedy in accordance with the law that the parties have chosen to apply to the dispute. In the absence of the parties' agreement to the contrary, it is unlikely that the tribunal has the power to award punitive damages under Bermuda law.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Section 31 of the 1993 Act provides that, subject to any agreement by the parties to the contrary, where a tribunal makes an award for money, the tribunal may include an award of interest at such reasonable rate as it determines. Where the sum payable is in Bermuda Dollars, the Interest and Credit (Charges) Regulations 1975 will apply.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Under section 32 of the 1993 Act, and subject to any agreement by the parties to the contrary, the arbitral tribunal has wide direction in relation to an award of attorneys' fees and/or costs. It can determine who is to bear fees and costs, and in what shares they should be borne. Costs are broadly defined to mean: (i) the fees and expenses of the arbitrators; (ii) legal fees and expenses of the parties, their representatives and expert witnesses; (iii) administration fees of an arbitral institution; and (iv) any other expense incurred in connection with the proceedings.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Arbitral awards are not subject to tax in Bermuda (save in the case of domestic arbitration awards, which, pursuant to Head 9 of the Schedule and section 2 of the Stamp Duties Act 1976 require payment of stamp duty in the sum of 0.25% of the amount or value awarded but not exceeding a maximum of $25).

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Section 96 of the Barristers' Code of Professional Conduct provides that, except in respect of undefended debt collections or to the extent permitted by Bar Council, Bermuda counsel shall not enter into contingent fee arrangements where the fees charged depend upon the results of the case, or consist of a pre-arranged share of money recovered on behalf of the client. It is unlikely that this restriction would apply to overseas counsel conducting arbitrations in Bermuda. A recommendation for the introduction of conditional and/or contingency fee arrangements is being actively considered by the Bermuda Bar Association. The involvement of professional third-party funders is becoming more prevalent in Bermuda. In *Stiftung Salle Modulable and another v Butterfield Trust (Bermuda) Limited* [2014] SC (Bda) 14, the Plaintiff procured funding in return for approximately 40% of any damages recovered. The court declined to follow "antiquarian" authorities, and observed furthermore that fair trial rights guaranteed by the Bermuda Constitution suggested that funding arrangements should be encouraged rather than condemned in Bermuda.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, the ICSID has been extended to Bermuda.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

According to the United Nations Conference of Trade and Development, Bermuda is not party to any in force BITs. (http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu.)

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

As an overseas territory of the United Kingdom, treaty language is largely negotiated by the UK.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Bermuda has not introduced legislation equivalent to the United Kingdom Sovereign Immunity Act 1978. Accordingly, the common law rules governing the defence apply: see *Miller v The Department of the Navy of the United States of America* [1986] Bda LR 78. It is likely that the Bermuda court will give effect to state immunity where circumstances require.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Bermudian insurers and reinsurers routinely include arbitration agreements in the many thousands of (re)insurance policies issued in the Bermuda market annually. Typically, these provide for arbitration in Bermuda (under the 1993 Act) or for arbitration in London (under the UK's Arbitration Act 1996). It is common for insurance policies issued in Bermuda to adopt (modified) New York law as the substantive law of the contract, but to adopt Bermuda or English law to govern procedural matters. In this context, there have been a number of cases recently in which US policyholders (in US bankruptcy proceedings) have sought to avoid Bermuda arbitration agreements by asserting claims against Bermuda insurance companies in US bankruptcy courts, thereby provoking applications for stays or anti-suit injunctions designed to enforce the arbitration agreements in question.

There has been recent discussion in the trusts industry about the suitability of arbitration as a means for resolving disputes relating to private trusts, but no legislative steps have yet been taken in this respect. Otherwise, there are numerous examples of arbitration agreements in commercial contracts, property and building contracts, and in corporate shareholders' agreements governed by Bermuda law.

There is an ongoing discussion in Bermuda regarding the establishment of an international arbitration centre with a view to positioning Bermuda as an international arbitration hub for the Americas along similar lines to that which Singapore occupies for the Asian region.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

A continuing trend in the Bermuda insurance market has been to allow the insured to determine the venue for any arbitration hearing, subject to a defined choice of venues (e.g. Bermuda, England or Canada). However, in such cases, the Bermuda or English arbitration statute continues to apply. Despite some pressure from insurance brokers and certain policyholders, the Bermuda insurance market has been resistant to abandoning arbitration clauses or to agreeing to arbitration in the United States.

At least one insurer in Bermuda has modified its arbitration clause so as to mitigate the effect of the "loser pays" costs "rule" in Bermuda arbitrations by providing that the insurer will not seek recovery of its costs in a coverage dispute unless the insurer succeeds on all matters in dispute. This modification would not be permitted under the English Arbitration Act 1996.

There has also been a market discussion regarding the potential linking of arbitrated disputes involving a single policyholder, but multiple insurers who have issued separate policies with separate arbitration clauses, with the objective of reducing the overall costs of coverage disputes and the potential for inconsistent awards. This could be done by enabling the joinder of separate disputes or, more controversially, through imposing "*res judicata*" clauses that attempt to bind insurers and the policyholder to the outcome of a lead arbitration.

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Kennedys Chudleigh Ltd. is a leading Bermuda law firm, with a strong focus on international arbitrations involving Bermuda and offshore entities, as well as "Bermuda Form" insurance arbitrations seated in both London and Bermuda, international commercial litigation, and domestic litigation and arbitrations across a range of industries.

The firm excels at prosecuting and defending complex matters involving significant exposure, sensitive public relations issues, and industry-wide policies.

Kennedys Chudleigh offers its clients not only local Bermuda expertise but also multinational legal expertise through its association with the international law firm Kennedys Law LLP.

In addition to its international insurance practice, the firm handles insolvency and restructuring matters, commercial litigation, corporate and trust disputes, contract drafting, and general corporate advisory/regulatory work.

Members of the firm regularly appear as counsel in arbitration, mediation, and regulatory tribunals, as well as accepting appointments as arbitrators and mediators.

Chapter 58

Canada

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

As a federal country, generally each of the provinces and territories and the federal government has adopted the UNCITRAL Model Law ("**Model Law**").

An arbitration agreement under the Model Law must be in writing; however, a record of the "contents" of the agreement "in any form" is recognised as being equivalent to a traditional written agreement. It will be sufficient if it is contained in a document signed by the parties, an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement which today would presumably include email. Ontario and British Columbia are the first Canadian provinces to adopt the 2006 Model Law, which is more flexible and provides that the arbitration agreement must still be in writing to be enforceable, but an agreement to arbitrate is in writing if the *content* is *recorded* in written form, including by electronic communication or email. However, in Ontario and British Columbia, an arbitration agreement can be *concluded* orally, by conduct, or by other means.

1.2 What other elements ought to be incorporated in an arbitration agreement?

An arbitration clause should use clear, standardised words, which spell out as clearly as possible the agreement between the parties. It must not be contradicted or modified by other clauses in the contract. The arbitration clause should address: (i) what is to be arbitrated (the scope of the clause); (ii) how it is to be arbitrated (i.e. *ad hoc* or institutional and which rules apply); (iii) where it should be arbitrated (the seat of arbitration); (iv) by whom it is to be arbitrated (number of arbitrators); (v) the applicable law of the arbitration clause; and (vi) the language of the arbitration.

If an institution is selected for an arbitration, a best practice is to use the sample clause of that particular institution and consider any additional elements the parties wish to incorporate.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Canadian law strongly favours enforcing arbitration agreements. Even if the jurisdiction of the arbitrator is disputed, courts will generally enforce an arbitration agreement unless it is clear that the agreement is void, inoperative or incapable of being performed (Model Law, Article 8).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Canada is a federation comprised of 10 provinces and three territories. Each province has exclusive jurisdiction with respect to all matters concerning property and civil rights. Thus, there is no unifying federal law with respect to arbitration. The Federal *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Suppl) only deals with matters involving the federal government. Commercial arbitration between private parties is governed by the legislation of the particular province in which the arbitration takes place. Fortunately, all the provinces have recognised the necessity for uniform legislation with respect to international commercial arbitration and all, save for Québec, have adopted the Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") as the law applicable to international commercial arbitration. In Québec, the Civil Code generally tracks the language of the Model Law and provides that the court take into consideration both the Model Law and the New York Convention where matters of extra-provincial or international trade are at issue.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The issue of whether an arbitration is characterised as domestic or international is important, as it determines whether the particular international or domestic legislation of a province applies. Generally speaking, legislation dealing with domestic arbitrations provides for more court involvement than legislation dealing with international arbitration, including the grounds on which a court may refuse to stay a proceeding and with respect to rights of appeal.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

As discussed above, with the exception of Québec, each of the provinces and the federal government have adopted the Model

Law as it was articulated in 1985 as the basic law for international arbitration. To date, Ontario and British Columbia are the only provinces that have adopted the 2006 amendments to the Model Law, and it is expected that other provinces will follow.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

If Canada is the place of arbitration, its mandatory laws will be applicable. Parties to an international arbitration may oust the application of the provincial legislation, but only to the extent that it does not have mandatory provisions. Further, in the absence of agreement between the parties, the *lex arbitri* will provide the law for the arbitral procedure and will deal with all matters concerning the conduct of the arbitration, and the court supervision thereof (*James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.,* [1970] A.C. 583).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The courts have the power, on public policy grounds, to refuse to permit a matter to be arbitrated. Normally, matters of private commercial law between parties will be arbitrable. The question of whether or not the subject matter of a dispute is arbitrable usually turns on the existence of a statute that may remove the right of parties to contract for a third party to resolve their dispute. For example, certain consumer protection disputes may not be arbitrated under relevant provincial legislation (*Wellman v. Telus*, 2017 ONCA 433; see also J. B. Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed, [JurisNet 2017] ("**Casey**"), ch. 3, 5 and 7).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Under the international arbitration acts, an arbitral tribunal may rule on its own jurisdiction. An arbitral tribunal's finding on jurisdiction is subject to review by the courts (Model Law, Article 16(3), 34).

As a general rule, courts will give deference to the arbitral tribunal to determine its own jurisdiction, including any jurisdictional challenges with respect to the existence or validity of the arbitration agreement. Where a court case has been brought in the face of an arbitration agreement and a question arises as to whether or not the matter falls within the jurisdiction of the arbitrator, there are three questions that need to be asked:

1. Are these the parties to the arbitration agreement?
2. Is the arbitration agreement *prima facie* enforceable between the parties?
3. Is the subject matter of the dispute arguably within the scope of the arbitration agreement?

If the answers to these questions turn on a pure question of law with little or no need to examine the facts then the court will typically decide the arbitrator's jurisdiction. If the answers involve mixed fact and law, or require a careful review of the evidence, then the court will refer the matter to the arbitral tribunal to decide its jurisdiction even if one of the issues it will have to decide is the existence or validity of the contract between the parties, within which the arbitration agreement is found (see *United Mexican States v. Cargill, Inc.,* 2011 ONCA 622; Casey, ch. 5 and ch. 7).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The courts in Canada are favourably disposed to arbitration and if there is a valid arbitration agreement the parties will be "held to their bargain". If a party to an arbitration agreement commences a court proceeding and refuses to arbitrate, the respondent can either accept the breach and continue the litigation or move for a stay of the court proceedings. Canadian courts will impose the obligation in a negative way by refusing to allow the court proceeding to continue if it is shown that an arbitration agreement is in full force and effect (*Mind Star Toys Inc. v. Samsung Co.* (1992) 9 O.R. (3d) 374 (Ont. Gen. Div.)).

In addition, the party seeking a stay of court proceedings must do so before that party's first submission on the substance of the dispute.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

As discussed above, Canadian courts can, in limited circumstances, address the issue of the jurisdiction and competence of an arbitral tribunal in an international arbitration. A court may deal with jurisdiction in the first instance where questions of jurisdiction turn on a pure question of law with little or no need to examine the facts. However, Canadian courts are generally arbitration-friendly and will usually defer to the tribunal's jurisdiction to determine its own jurisdiction and competence.

Courts may also address the issue of the jurisdiction and competence of an arbitral tribunal if a party is challenging an international arbitration award in Canada.

The standard of review with respect to an arbitral tribunal's decision as to its own jurisdiction is one of correctness. However, this does not give Canadian courts a broad scope for intervention in the decisions of international arbitral tribunals. Instead, courts in Canada should interfere only in rare cases where there is a true question of jurisdiction. Furthermore, courts must take a narrow view of what constitutes a question of jurisdiction and may not stray into the merits of the question decided by the tribunal (*Canada (Attorney General) v. Mobil Investments Canada Inc.,* 2016 ONSC 790 at para 37; *United Mexican States v. Cargill, Inc.*, 2011 ONCA 622 at paras 27–51).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Generally, the arbitral tribunal has no jurisdiction over persons who are not parties to the arbitration agreement. In Canada, there are six theories under which non-signatories could potentially be bound to, or may bind others to, arbitration agreements: (1) lifting the corporate veil/alter ego; (2) incorporation by reference; (3) assumption/assignment; (4) agency; (5) equitable estoppel; and (6) implied consent to arbitrate (see Casey, ch. 5, s. 5.3.1).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Limitation periods for the commencement of arbitrations in Canada are applied in the same manner as a court action. In Ontario, the provincial legislation imposes a limitation period of 10 years from the date the award was made, or, where there was a proceeding to set aside an award, 10 years from the date on which the proceedings concluded. As a general rule, if a provincial law governs the contract, the limitation periods are typically two years, but may vary from province to province. The international acts provide that the arbitral tribunal must decide a dispute in accordance with the rules of law chosen by the parties. The Supreme Court of Canada has held that limitation provisions in a statute are substantive (*Yugraneft Corp. v. Rexx Management Corp*., 2010 SCC 19, at para 27). Issues may arise in the context of international arbitration where the substantive law of the contract differs from the mandatory procedural law of the place of arbitration.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

In Canada, the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 ("**BIA**") provides that a creditor has no remedy against the debtor and all actions and proceedings respecting claims provable in bankruptcy are stayed (BIA, s. 69). Canadian courts have defined "proceedings" broadly to include arbitration proceedings (*Quintette Coal Ltd. v. Nippon Steel Corp.*, (1990), 51 BCLR (2d) 105 (B.C.C.A). If a foreign bankruptcy order is obtained against a party involved in an international arbitration in Canada, the arbitrator must consider the extent to which the bankrupt party has lost capacity to proceed and whether or not the foreign court order should be recognised and the arbitration proceedings stayed (see Casey, ch. 7, s. 7.18.2).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The substantive law governing the issues in dispute is determined by the choice of law clause in the contract. If the parties have not agreed on the applicable law, it will be determined by the arbitral tribunal based on conflict of laws rules (Model Law, Article 28).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Typically, the substantive law chosen by the parties will prevail so long as it is not contrary to Canadian public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The question of which law governs the formation, validity and effect of arbitration agreements is determined by the conflict of laws rules applicable to contracts in general. Often, considerations will be given to the express choice of law in the substantive contract, the implied choice of law, or the law which has the closest and most real connection to the arbitration agreement.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

In Canada, parties have general freedom to choose arbitrators. However, an arbitrator must be independent and impartial.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the arbitration is administered by an institution, the institution's rules will typically provide a procedure for appointing arbitrators if the parties are not able to agree on any proposed candidates.

If the arbitration is *ad hoc* or the selected rules do not provide a procedure, the parties cannot agree on any proposed candidates, and cannot reach agreement of the procedure of appointing the arbitrator, the court will appoint the arbitrator on the application of either party (Model Law, Article 11(4)).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Under the Model Law, the court may intervene if the parties are unable to select an arbitrator.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Before accepting an appointment as arbitrator, the nominee must disclose to all parties "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" (Model Law, Article 12(1)).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

A fundamental requirement of domestic and international arbitration is that the parties be treated fairly and equally and that each party be given an opportunity to present his or her case. Other than this general requirement, the arbitral tribunal is free to determine what procedure is to be followed, absent the agreement of the parties. In default of any agreement the basic procedures set out in the Model Law and the domestic legislation apply, but again, unless a provision is mandatory (such as fairness and equality), the arbitral tribunal may conduct the arbitration in any manner it considers appropriate.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

As stated above, there is an obligation to treat the parties fairly and equally and to give each party an opportunity to present his or her case. The legislation also imposes the requirement of a reasoned, written award.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The conduct of Canadian counsel in arbitral proceedings is governed by the relevant law society rules of professional conduct within each province, but the local professional conduct rules are not binding on counsel from jurisdictions outside of Canada. This can create a lacuna where parties do not include rules governing the conduct of counsel in their arbitration agreements.

Parties to international arbitration proceedings in Canada are likely to adopt, in whole or in part, the International Bar Association ("**IBA**") Guidelines on Party Representation in International Arbitration once an arbitration is underway, although they seldom include these or other IBA Guidelines in arbitration clauses.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

An arbitral tribunal has the authority to rule on its own jurisdiction. Absent any agreement by the parties, an arbitral tribunal has the power to determine the procedure to be followed in the arbitration, provided it is in accordance with the mandatory provisions of the relevant arbitration legislation or Model Law.

An arbitral tribunal has the power to make orders for interim injunctions, the preservation or sale of assets, and, where appropriate, to appoint a receiver. Typically, the power to award interest and costs comes from the agreement between the parties. However, absent any agreement to the contrary, an international tribunal sitting in Canada has the power to award costs. An arbitral tribunal may also, in certain circumstances, have the power to award security for costs, as discussed below.

An award of an arbitral tribunal is final, and may not be limited to a monetary award, but may include orders for specific performance, injunctions, and other equitable remedies. (See Casey, ss. 5.8, 6.1, 8.2, 8.5 and 8.7.)

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are no particular qualification requirements for representatives appearing on behalf of a party in an arbitration in Canada. No provincial bar association has, to date, taken the position that a party may only be represented by a lawyer admitted to the local bar. However, in the event recourse to local courts may be required, there are restrictions that require counsel to be a member of the local bar, or at least that of another Canadian province. Such rules generally prevent a person who is not a member of the local bar from appearing.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Historically, an arbitrator has been immune from action in negligence or breach of contract. The Supreme Court of Canada in *Sport Maska Inc. v. Zittrer* [1988] 1 S.C.R. 564 established that an arbitrator will be immune from suit so long as they act in a judicial or quasi-judicial manner while fulfilling his or her function as an independent party, in compliance with the mandatory provisions of the applicable legislation. While an arbitrator is immune from suit for negligence, conduct amounting to wilful or intentional acts or bad faith may attract liability (*Flock v. Beattie*, 2010 ABQB 193).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Generally, under the Model Law, courts do not have jurisdiction to intervene in interim procedural issues that arise during an arbitration (*Inforica Inc. v. CGI Information Systems Management Consultants*, 2009 ONCA 642).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The Model Law empowers a tribunal to make orders for interim injunctions, the preservation or sale of assets and in an appropriate case, to appoint a receiver, as part of the powers given to the tribunal by the agreement of the parties, without the assistance of the courts (Model Law, Article 17).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The Model Law permits a party to request from a court an interim measure of protection and permits the court to grant such a measure (Model Law, Article 9). The provincial courts will grant interim relief in support of arbitration proceedings, particularly where it is necessary to bind third parties over whom the arbitral tribunal has no jurisdiction. Before the court will hear the matter there must be some evidence that the arbitration has commenced or that there is an undertaking to immediately commence it. A court may decline to exercise its jurisdiction where it would have the effect of adjudicating the substance of the dispute (*African Mixing Technologies (PTY) Ltd. v. Canamix Processing Systems Ltd.*, 2014 BCSC 2130).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Canadian courts will determine whether an interim measure of

protection is appropriate using the test applicable under the relevant procedural law of the arbitration. This generally includes the requirement to meet the following test:

a) there is a serious case to be tried;

b) the applicant would suffer irreparable harm if the application were refused; and

c) the balance of convenience favours the granting of an interlocutory injunction.

Additionally, the party seeking interim relief must give an undertaking to the court that if it turns out that the interim relief should not have been granted, the moving party will be liable for any damages occasioned by the granting of the order.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

If the arbitration is proceeding in Canada, then the relevant supervisory court has jurisdiction to consider if it is appropriate to grant an anti-suit injunction if a party to the arbitration commences legal proceedings in another jurisdiction. In *Amchem Products Inc. v. British Columbia (Worker's Compensation Board)* [1993] 1 S.C.R. 897, the Supreme Court indicated that a court would likely grant an anti-suit injunction where a foreign court did not accept jurisdiction in a manner that is consistent with the New York Convention, Canadian law or the arbitration agreement.

A Canadian court may grant an anti-suit injunction *before* the foreign action has commenced. The court may do so to support an arbitral tribunal's anti-suit injunction, granted on the grounds that a threatened foreign action would be abusive and disruptive (*BG International Limited v. Grynberg Production Corporation*, 2009 ABQB 452).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The provincial international arbitration acts and the Model Law provide for security for costs when a party is seeking an "interim measure of protection" relating to the subject matter of the dispute. They otherwise do not deal with the specific concept of security for costs. Instead, the power must be found either expressly or impliedly in the arbitration agreement or the rules under which the parties have agreed to arbitrate. (See Casey, s. 5.11.)

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Pursuant to the Model Law, courts consider "award" to mean a final award. Accordingly, courts generally may not enforce interim awards. However, in Ontario, the legislation empowers the courts to enforce interim measures ordered by a tribunal.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Domestic rules of evidence do not apply to international arbitration proceedings. Under both the domestic and international arbitration legislation, the parties can agree on the rules of evidence. Article 19(2) of the Model Law permits the tribunal to determine all matters relating to the admissibility, relevance, materiality and weight of any evidence. It is relatively common for an arbitral tribunal in an international arbitration in Canada to adopt or take guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

An arbitral tribunal has the power to order disclosure or discovery from the parties, save for the production of privileged documents. However, an arbitral tribunal does not have the power to order a third party to disclose documents, and a party must seek court assistance if it seeks the disclosure of documents from a third party.

The Model Law does not provide an arbitral tribunal with the power to compel witnesses to attend an arbitration. However, Article 27 of the Model Law provides that the arbitral tribunal or a party, with the approval of the arbitral tribunal may request the assistance of the court in the taking of evidence. Canadian courts have held that Article 27 of the Model Law is broad enough to give the court power to compel a non-party to disclose documents or be deposed prior to the arbitral hearing (*Jardine Lloyd Thompson Canada Inc. v. SJO Catlin,* (2006) 264 DLR. (4th) 358 (A.B.C.A.)).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

As stated above, the arbitral tribunal, or a party with the approval of the arbitral tribunal, can request court assistance in the taking of evidence (Model Law, Article 27).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Canadian arbitration legislation does not set out specific rules governing the production of written or oral witness testimony. The Model Law empowers a tribunal to determine evidentiary matters, absent the agreement of the parties (Model Law, Article 24). It is common in international arbitration in Canada to produce witness statements and expert reports. The hearing tends to only deal with cross-examination and oral argument. The witness statements stand as the direct evidence of the witness. The Model Law does not require that an oath be administered for a witness giving oral evidence at a hearing.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

In Canada, solicitor-client privilege protects the direct communications, both oral and documentary, prepared by the lawyer or client and flowing between them, in connection with the provision of legal advice. Privilege also attaches to documents prepared for the dominant purpose of actual or contemplated litigation. Privilege may, in certain circumstances, extend to third

parties who are performing functions that are central to the existence or operation of the lawyer-client relationship.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An award must be final, certain, consistent, and must decide the matters submitted, and no more than the matters submitted (see *Mullins v. Mullins* (1983), 42 O.R. (2d) 208 (Div. Ct.)). The arbitral award:

- must be in writing;
- state the reasons for the decision unless the decision was on consent, or the provision is waived;
- give the place and date the award is made;
- be signed by all the arbitrators or a majority of them so long as any omission is explained; and
- be delivered to each party.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Under the Model Law, the arbitral tribunal has the power, upon request and only if the arbitral tribunal considers the request to be justified, to (a) correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature, (b) give an interpretation of a specific point or part of the award, and (c) make an additional award as to claims presented in the arbitral proceedings but omitted from the award (Model Law, Article 33).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

A party can only challenge an award by bringing an application to set it aside on one of the stated grounds set out in the Model Law (Model Law, Article 34). Generally, the specific grounds relate to lack of jurisdiction of the tribunal, excess of jurisdiction of the tribunal, and lack of proper conduct or procedure.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

There is an interesting tension in some of the jurisprudence in Ontario regarding this issue (e.g. see http://www.constructionlawcanada.com/arbitration/can-the-parties-contract-out-of-the-uncitral-model-law/). In particular, questions have been raised as to whether Article 34 of the Model Law is a mandatory provision that cannot be contracted out of. While there has yet to be any controlling appellate authority on this issue, the idea that parties could contract out of rights that are granted by statute seems more problematic than the idea that the parties could expand their rights by agreement. Of course, if it is ultimately concluded by a binding appellate authority that Article 34 is indeed a mandatory provision, it would effectively preclude parties from being stripped of rights that are granted by the provision. If a right of appeal or challenge is based in statute, the parties should not be able to exclude it.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There is no clear appellate authority as to whether parties to an arbitration agreement can expand the scope of an appeal beyond the applicable legislation. However, the Newfoundland Supreme Court Trial Division recently confirmed that sophisticated parties may create arbitration agreements that deviate from the structures of provincial and federal legislation, as long as the agreed process does not unduly infringe on the courts' inherent jurisdiction and provides for a process that protects the principles of fundamental justice. In the result, the court dismissed an application for an order setting aside an arbitral award under domestic arbitration legislation in *Newfoundland and Labrador v. ExxonMobil Canada Properties,* 2017 NLTD(G) 147. The legislation empowered a court to set aside an award where an arbitrator has misconducted themselves, or where an arbitration or award has been improperly procured. By contrast, the parties' arbitration agreement included Article 34(2) of the Model Law as the grounds on which the award could be set aside. In this particular case, the court held that the tribunal did not make a jurisdictional error and its interpretations were justifiable in fact and law.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Under the Model Law, there are no rights of appeal respecting errors of fact or errors of law. A party can only challenge an award by bringing an application to set it aside on one of the stated grounds set out in Article 34 of the Model Law. The application must be brought within three months since the date of the arbitral award or from the date that the arbitral tribunal was requested to correct an award under Article 33, though the rules of procedure may vary between the provinces.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

In 1986, Canada ratified the New York Convention, and passed the *United National Foreign Awards Convention Act,* implementing the New York Convention. Canada has adopted the reservation to limit recognition only to arbitral awards considered to be "commercial", except in the case of Québec. Each province and territory has enacted legislation recognising or otherwise incorporating the New York Convention.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Canada has not signed or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards other than the New York Convention.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

A party seeking recognition and enforcement must file an application in accordance with the provincial rules of procedure. The court must enforce an arbitral award unless the defendant can satisfy the court that it meets the criteria to refuse enforcement under Article 36 of the Model Law. The grounds upon which a foreign award may not be recognised are limited, and the onus of proof is on the party resisting enforcement. Enforcement proceedings must be brought within the relevant limitation period, which varies from province to province.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Canadian courts will apply *res judicata* to final arbitration decisions. Courts will not permit parties to re-litigate an issue that was finally determined by an arbitral tribunal (*Chriscan Enterprises Ltd. v. St. Pierre,* 2016 BCCA 442; *Nordion Inc. v. Life Technologies Inc.*, 2015 ONSC 99).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

In Canada, the standard for refusing enforcement of an arbitral award on the grounds of public policy is whether enforcing the award "offends our local principles of justice and fairness in a fundamental way". This is a difficult threshold to meet and typically will require that the moving party demonstrate that the award was made in a jurisdiction where the procedural or substantive rules diverge markedly from those in Canada, or where there was corruption on the part of the tribunal (*Corporacion Transnacional de Inversiones, S.A. de C.V. v. Stete International, S.P.A.*, [2000] O.J. No. 3408 (Ont. C.A.); *Schreter v. Gasmac Inc.*, (1992) 7 O.R. (3rd) 608 (Gen. Div.), at p. 623).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

If the arbitration agreement deals with confidentiality then, subject to court intervention, the agreement of the parties will govern. If nothing is said in the arbitration agreement directly, there may be a provision for confidentiality in any procedural rules that have been agreed to. However, there is no legal duty of confidentiality implied or inherent in an arbitration agreement.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

There are no explicit legislative provisions that prevent information that is disclosed in an arbitration from being relied on in subsequent proceedings; however, information should generally not be disclosed without the consent of the parties. Even with a confidentiality agreement in place, or an order of the tribunal, a court may still determine that the agreement is subject to exceptions including considerations of public policy and the necessity to protect the interests of a party to the arbitration which may result in the disclosure of documents or evidence disclosed in an arbitration.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The arbitral tribunal is not restricted to granting only a monetary award. Injunctions, declarations, specific performance, restitution and statutory remedies are all remedies that are available to the arbitral tribunal, provided the remedy is asked for and comes within the scope of the arbitral agreement.

If the substantive law to be applied to the dispute provides for punitive damages, then unless the parties have removed this power from the arbitrators or there is a restriction under the rules of an institution, the arbitral tribunal may award punitive damages.

13.2 What, if any, interest is available, and how is the rate of interest determined?

British Columbia's legislation expressly empowers a tribunal to award interest. The Model Law is silent as to whether a tribunal may award interest, and therefore generally the availability of interest would depend on the agreement between the parties, the rules governing the arbitration and the substantive law. Pre-judgment interest rates that are recognised in Canadian law are set out in provincial regulations.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The legislation in Ontario and British Columbia empowers a tribunal to award costs. Since the Model Law makes no provision for costs, regard must be had to the contract, the arbitration agreement, any rules agreed to by the parties, or, if necessary, the *lex arbitri*. Most institutional rules provide for awarding costs, as such parties should refer to the institutional rules of the arbitration.

The discretion in awarding costs is not unfettered and must be exercised "judicially" (*Azurix North America Engineering Corp. v. Deep River* [2006] O.J. No. 2143 (S.C.J.)). The imposition of costs may also be imposed by the courts to deter parties for "baseless" attempts to challenge an award or an arbitrator's impartiality (*Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 1478).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award may be subject to taxation in Canada or another jurisdiction depending on the nature of the award and applicable law. In Canada, arbitrators fees are subject to the applicable taxes depending on the location of the arbitrator. It follows that taxes payable may be included in the costs of arbitration. (Casey, ch. 8.9.)

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The jurisprudence on third-party funding has been shaped by the class actions context and by cases concerning contingency fee arrangements. In deciding whether to approve a litigation funding agreement, the court will examine the motives of the funder and whether the agreement is fair and reasonable as between the parties. The courts have retained a significant supervisory role over such agreements in the class actions context. In the private commercial litigation and arbitration context, the policy concerns that inform strict judicial supervision of third-party funding agreements are somewhat different but remain subject to judicial oversight. The tort of maintenance and champerty remains in force to prevent a third party from improperly inserting itself into litigation.

Contingency fees are legal in Canada, except in certain circumstances outlined in the law society rules within each province (e.g. criminal and quasi-criminal cases). Third-party funding agreements may be structured like a contingency fee agreement where payment depends on success. Unlike a contingency agreement, however, the agreement is not between counsel and the party and is thus not governed by the rules of professional conduct bearing on legal counsel. Third-party agreements in the commercial litigation and arbitration contexts more closely resemble private commercial transactions (see Anthony Duggan, Jacob Ziegel & Jassmine Girgis, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017) 50:65 CBLJ).

Canada has recently seen a marked increase in professional funders in arbitration and complex commercial litigation, and we expect to see a further increase as demand for funding continues to grow.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Canada ratified the ICSID in 2013, and passed the *Settlement of International Investment Disputes Act*, S.C. 2008, ch. 8 shortly thereafter.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

In Canada, BITs are known as Foreign Investment Promotion and Protection Agreements ("**FIPA**"). Canada is currently party to 37 FIPAs and 14 free trade agreements ("**FTA**") that are in force. For a full listing of FIPAs and FTAs to which Canada is a party, visit: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Canada's investment treaties provide relatively standard investor protections, including national treatment, most favoured nation treatment, and protection against expropriation.

Notably, NAFTA and subsequent Canadian investment treaties include a reference to "fair and equitable treatment" which does not impose any higher standard of treatment than the customary minimum standard of treatment of aliens in international law. Also, the fair and equitable treatment standard in CETA is limited to situations where a specific promise or representation is made by the state.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Under the *State Immunity Act*, RSC 1985, c S-18 foreign states (including their agencies and property) are immune from jurisdiction of Canadian courts, with certain exceptions. Where a state has entered into a commercial agreement that is subject to arbitration, the consent to arbitrate would likely negate a claim to state immunity (*Collavino Inc. v. Tihama Development Authority*, 2007 ABQB 212). The "commercial activity" exception to state immunity is strictly interpreted based on the nature and purpose of the endeavour (*Steen et al. v. Islamic Republic of Iran et al*. 2013 ONCA 30).

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The Uniform Law Commission of Canada ("**ULCC**") recently published a review of the existing international arbitration legislation in Canada with the objective of modernising and harmonising the legislation. Ontario and British Columbia updated their legislation and responded to two of the ULCC's core proposals and adopted the 2006 amendments to the Model Law, which offers a flexible interpretation of some of the more rigid requirements of the New York Convention. Implementation of the 2006 Amendments in other provinces will likely follow.

On March 8, 2018, 11 countries including Canada signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**"). The CPTPP, which is expected to be ratified by 2019, includes investor-state dispute resolution provisions.

The Investment Court System established by CETA has a number of notable attributes, including a permanent investment court, an appeal mechanism, fast-track rejection of unfounded claims, and a "loser-pays" regime. However, in light of the European Court of Justice's ruling in *Slovak Republic v. Achmea B.V. (Achmea)*, the future of the ICS is uncertain.

Similarly, Chapter 11, the investor-state dispute settlement regime of NAFTA is a significant sticking point in the ongoing negotiations between Canada, the United States and Mexico.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

In March 2017, the International Chamber of Commerce, which is represented in Canada by the Canadian Chamber of Commerce,

adopted the amendments to its Rules of Arbitration. Notably, the new ICC Rules incorporate an emergency arbitrator provision and expedited procedures, which will be the default for claims under US$2 million and may be used in other circumstances on consent.

Similarly, in June 2014, the ICDR (which has a Canadian branch, ICDR Canada) updated its International Arbitration Rules which include emergency measures of protection and expedited procedures, which are the default for claims under US$250,000.

Acknowledgment

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Turks and Caicos Islands

GrahamThompson

Stephen Wilson QC

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Arbitration agreements are referred to in the Arbitration Ordinance (Cap. 4.08) ("*the Ordinance*") as a "*submission*". By section 2 of the Ordinance, "*submission*" is defined as "*a written agreement to submit present or future differences to arbitration, whether or not any arbitrator is named therein*". As such, the only real legal requirement is that the arbitration agreement is in writing.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Given the absence of any detailed arbitration rules, we would advise that any arbitration agreement incorporates by reference a set of procedural rules, whether institutional or otherwise.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

We do not have any organised system for the reporting of cases in the Turks and Caicos Islands ("*TCI*"), so it is difficult to research a body of local case law; however, based on personal experience, the national courts are pro-enforcement of arbitration agreements.

Section 3 of the Ordinance provides that:

> "*A submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the court and shall have the same effect in all respects as if it had been made an order of court.*"

Section 5 of the Ordinance provides that:

> "*If any party to a submission, or any person claiming through or under him, commences any proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such proceedings may at any time after appearance, and before delivering any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.*"

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Ordinance, as defined in the response to question 1.1 above.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes, the Ordinance governs both domestic and international arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

No. The Ordinance came into force 10 years before the UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law. There are significant differences between the two in that the Ordinance is as sparse in its provisions as the Arbitration Act 1889 of England and Wales. The law in TCI remains much the same as it was in England and Wales before the Arbitration Act 1934.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The Ordinance make no distinction between domestic and international arbitrations, so there are no provisions which deal specifically with international arbitrations.

Section 4 of the Ordinance provides that:

> "*A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set out in the Schedule, so far as they are applicable to the reference under the submission.*"

The Schedule contains nine short paragraphs dealing with, *inter alia*: the number of arbitrators; the timing of the making of the award; the examination of the parties by the arbitrators or umpire; the examination of witnesses on oath; the final and binding nature of the award; and the costs.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The Ordinance does not contain any restriction on the subject matters that may be referred to arbitration.

The terms of the arbitral tribunal's jurisdiction and powers in any particular case depend on a proper construction of the arbitration agreement. The arbitral tribunal must consider the dispute in question and then elicit from the arbitration agreement whether the parties intended a dispute of the kind in question to be resolved by arbitration. This is a matter of construction and ought to be resolved by arriving at the parties' presumed mutual intention using ordinary principles of construction.

In arriving at the parties' presumed mutual intention, the weight of modern authority supports a presumption in favour of a broad or liberal approach leading to "*one-stop adjudication*".

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

There is nothing in the Ordinance dealing with this; however, it is highly likely that the principle of competence-competence would be recognised allowing the arbitral tribunal to rule on the question of its own jurisdiction.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

See the response to question 1.3 above.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

This is not addressed in the Ordinance; however, pursuant to Order 73, rule 2(2) of the Rules of the Supreme Court 2000, a judge may declare that an award made by an arbitrator or umpire is not binding on a party to the award on the ground that it was made without jurisdiction.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

This is not addressed in the Ordinance.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are currently no laws or rules prescribing limitation periods for the commencement of arbitrations in the TCI.

The common law approach to limitation applies. Traditionally, a distinction was drawn between two kinds of statutes of limitation: those which merely bar a remedy and were treated as procedural (and thus governed by the *lex fori*); and those which extinguish a right which were treated as substantive (and thus governed by the *lex causae*); however, the modern approach in Commonwealth jurisdictions such as Australia and Canada suggest that all statutes of limitation should now be treated as substantive.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

This is not addressed in the Ordinance and so there is likely to be no effect.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

By the common law choice-of-law rules.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

When the matter at issue is procedural in nature, the law of the seat is likely to prevail.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The common law choice-of-law rules – which, in the absence of an express choice by the parties, is most likely to be the law of the seat.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are none contained in the Ordinance.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. In the event that no arbitrator, umpire or third arbitrator is appointed within 21 days after the service of a written notice by a party on the other parties or the arbitrators, as the case may be, to appoint an arbitrator, umpire or third arbitrator, pursuant to section 6 of the Ordinance, the Supreme Court may on application by the party who gave the notice appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

There is nothing contained in the Ordinance giving the court such power, other than the ability to fill a vacancy.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

There are no requirements in the Ordinance and no arbitration institutions with jurisdiction.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

See the response to question 2.4 above. The Ordinance, including the Schedule, applies to all arbitral proceedings in the TCI.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

See the response to question 2.4 above.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The conduct of an attorney called to the Bar of the TCI is governed by the Legal Profession Code of Professional Conduct ("*the Code of Conduct*"). They apply to any court or tribunal, or any other person or body of persons before whom an attorney appears as an advocate. They only extend to attorneys admitted to practice in accordance with the Legal Profession Ordinance and thus would not govern the conduct of counsel from outside the jurisdiction in arbitral proceedings sited in the TCI.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The powers of arbitrators are set out in section 8 of the Ordinance, which provides:

> "*Arbitrators or an umpire acting under a submission, unless the submission expresses a contrary intention, shall have power—*
>
> *(a) to administer oaths or to take the affirmations of parties and witnesses appearing;*
>
> *(b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court; and*
>
> *(c) to correct in any award any clerical mistake or error arising from any accidental slip or omission.*"

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Legal Profession Ordinance prohibits the practising of law by any person whose name is not entered on the Roll of Attorneys. Practising law is defined as, *inter alia*: for or in expectation of gain or reward, appearing on behalf of any person in any court, tribunal or inquiry having jurisdiction in the Islands. Thus, the restriction arguably applies to arbitration proceedings in the TCI.

Further, the Immigration Ordinance prohibits any person from working in the TCI without a work permit.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are none.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The court may:

(1) fill the vacancy of arbitrator or umpire;

(2) remove an arbitrator, umpire or referee;

(3) set aside an award or report;

(4) determine any question of law arising in the course of a reference; or

(5) declare that an award made by an arbitrator or umpire is not binding on a party to the award on the ground that it was made without jurisdiction,

otherwise there are no provisions giving the court jurisdiction to deal with procedural issues arising during an arbitration.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

There are no provisions in the Ordinance dealing with preliminary or interim relief.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

There are no provisions in the Ordinance giving the court power in support of arbitration proceedings granting preliminary or interim relief; however, a party may be able to rely on judicial pronouncements that have been made suggesting that the court has a very broad inherent jurisdiction upon which it may rely for the purpose of granting interim relief.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

This is difficult to say given the absence of local decisions.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Again, this is difficult to say given the absence of local decisions.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

No. The position is as it was in England and Wales before the Arbitration Act 1934.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

See the responses to questions 7.1–7.3 above.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

There are no rules of evidence that specifically apply to arbitral proceedings in the TCI.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Save as hereinafter appears, the Ordinance makes no provision in respect of disclosure/discovery; however, section 9 provides that:

> "*Any party to a submission may sue out a writ of subpoena ad testificandum or of subpoena duces tecum, but no person shall be compelled under any such writ to give any evidence or produce any document which he could not be compelled to give or to produce on the trial of an action.*"

Section 17 provides that:

> "*For the purposes of compelling the attendance of any witness or the production of any document in proceedings before an arbitrator, umpire or referee, the court shall have the same powers as it possesses for these purposes in proceedings before the court.*"

Further, paras. 6 and 7 of the Schedule also provide that:

> "***6.*** *The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, an oath or affirmation, in relation to the matters in dispute, and shall subject as aforesaid produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things relevant to the matter under reference which during the proceedings the arbitrator or umpire may require.*
>
> ***7.*** *The witnesses on the reference shall, if the arbitrators or umpire so require, be examined on oath or affirmation.*"

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

See the response to question 8.2 above.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Save as appears in the response to question 8.2 above, there are no applicable laws or regulations. The Code of Conduct contains provisions dealing with the examination of witnesses.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Communications with outside counsel attract privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Para. 3 of the Schedule to the Ordinance provides that:

> "*The arbitrators shall make their award in writing within three months after entering on the reference or after having been called on to act by notice in writing from any party to the submission or on or before any later date to which the arbitrators by writing signed by them, may from time to time extend the time for making the award.*"

Section 15 of the Ordinance also gives a power to the arbitrators, umpire and the court to extend the time for the award.

Otherwise, there are no other legal requirements of an arbitral award.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

No such powers are referred to in the Ordinance.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

By section 16(2) of the Ordinance, the court may set aside the award where an arbitrator, umpire or referee has misconducted himself, or the arbitration award has been improperly procured.

Further, pursuant to Order 73, rule 2(2) of the Rules of the Supreme Court 2000, an application may be made to a single judge in court for a declaration that an award is not binding on a party to the award on the ground that it was made without jurisdiction.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The Ordinance makes no provision for this.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The Ordinance makes no provision for this.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

There is no route of appeal. The only provision is for the setting aside of an award on the limited grounds referred to in the response to question 10.1 above. By Order 73, rule 4, an application to court to set aside an award under section 16(2) of the Ordinance or otherwise must be made within six weeks after the award has been made and published to the parties. In the case of every such application, the notice of motion must state in general terms the grounds of the application and, where the motion is founded on evidence by affidavit, a copy of every affidavit intended to be used must be served with that notice.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The TCI is not a contracting party to and has not ratified the New York Convention. It is a party to the Geneva Protocol on Arbitration Clauses.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Section 10 of the Ordinance provides that:

> "*Any award on a submission may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect.*"

In respect of foreign arbitration awards, Order 73, rule 6 provides that:

> "*Where an award is made in proceedings on an arbitration in any country to which the Overseas Judgment (Reciprocal Enforcement) Ordinance extends, being a country to which the said Ordinance has been applied, then, if the award has, in pursuance of the law in force in the place where it is made, become enforceable in the same manner as a judgment given by a court in that place, the Overseas Judgments (Reciprocal Enforcement) Rules shall apply in relation to the award as they apply in relation to a judgment given by a court in that place, subject, however, to the following modifications-*
>
> *(a) for reference to the country of the original court there shall be substituted references to the place where the award was made, and*
>
> *(b) the affidavit required by rule 5 of the said Rules must state (in addition to the other matters required by that rule) that to the best of the information or belief of the deponent the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.*"

Unfortunately, the provisions of the Overseas Judgment (Reciprocal Enforcement) Ordinance have not been extended to any country with the result that any foreign award will have to be enforced at common law, which requires bringing proceedings on it.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

There are no local decisions on this issue and so the local courts would be guided by decisions of the courts of England and Wales and other Commonwealth jurisdictions.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Again, there are no local decisions dealing with this issue (indeed, there are very few reported cases in which foreign judgments *in personam* have been denied recognition or enforcement in England on grounds of public policy, no doubt because this concept is narrowly interpreted in the English conflict of laws (see **Dicey, Morris & Collins, *The Conflict of Laws*** (15th Ed.) para. 16-125).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

There is no statutory provision in the Ordinance or elsewhere dealing with privacy and confidentiality in the arbitration context. The relevant law is therefore the common law and the obligation of confidentiality is implied into the arbitration agreement as a matter of law, albeit subject to exceptions and the reservations expressed by the Privy Council in *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11 at [20].

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

It is difficult to say given the difficulty which results from the relatively undefined scope of the obligation of confidentiality imposed at common law.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no statutory provisions; however, the general common law rules apply and so punitive damages would not be available in an arbitration governed by TCI law.

13.2 What, if any, interest is available, and how is the rate of interest determined?

There are no provisions in the Ordinance dealing with the award of interest, though assuming any award is to be enforced through the Supreme Court, statutory post-judgment interest at the rate of 6% *per annum* may be awarded pursuant to section 20 of the Civil Procedure Ordinance (Cap. 4.01).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Section 19 of the Ordinance provides that:

> "*Any order made under this Ordinance may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.*"

Para. 9 of the Schedule to the Ordinance provides that:

> "*The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be paid or any part thereof, and may award costs to be paid as between attorney and client.*"

The general rule applied is that costs follow the event.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

There is no tax in the TCI.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Both champerty and maintenance remain illegal in the TCI and contingency fees are unlawful.

As far as we are aware, there are no professional funders active in the TCI market for either litigation or arbitration.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

It is possible that ICSID extends to the TCI through the UK's signature and ratification; however, there has been no order in council extending it to the TCI and there is no local legislation dealing with it.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

There are none known.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

There are none known.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

There are no local decisions known and so the national courts would be guided by decisions of the courts of England and Wales and other Commonwealth jurisdictions.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Arbitration is rarely used given the antiquated state of the applicable legislation; however, the current Chief Justice has indicated a strong desire to have the law modernised and to develop the jurisdiction as a seat.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

There are none. See the response to question 15.1 above.

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"*Stephen Wilson QC heads the firm's dispute resolution practice in Turks & Caicos and is singled out as one of the leading advocates in the jurisdiction. Sources particularly note his strong work ethic, and highlight his ability "to assimilate and counter any point raised by the other side very quickly." Peers are also highly impressed by his abilities, with one lawyer being moved to observe: "If I had a code-red referral, Stephen would be at the top of my list." His considerable expertise covers a variety of disputes involving clients in the financial services, hospitality, insurance and construction industries.*" (*Chambers Global 2018.*)

Stephen is sought after in TCI for his expertise with complex corporate and commercial disputes. He has worked on multi-jurisdictional claims, multi-party actions, contract breaches, and insolvencies, liquidations and receiverships involving local and international parties. Stephen has also appeared in a number of domestic and international arbitrations in TCI and elsewhere.

Founded by Peter Graham CMG and Bernard Thompson in New Providence, Bahamas in 1950 and serving a client base that is both domestic and international, the top-ranked GrahamThompson is a highly regarded law firm with extensive expertise in: banking and finance; corporate, commercial and securities; employment and labour; immigration and naturalisation; insurance; civil and commercial litigation, arbitration and dispute resolution; private clients, trusts and estates; property and development; and shipping, admiralty and aviation.

The firm maintains its head office in the heart of downtown Nassau in New Providence, Bahamas, and operates three additional locations: Freeport, Grand Bahama; Lyford Cay in Western New Providence; and Providenciales, Turks and Caicos Islands. The firm is led by Managing Partner, Judith Whitehead, and in the Turks and Caicos Islands by Stephen Wilson QC. Stephen is one of the firm's two Queen's Counsel.

The firm and attorneys from GrahamThompson have been recognised and awarded by top international ranking agencies. In consecutive years including 2018, GrahamThompson has been recognised by *Chambers and Partners Global* as a leading law firm in general business law. Attorneys from GrahamThompson have similarly received leading lawyer designations in areas of general business law, dispute resolution and real estate. The firm is also recognised *by Chambers and Partners HNW*, as a leading law firm in the high-net-worth sector, specifically offshore trusts, with similar recognitions for individual attorneys. The firm has also been distinguished by *IFLR 1000 Financial and Corporate*, as a top-tier firm, in consecutive years including 2018. Individual attorneys have also appeared on Citywealth Leaders Lists.

USA

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA"), governs arbitration agreements in contracts involving interstate commerce and applies in both federal and state courts. The only express requirement for enforceability under the FAA is that the arbitration agreement be in writing. 9 U.S.C. §§ 2-4 (the writing need not be signed). The form of the writing can vary; it can be an arbitration clause in the underlying commercial contract; a stand-alone arbitration agreement; or some other type of memorialisation. The same contract principles that apply to contracts generally under state law apply to arbitration agreements under the FAA.

1.2 What other elements ought to be incorporated in an arbitration agreement?

An arbitration agreement can contain whatever terms the parties wish; it can be as succinct or detailed as they desire. The parties are free to limit the types of disputes that may be referred to arbitration.

To ensure the enforceability of the arbitration clause and any award, however, the agreement should:

(1) unambiguously designate arbitration as the form of dispute resolution, specifying that any award rendered is binding on the parties;

(2) clearly define the scope of the arbitration clause, i.e., the categories of the disputes subject to arbitration, so that it covers any and all such disputes arising under, in connection with, or relating to the commercial contract;

(3) designate the procedural rules of the arbitration and any administering institution;

(4) designate the place of arbitration, i.e., where the arbitration is formally located as a matter of law or its juridical seat;

(5) specify the number of arbitrators, their qualifications, and the method of their selection;

(6) specify the language of the arbitration;

(7) include a choice-of-law clause specifying the substantive law applicable to the contract and the resolution of any disputes;

(8) provide that the FAA governs the arbitration agreement and the arbitration process; and

(9) provide that judgment may be entered on the arbitral award by any federal or state court having jurisdiction.

The parties may consider additional provisions as well. Some of the more common provisions include: (1) establishing conditions precedent to arbitration in multi-step clauses requiring negotiation and/or mediation; (2) binding non-signatory parents and affiliates to the arbitration clause; (3) addressing limitations on class actions; (4) allowing for consolidation or joinder; (5) requiring confidentiality of the arbitrators and the parties; (6) specifying or limiting the scope and types of disclosure that may be ordered by the tribunal; (7) specifying or limiting the type of remedies that may be awarded; (8) providing for fee and cost allocation; (9) providing for interim or provisional relief; (10) addressing any limitations on punitive damages; (11) providing for a reasoned award; (12) specifying the pre-award, post-award and post-judgment rate of interest; (13) specifying a time limit for rendering the final award; and (14) providing for appeal of arbitration awards to another arbitration body.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

"The preeminent concern of Congress in passing the [FAA] was to enforce private [arbitration] agreements into which parties had entered…." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Thus, the Supreme Court has held that, where the FAA applies, arbitration agreements are to be enforced according to their terms. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 683-84 (2010). Moreover, the Court has held that the FAA expresses "a national policy favoring arbitration when the parties contract for that mode of dispute resolution". *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). This policy, in turn, has led the Court to conclude that, as a general matter and where the FAA applies, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration". *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). However, "there is an exception to this policy: The question of whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise'." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (alteration in original) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

See question 1.1, *supra*. The FAA governs the enforcement of

arbitration agreements involving interstate commerce, in both federal and state courts. Section 12 of the FAA provides that, where the FAA applies, 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". 9 U.S.C. § 12.

The parties can contract to apply state arbitration law in commercial transactions. If there is a conflict between state and federal arbitration law, however, a general choice-of-law provision in the agreement, invoking the law of a particular state, will not override the FAA. *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52 (1995). Parties wishing to supplement the FAA with the provisions of state arbitration law, or to substitute a state arbitration statute for the FAA, must make their intention indisputably clear. *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 479 (1989).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The same arbitration law governs both domestic and international arbitration proceedings, and is set forth in three Chapters located in Title 9 of the U.S. Code.

Chapter 1 (9 U.S.C. § 1 *et seq*.) codifies the FAA and sets forth general provisions applicable to arbitration agreements involving maritime, interstate, or foreign commerce.

Chapter 2 (9 U.S.C. § 201 *et seq*.) implements the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). As the Second Circuit has observed: "Under Section 202, actions or proceedings that 'fall[] under the [New York] Convention' include 'arbitration agreement[s] or arbitral award[s] arising out of a legal relationship, whether contractual or not, which is considered as commercial' between any parties, *unless* both parties are citizens of the United States and 'that relationship involves [neither] property located abroad, [nor] envisages performance or enforcement abroad, [n]or has some other reasonable relation with one or more foreign states". *CBF Industria de Gusa S/A v. AMCI Holdings, Inc*., 850 F.3d 58, 71 (2d Cir. 2017) (quoting 9 U.S.C. § 202). The provisions of Chapter 1 apply to foreign arbitral awards and proceedings only "to the extent that chapter is not in conflict with" Chapter 2, i.e., the New York Convention. 9 U.S.C. § 208.

Chapter 3 (9 U.S.C. § 301 *et seq*.) implements the 1975 Inter-American Convention on International Arbitration ("Panama Convention"). If there is a conflict between Chapter 1 and Chapter 3, the provisions in Chapter 3 apply. 9 U.S.C. § 307. Where both the New York and Panama Conventions could apply to the enforcement of an arbitral award, the New York Convention controls, unless the parties indicate the Panama Convention should apply. 9 U.S.C. § 305.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The United States has not enacted the UNCITRAL Model Law. Eight states, however, have enacted statutes based on the Model Law. These are California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon and Texas.

The FAA and the Model Law have several similar provisions but differ in other significant respects. The main differences relate to: (1) the number of arbitrators and the method of their selection in the absence of party agreement; (2) the authority of the arbitral tribunal to rule on its own jurisdiction (*competence-competence*); (3) the power of the courts to correct or modify an award; and (4) the grounds for setting aside an award.

(1) Article 10(2) of the Model Law provides that there shall be three arbitrators unless the parties have otherwise agreed, and Article 11 states that in the event no method of selection is specified, there shall be two party-appointed arbitrators, who shall appoint the third arbitrator, failing which the court shall make the appointment. Section 5 of the FAA, 9 U.S.C. § 5, provides that, unless otherwise specified in the agreement, there shall be one arbitrator and that when the method of appointment has not been specified or timely invoked by a party, the court shall designate or appoint an arbitrator or arbitrators.

(2) Article 16 of the Model Law empowers the arbitral tribunal to rule on its own jurisdiction. If the tribunal rules that it has jurisdiction in the form of a preliminary question (as opposed to in an award on the merits), a party may within 30 days thereafter request a court to decide the matter. Under the FAA, as construed by the Supreme Court of the United States, it is for the court to decide on the arbitrator's jurisdiction, absent clear and unmistakable evidence that the parties agreed to submit the issue of arbitrability to the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995).

(3) Under Article 33 of the Model Law, the arbitral tribunal may correct errors in an award of a computational, clerical, typographical or similar nature and, by mutual agreement of the parties, may interpret an award. The only recourse available against an award in the courts, however, is an application to set aside. In contrast, under Section 11 of the FAA, 9 U.S.C. § 11, a court may modify or correct an award where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property or where the award is imperfect as a matter of form not affecting the merits. (The parties may also adopt arbitral rules that allow arbitrators to correct computational or typographical errors in an award or interpret an award.)

(4) Article 34 of the Model Law contains four grounds for setting aside an award that have no express FAA counterpart; and the FAA has two statutory grounds for setting aside an award that are not addressed in the Model Law: (1) the award was procured by corruption, fraud, or undue means; and (2) there was evident partiality or corruption in the arbitrators. 9 U.S.C. § 10(a) (1)-(2). In addition, some courts have held that an award can be vacated if rendered in "manifest disregard" of the law. The continued viability of this non-statutory ground has been questioned following the Supreme Court's decision in *Hall Street Associates, LLC v. Mattel, Inc*., 552 U.S. 576, 578 (2008).

There are several issues addressed by the Model Law that are not addressed by the FAA. These include: the availability of provisional measures from a court; the disclosure obligations of the arbitrators; the means of challenging an arbitrator's alleged impartiality; the arbitrator's authority, in the absence of party agreement, to determine the venue and language of the arbitration and the governing law; the tribunal's right to appoint experts; procedures to follow upon default; and the form of the arbitral award.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The FAA contains no mandatory rules governing arbitral proceedings sited in the United States but, as discussed below, failure to (for example) consider evidence is grounds for *vacatur* of the award.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The FAA does not have an express subject-matter limitation on the kinds of disputes that can be resolved through arbitration. And the Supreme Court has held that rights created by statute – e.g., securities and antitrust claims – can be resolved in arbitration. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Traditional contract defences available under state law that may invalidate the arbitration agreement, including fraud, duress, unconscionability, and public policy concerns, must be resolved first before proceeding with the arbitration. However, "[a] challenge to the contract as a whole is not sufficient to prevent the enforcement of an arbitration clause, because an arbitration provision is severable from the rest of the contract". Accordingly, "[u]nder the FAA, the party seeking to invalidate an arbitration clause must show that the arbitration clause itself was invalid". *Eisen v. Venulum Ltd.*, 244 F. Supp. 3d 324, 335 (W.D.N.Y. 2017) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010)). While a court "may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability", it may not invalidate the agreement based on legal rules "that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue'". *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The parties to a contract can agree to arbitrate so-called "gateway questions to arbitrability". *Kai Peng v. Uber Technologies, Inc.*, 237 F. Supp. 3d 36, 52 (E.D.N.Y. 2017) (quoting *Hartford Acc. & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001)). These questions include: (1) whether there exists a valid agreement to arbitrate; and (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration clause. *Id.* Courts cannot assume the parties agreed to arbitrate these issues absent "clear and unmistakable evidence that they did so". *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 79 (2010). *See Gunn v. Uber Techs., Inc.*, 2017 WL 386816, at *3 (S.D. Ind. Jan. 27, 2017) (there was clear and unmistakable evidence where the agreement stated that "disputes arising out of . . . this Arbitral Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of [it] . . . shall be decided by an Arbitrator and not by a court or judge"). "[C]hallenges to the very existence of the contract are, in general, properly directed to the court." *Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979, 983 (9th Cir. 2017).

Most of the leading institutional arbitral rules provide that the arbitral tribunal is competent to resolve questions about its own jurisdiction. *See, e.g.*, Rule 8.1, International Institute for Conflict Prevention and Resolution ("CPR") Rules for Non-Administered Arbitration (the "Rules") (effective Mar. 1, 2018) (the tribunal has the authority to hear and determine challenges to its jurisdiction, "including any objections with respect to the existence, scope or validity of the arbitration agreement"); Rule 8.2 (the tribunal has the authority "to determine the existence, validity or scope of the contract of which an arbitration clause forms a part"). Courts have held that, when the parties incorporate such rules into their agreement to arbitrate, the incorporation constitutes "clear and unmistakable" proof of an intention to delegate questions of arbitrability to the tribunal. *Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052 (9th Cir. 2018). Where the parties incorporate institutional rules that give arbitrators authority to determine their own jurisdiction, courts "must compel the arbitration of arbitrability issues in all instances in order to effectuate the parties' intent regarding arbitration". *Belnap v. Iasis Healthcare*, 844 F.3d 1286, 1292 (10th Cir. 2017); *Jones v. Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017); and *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522 (4th Cir. 2017).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Section 2 of the FAA states that qualifying arbitration agreements are "valid, irrevocable, and enforceable". Section 3 states that a federal court, with a valid agreement before it, "*shall* on application of one of the parties stay the trial of the action until such arbitration has been had". 9 U.S.C. §§ 2-3 (emphasis added). Thus, when a party initiates litigation despite having an arbitration clause in his or her agreement, the counterparty may move to stay the litigation, pursuant to Section 3 of the FAA, and to compel arbitration under Section 4 of the FAA. Where appropriate, a stay of litigation "enables parties to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation, and generally precludes judicial interference until there is a final award". *Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2d Cir. 2015).

While federal policy favours arbitration, and although there is no specific limitation period for filing a motion to compel arbitration, a party may waive the right to arbitration "when it engages in protracted litigation that prejudices the opposing party". *Tech. in P'ship, Inc. v. Rudin*, 538 F. App'x 38, 39 (2d Cir. 2013) (internal quotation marks omitted). Prejudice has been found where "a party seeking to compel arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims, or delays invoking arbitration rights while the adversary incurs unnecessary delay or expense". *Id.* at 40 (quoting *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993)). *Westcode, Inc. v. Mitsubishi Electric Corporation*, 2017 WL 1184200 (N.D. N.Y. Mar. 29, 2017) (denying reconsideration of a court order refusing to compel arbitration where "Westcode suffered prejudice as a result of Mitsubishi's continued pursuit of litigation").

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

See question 3.2 *supra*. The arbitral tribunal has the authority to decide its own jurisdiction only if the parties have "clearly and unmistakably" agreed to give it this authority. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1996); *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014). Where the parties have agreed that an issue is for the arbitrators to decide, the court will defer to the arbitral resolution of the question. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013). On the other hand, the court will "make[] up its mind about [an issue] independently", where the parties did not agree the issue should be arbitrated. *First Options*, 514 U.S. at 942.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

"Arbitration under the [FAA] is a matter of consent, not coercion". *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). That said, the fact that a party did not sign an arbitration agreement is not dispositive of the question of whether it is bound to such agreement. As the Second Circuit has observed, "a nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency.'" *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). Accordingly, traditional state law contract principles govern the applicability of an arbitration agreement to non-signatories. Courts have held that non-signatories may be bound to arbitration agreements under various theories – including: (1) incorporating by reference of the agreement to arbitrate into another contract; (2) assumption; (3) agency; (4) veil-piercing/alter ego; (5) third-party beneficiary; and (6) estoppel. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) (arbitration agreements are enforceable by and against non-signatories, under state law contract principles); *Color-Web, Inc. v. Mitsubishi Heavy Industries Printing & Packaging Machinery, Ltd*., 2016 WL 6837156 (S.D.N.Y. Nov. 21, 2016) (applying estoppel to bind non-signatory plaintiffs and defendants to arbitration, including corporate parents, agent, and successor). Independent contractors are not "agents" that can be bound as non-signatories to an arbitration clause. *Oudani v. TF Final Mile, LLC*, 876 F.3d 31 (1st Cir. 2017).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The parties are free to incorporate time limits into their arbitration agreements. The FAA does not contain a statute of limitations, and most states do not have a specific statute addressing limitation periods in the context of arbitrations. However, in many states, the language of general limitations provisions have been read to include arbitrations. *See Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186 (Fla. 2013) (the statutory term "civil action or proceeding" includes arbitrations). Under New York law, the time limitation for making a demand is the same as would have applied had the action been filed in court. N.Y. C.P.L.R. § 7502(b) ("[i]f, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court").

Issues relating to the timeliness of a demand for arbitration are generally decided by the arbitrator. *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014) (courts presume the parties intend arbitrators and not the court to decide "procedural gateway matters" such as time limits); *Conticommodity Servs. Inc. v. Philipp & Lion*, 613 F.2d 1222, 1224-25, 1227 (2d Cir. 1980) ("[i]n the absence of express language in the contract referring to a court questions concerning the timeliness of a demand for arbitration, the effect of a time limitation embodied in the agreement is to be determined by the arbitrator"). *But see Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp*., 826 N.E.2d 802 (N.Y. 2005). ("A choice of law provision, which states that New York law shall govern both 'the agreement *and its enforcement*,' adopts as binding New York's rule that threshold Statute of Limitations questions are for the courts ... In the absence of more critical language concerning enforcement, however, all controversies, including issues of timeliness, are subjects for arbitration.") (Emphasis in original.)

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

A party's pending insolvency will not invalidate an arbitration agreement but may cause other parties to seek an attachment of funds or property, or injunctive relief to prevent the transfer or liquidation of assets.

Once a bankruptcy petition is filed, the Bankruptcy Code's automatic stay provision prevents an arbitration from proceeding, unless and until the stay is lifted. The automatic stay cannot be waived and is violated by filing a motion to compel arbitration in a forum other than the bankruptcy court. An award issued in violation of the automatic stay will be vacated. *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252 (3d Cir. 2006) (Alito, J.) (vacating award).

However, a party can petition the bankruptcy court to allow the arbitration to go forward. Some appellate courts have held that bankruptcy judges have discretion to deny requests for arbitration where the "claims directly implicated matters central to the purposes and policies of the Bankruptcy Code". *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 110 (2d Cir. 2006). In the Second Circuit, a bankruptcy court's discretion to deny a motion to compel arbitration turns on whether the dispute is "substantially" a core matter because it is based on a substantive right conferred on the debtor-in-possession or trustee by the Bankruptcy Code; and whether arbitration would conflict with the objectives of the Bankruptcy Code. *Id*. at 108-110.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The FAA contains no choice-of-law rules, and the parties generally are free to select the substantive law that will apply in the arbitration. It is advisable for parties to state clearly the law applicable to the dispute in advance, to avoid complicated choice-of-law disputes. *Mastrobuno v. Shearson Lehman Hutton*, 514 U.S. 52 (1995) (parties wishing to apply state arbitration law cannot rely on a general choice-of-law provision in the contract, but must explicitly require the application of state arbitration law). The FAA preempts state laws that directly conflict with the FAA, that single out or discriminate against arbitration, or that "stand as an obstacle to the accomplishment of the FAA's objectives". *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 334 (2011).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There is no provision in the FAA that limits the parties' choice of procedural or substantive law. That said, the Supreme Court has not had occasion to consider the extent to which other provisions of U.S. law might limit parties' ability to apply foreign law to conduct occurring in the United States. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) (holding that antitrust claims are arbitrable but noting the parties' concession that U.S. antitrust law applied to the claims at issue).

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

See questions 1.1 and 4.1, *supra*. The parties are free to decide what substantive law will apply to the arbitration agreement. If the parties have not specified the applicable law, arbitrators will determine the applicable substantive law. Institutional arbitral rules typically give arbitrators the discretion to apply whatever law they deem appropriate. *See* JAMS Arbitration Rule 24(c); International Institute for Conflict Prevention & Resolution ("CPR") Administered Arbitration Rules (2013), Rule 10.1.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are generally no restrictions on the parties' autonomy to select the arbitrators. The FAA expressly favours the selection of arbitrators by the parties rather than the courts. *Shell Oil Co. v. CO_2 Comm., Inc.*, 589 F.3d. 1105, 1109 (10th Cir. 2009). In their arbitration agreement, therefore, the parties may specify the number of arbitrators, their qualifications, and the method of their selection.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Section 5 of the FAA, 9 U.S.C. § 5, authorises judicial intervention in the arbitral process to select an arbitrator, on a party's application: (1) if the arbitration agreement does not specify a method for selecting arbitrators; (2) if any party fails to follow the method specified in the agreement for selecting arbitrators; or (3) if there is a "lapse in the naming of an arbitrator or arbitrators". Unless the agreement specifies otherwise, the court shall appoint a single arbitrator. The arbitrators chosen by the court "shall act . . . with the same force and effect" as if they had been specifically named in the arbitration agreement. *Id.* State laws may also expressly empower courts to appoint arbitrators. *See* N.Y. C.P.L.R. § 7504. ("If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.")

5.3 Can a court intervene in the selection of arbitrators? If so, how?

See question 5.2, *supra*. Except in rare cases, a court will not intervene pre-award to remove an arbitrator for bias, corruption or evident partiality; the FAA does not contain any express authorisation for such intervention.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Under Section 10(a)(2) of the FAA, one of the grounds on which an award may be vacated is "where there was evident partiality…in the arbitrator[]…." 9 U.S.C. § 10(a)(2). The phrase "evident partiality" means more than merely the appearance of partiality, but does not require proof of actual bias on the part of the arbitrator. There is some disagreement among the federal courts of appeals as to how to articulate the test. In general, a majority of the circuits, including the Second Circuit, follow the rule that evident partiality means that an award will be vacated "only when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side". *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (emphasis and internal quotation marks omitted). The Ninth Circuit has phrased the standard somewhat differently, as requiring "facts showing a reasonable impression of partiality". *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1106 (9th Cir. 2007).

The FAA does not contain any express disclosure requirements for arbitrators. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968), however, the Supreme Court held that an award can be vacated under Section 10(a)(2) of the FAA where the arbitrator fails to disclose a material relationship with a party, although there was no majority consensus on the exact test to be applied. Courts have since held that where an arbitrator has reason to believe that a non-trivial conflict of interest might exist, he must (1) investigate the conflict, or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate. *Applied Indus.*, 492 F.3d at 137. His failure to do either is indicative of evident partiality. The mere failure to investigate is not, by itself, sufficient to vacate an arbitral award; rather, "the materiality of the undisclosed conflict drives a finding of evident partiality, not the failure to disclose or investigate *per se*". *Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, 476 (S.D.N.Y. 2016), *aff'd*, 675 F. App'x 89 (2d Cir. 2017). An arbitrator's duty to investigate and disclose continues after his appointment, until the award is rendered.

Institutional arbitral rules invariably require that arbitrators be impartial and independent of the parties (particularly in international cases) and impose disclosure requirements on arbitrators. American Arbitration Association ("AAA") Commercial Arbitration Rules & Mediation Procedures, Rule R-17(a) (2016), for example, requires disclosure of "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives". *See also* CPR Arbitration Rules 5.1(c) & 7.3 (the designated arbitrator must disclose in writing "circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality"); JAMS Arbitration Rule 15(h) (parties and their representative shall disclose "any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence").

The timing of a challenge based on arbitrator impartiality is important. The FAA does not provide for pre-award removal of an arbitrator by the court, absent fraud in the inducement or other infirmity in the contracting process. *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 748 F.3d 708, 720 (6th Cir. 2014). Moreover, a party that fails to raise a claim of bias against an arbitrator until after an award has been issued may be deemed to have waived the objection. *Goldman, Sachs & Co. v. Athena Venture Partners, L.P.*, 803 F.3d 144, 149 (3d Cir. 2015).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

There is no federal policy favouring arbitration under a certain set of procedural rules. Instead, the parties have broad freedom

to determine the procedural rules under which the arbitration will be conducted, even if those rules differ from those in the FAA. Arbitrators generally must follow the procedural rules agreed upon by the parties. Contracting parties will typically agree to arbitrate under the rules of an established arbitral institution. These rules give arbitrators discretion to manage the arbitration in the manner they deem appropriate, subject to minimum due process requirements.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

See question 6.1, *supra*.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The practice of law in the United States is regulated by the individual states. The American Bar Association Model Rules of Professional Conduct have been adopted (often with modifications) by all states except California, which has its own ethics rules. The rules apply to lawyers' conduct in arbitrations and other contexts. Under Model Rule 8.5(a), lawyers remain subject to the disciplinary authority of the jurisdiction where they are admitted, regardless of where the conduct occurred. *See* N.Y. Rule of Prof'l Conduct 8.5(a); D.C. Rules of Prof'l Conduct 8.5(a). However, the rules of the jurisdiction where the arbitration is pending may also apply. N.Y. Rule 8.5(b)(1); D.C. Rule 8.5(b)(1).

In many jurisdictions, including New York, Florida and the District of Columbia, representation of clients in arbitration does not constitute the "unauthorized practice of law", and both out-of-state and foreign lawyers need not be admitted locally to participate, but will be subject to the rules of conduct of the state bar where the arbitration takes place. Some states may impose particular procedural requirements on lawyers' participation, depending on whether the arbitration is domestic or international.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators' powers are determined by the terms of the arbitration agreement; the designated arbitration rules; and the provisions of the FAA. State law may also potentially apply. *See* questions 1.3 and 2.1, *supra*.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

As discussed in question 6.3, the practice of law in the United States is regulated largely by individual states. The jurisdictions where arbitrations are most typically sited do not regard appearances by out-of-state or foreign lawyers in arbitrations as constituting the "unauthorized practice of law", and therefore do not require that they be admitted locally. This is especially true for international arbitrations.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The FAA is silent on arbitrator immunity. The case law recognises that arbitrators exercise quasi-judicial duties and like judges have absolute immunity from civil suits, for acts taken within the scope of the arbitral process. *Landmark Ventures, Inc. v. Cohen*, No. 13 Civ. 9044 (JGK), 2014 WL 6784397, at *4 (S.D.N.Y. Nov. 26, 2014). ("[U]nder well-established Federal common law, arbitrators and sponsoring arbitration organizations have absolute immunity for conduct in connection with an arbitration".) Courts, moreover, cannot inquire into the bases of an arbitrator's decision or the arbitrator's decision-making process. *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57 (2d Cir. 2003) (collecting cases), *overruled on other grounds by Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Martin Weiner Co. v. Fred Freund Co.*, 155 N.Y.S.2d 802, 805 (App. Div. 1956). ("Inquisition of an arbitrator for the purpose of determining the processes by which he arrives at an award, finds no sanction in [the] law"), *aff'd*, 3 N.Y.2d 806 (1957).

The institutional arbitral rules also provide arbitrators and arbitral institutions with immunity from liability for conduct in connection with an arbitration. For example, AAA Arbitration Rule R-52(d) provides that "[p]arties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules". *See also* CPR Arbitration Rule 20. ("Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules"); JAMS Arbitration Rule 30(c) (same).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Under the FAA, courts do not have jurisdiction over procedural issues that arise during an arbitration, with the exception of arbitrator appointment issues discussed *supra* in question 5.2.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The FAA does not address this issue, but it is generally accepted that arbitrators have inherent authority to order interim or preliminary relief pending a final award. Arbitrators may also have express authorisation to order interim relief by the terms of the arbitration agreement and/or the terms of the chosen arbitral rules. *See* AAA Arbitration Rule R-37(a) ("[t]he arbitrator may take whatever interim measures he or she deems necessary"); CPR Arbitration Rule 13.1 ("[a]t the request of a party, the Tribunal may take such interim measures as it deemed necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods"). Interim relief may also include preliminary injunctions and temporary restraining orders, as well as measures intended to preserve evidence.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The only provision of the FAA that expressly deals with interim relief is Section 8, 9 U.S.C. § 8, which applies to a narrow category of admiralty and maritime disputes. However, most federal courts have held that under the FAA a court may grant interim relief pending arbitration. *Sojitz Corp. v. Prithvi Info. Solutions, Ltd*., 921 N.Y.S. 2d 14, 17 (App. Div. 2011). And most state laws authorise provisional remedies in aid of arbitration. *See* NY CPLR § 7502; *Stemcor USA Inc. v. CIA Siderurgica Do Para Cosipar*, 870 F.3d 370, 374-79 (5th Cir. 2017) (where pre-arbitration attachment was available under Louisiana law in aid of an arbitration subject to the Convention to be filed in New York).

Interim orders generally are in effect only until the arbitrators are appointed. *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010) (interim relief is permitted when there has been "a showing of some short-term emergency that demands attention while the arbitration machinery is being set in motion"). *See* NY CPLR § 7502(c) (if arbitration is not initiated within 30 days of granting the provisional relief, the order granting relief expires, and costs and fees are to be awarded to the respondents). The rules of the leading arbitral institutions provide that seeking interim relief from the court does not waive the jurisdiction of the tribunal. *See* AAA Arbitration Rule R-37(c). ("A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate"); CPR Arbitration Rule 13.2 (same).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

See question 7.2, *supra*. A minority of federal courts have declined to grant interim relief when the underlying dispute is subject to arbitration. Most courts afford interim relief. Courts require that the moving party make a showing to justify interim relief. The standard for granting preliminary injunctive relief varies slightly by jurisdiction. Under New York law, interim injunctive relief requires: (1) a showing of irreparable harm; (2) a likelihood of success in the arbitration; and (3) that the balance of equities favours the moving party. *See*, *e.g.*, *In re TapImmune Inc*., No. 654460/12, 2013 WL 1494681 (N.Y. Sup. Ct., N.Y. Cty. Apr. 8, 2013). The likelihood of success on the merits factor is measured by the likelihood of success in the arbitration.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Courts have the power to grant anti-suit injunctions in cases concerning a pending or threatened foreign arbitration. *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, No. 13 Civ. 6073 (PKC), 2013 WL 6171315 (S.D.N.Y. Nov. 25, 2013) (enjoining actions filed in Greece raising claims covered by the arbitration agreement), *aff'd*, 776 F.3d 126 (2d Cir. 2015).

In the Second Circuit, a court may enjoin a party from pursuing a foreign action if "two threshold requirements are met: first, the parties must be the same in both proceedings, and second, resolution of the case before the enjoining court must be dispositive of the action to be enjoined". *Eastman Kodak Co. v. Asia Optical Co.*, 118 F. Supp. 3d 581, 586 (S.D.N.Y. 2015). If these requirements are met, courts weigh five additional factors identified in *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987). These factors include: (1) the threat to the enjoining court's jurisdiction posed by the foreign action; (2) the potential frustration of strong public policies in the enjoining forum; (3) the vexatiousness of the foreign litigation; (4) the possibility of delay, inconvenience, expense, inconsistency, or a race to judgment; and (5) other equitable considerations.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The FAA does not address costs and fees. Certain institutional arbitral rules expressly grant arbitration tribunals the power to require security for costs. *See* AAA Arbitration Rule R-37(b); CPR Arbitration Rules 13.1 and 19.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

It is generally accepted that courts will enforce interim arbitration awards "when such confirmation is necessary to ensure the integrity of arbitration". *Companion Property and Cas. Ins. Co. v. Allied Provident Ins., Inc*., 2014 WL 4804466 (S.D.N.Y. 2014) (confirming an interim security award). The interim award must fully resolve a discrete issue. *Sperry Int'l Trade v. Government of Israel*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982) (order of arbitrator requiring defendant to place letter of credit in escrow pending final determination was "a final Award on a clearly severable issue"); *Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) ("[j]ust as a district court's grant of a preliminary injunction is reviewable as a discreet and separate ruling…so too is an arbitration award granting similar equitable relief").

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The FAA does not refer to rules of evidence except to provide, in Section 10(a)(3), that courts have authority to vacate an award where the tribunal "refuses to hear evidence pertinent and material to the controversy". 9 U.S.C. § 10(a) (3). The parties are free to address evidentiary matters in their agreement and incorporate institutional arbitral rules that address document disclosure. Arbitral tribunals typically do not follow the Federal Rules of Evidence or the Federal Rules of Civil Procedure.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Section 7 of the FAA, 9 U.S.C. § 7, provides that "[t]he arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or

them any book, record, document, or paper which may be deemed material as evidence in the case". 9 U.S.C. § 7. Courts are divided as to whether arbitrators can order the production of documents before the hearing or order witnesses to appear for a pre-hearing deposition. Some courts, including the Second Circuit, have held that the FAA does not grant an arbitrator authority to order non-parties to appear at depositions or provide parties with documents prior to a hearing. *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216–17 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004). On the other hand, the Eighth Circuit has ruled that the FAA provides arbitration panels with authority to require pre-hearing production by non-parties. *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870–71 (8th Cir. 2000); and the Sixth Circuit has authorised a subpoena directed at a non-party for pre-hearing documents in a labour arbitration. *Am. Fed'n of Television & Radio Artists v. WJBK-TV (New World Commc'ns of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Under Section 7 of the FAA, 9 U.S.C. § 7, when a party fails to comply with a tribunal's order to testify or produce documents, the party seeking to enforce the order may petition a court for enforcement. 9 U.S.C. § 7. If the subpoenaed party does not comply with the court order, the party may be held in contempt. However, Section § 7 does not provide an independent grant of federal subject-matter jurisdiction.

United States courts have the authority, pursuant to 28 U.S.C. § 1782, to compel the production of evidence for use in international proceedings. The statute requires that the documents or testimony sought by the parties must be for use "in a proceeding in a foreign or international tribunal". While courts have ruled that investor-state arbitration panels are covered by § 1782, they are divided as to whether private international arbitrations constitute tribunals. Moreover, the target of the discovery must "reside" or be "found" in the district where discovery is sought, which can raise complex jurisdictional issues. An advantage of the § 1782 procedure, however, is that it may be filed *ex parte*, and without regard to the evidentiary rules of the foreign tribunal.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The FAA contains no formal requirements regarding the production of documents or oral witness testimony. Cross-examination, however, is regularly employed in arbitrations in the U.S.

The FAA contains no oath requirement for witness testimony. AAA Arbitration Rule R-27 requires that each arbitrator take an oath of office, if required by law to do so, and states that the arbitrator may require witnesses to testify under oath.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Privilege law in the United States varies depending on whether state or federal law applies. The FAA contains no choice-of-law provision regarding privilege issues. But the rules of most of the leading arbitral institutions reference the need to respect privilege. *See*, e.g., CPR Arbitration Rule 12.2. ("The Tribunal is not required to apply any rules of evidence used in judicial proceedings. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered".) Generally speaking, to invoke attorney-client privilege, a party must show a communication between client and counsel; which was intended to be and was in fact kept confidential; and which was made for the purpose of obtaining or providing legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976). In addition, state and federal courts recognise "work product protection" over documents prepared in anticipation of litigation. The privileges can be waived under various circumstances, including by disclosing the communication to someone outside of the privilege. Jurisdictions in the United States extend the attorney-client privilege to communications with in-house counsel. *See Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y. 2d 588, 592 (N.Y. 1989).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4), provides that an arbitral award must be "mutual, final, and definite", but the statute does not impose any requirements as to form. The New York Convention, implemented through Section 201 of Chapter 2, indicates that foreign awards must be in writing. There is no requirement that the award be reasoned. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). ("Arbitrators have no obligation to the court to give their reasons for an award".) Where the arbitrators have not provided the grounds for their decision, the court need only find "a barely colorable justification for the outcome reached" to confirm the award. *Mandell v. Reeve*, 2011 WL 4585248, at *3 (S.D.N.Y. Oct. 4, 2011), *aff'd*, 510 F. App'x 73 (2d Cir. 2013).

Institutional arbitral rules, such as AAA Arbitration Rule R-46, require that the award be in writing and signed by the arbitrators. *See also* CPR Arbitration Rule 15.2 (award must be in writing and signed by at least a majority of the arbitrators); JAMS Arbitration Rule 24(h) (award shall be written and signed).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The FAA authorises a court to modify or correct an award in three instances: (1) "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award"; (2) "[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted"; or (3) "[w]here the award is imperfect in matter of form not affecting the merits of the controversy". 9 U.S.C. § 11. In addition, a court may remand an award to the arbitrator if it is so ambiguous, or indefinite, that the court does not "know what it is being asked to enforce". *Washington v. William Morris Endeavor Entm't, LLC*, 2014 WL 4401291, at *7 (S.D.N.Y. 2014) (citation omitted).

Certain institutional arbitral rules permit the arbitrators to correct minor errors not affecting the merits. *See* AAA Arbitration Rule

R-50. ("The arbitrator is not empowered to redetermine the merits of any claim already decided", but can correct "clerical, typographical, or computational errors in the award".) Some state arbitral laws, if made applicable by the parties, also provide for arbitrators to correct errors of a similar nature that do not affect the merits.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Under the FAA, a party may challenge an award by moving to vacate the award and serving the motion on the adverse party or the party's attorney, within three months of the filing or delivery of the award. A party seeking to vacate an arbitration award "bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law". *Mintz & Gold LLP v. Battaglia*, 2013 WL 5297093, at * 2 (S.D.N.Y. Sept. 17, 2013). Section 10 of the FAA contains the exclusive grounds for seeking *vacatur*: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject-matter submitted was not made". 9 U.S.C. § 10(a). A party seeking to invoke one of these statutory grounds "must clear a high hurdle". *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. at 671.

(1) Section 10(a)(1), involving fraud, corruption and undue means, requires the party to prove, by clear and convincing evidence, that (1) there was actual fraudulent conduct, (2) the fraud could not have been discovered through the exercise of reasonable diligence, and (3) the conduct was materially related to the arbitrator's decision. *ARMA, S.R.O. v. BAE Systems Overseas, Inc.*, 961 F. Supp. 2d 245, 254 (D.D.C. 2013).

(2) Section 10(a)(2), involving "evident partiality" in the arbitrators, has divided the courts as to the applicable standard of proof. *See* question 5.4, *supra*. In the Second Circuit, and a majority of federal circuits, evident partiality has been held to be shown where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration". *Morelite Const. Corp. v. New York City District Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984). Proof of evident partiality must be by "clear and convincing evidence". *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 106 (2d Cir. 2013). Moreover, because arbitration is a matter of contract, "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen". *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016).

(3) Section 10(a)(3), involving misconduct or misbehavior by the arbitrators, has been held to be shown where the arbitrators did not "grant the parties a fundamentally fair hearing". *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007).

(4) Section 10(a)(4), involving an arbitrator's exceeding his powers, has been held to be shown where the arbitrator "dispense[s] his own brand of industrial justice". *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (*per curiam*) ("[i]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision") (citation omitted). An error of law or fact, even when serious, is not sufficient to justify *vacatur* under this Section. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-72 (2010).

For decades, courts treated "manifest disregard of the law" as an additional judicially implied or common law ground for vacating an arbitral award. In *Hall Street Associates LLC v. Mattel, Inc.*, 552 U.S. 576, however, the Supreme Court held that the exclusive grounds for vacating an award are those enumerated in Section 10 of the FAA, thus casting doubt on the continued vitality of the "manifest disregard of the law" doctrine. In the aftermath of *Hall*, courts are divided on the issue. The Second, Fourth, Sixth, and Ninth Circuits still recognise the doctrine, but the Seventh, Eighth and Eleventh Circuits do not. To salvage the doctrine after the *Hall* decision, the Second Circuit "reconceptualized" it as a gloss on the grounds for *vacatur* enumerated in the FAA. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008). In its subsequent ruling in that same case, the Supreme Court was willing to assume *arguendo* that manifest disregard still remained available as a ground for *vacatur*, although it concluded that it was unnecessary to reach that issue and decided the case on other grounds. *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 559 U.S. at 669-70. In any event, attempts to vacate on the basis of the doctrine are rarely successful even in those circuits where it continues to be recognised. *But see Daesang Corp. v. Nutrasweet Co.*, 55 Misc. 3d 1218, 58 N.Y.S.3d 873 (N.Y. Sup. 2017) (partially vacating and remanding for reconsideration an international arbitral award, when the tribunal manifestly disregarded New York law by dismissing a counterclaim for fraud in the inducement). The decision in *Daesang* has been widely criticised, and is currently on appeal.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

There is case law that the parties cannot agree to exclude any of the grounds for *vacatur* under Section 10(a) of the FAA, 9 U.S.C. § 10. *Burton v. Class Counsel (In re Wal–Mart Wage & Hour Emp't Practices Litig.)*, 737 F.3d 1262, 1267-68 (9th Cir. 2013) (statutory grounds under 9 U.S.C. § 10(a) "may not be waived or eliminated by contract"); *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 64–66 (2d Cir. 2003) (parties seeking to enforce an arbitration award cannot contract to divest courts of statutory authority under § 10), *overruled on other grounds* by *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008). One federal circuit court, however, has held that, so long as the intent is clear and unequivocal, parties can agree to waive appeals from a district court's confirmation or *vacatur* of an arbitral award. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The Supreme Court, in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), held that the grounds for *vacatur* under Section 10 of the FAA are exclusive and cannot be supplemented by a contract. Some state courts (including California, Connecticut, New Jersey, and Rhode Island) have held that the parties can agree to an expanded judicial review under state arbitration laws. *See*

Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008) (requiring an explicit contract provision for expanded review); *Nafta Traders Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011). Other state courts have taken the contrary position. *Brookfield Country Club, Inc. v. St. James Brookfield, LLC*, 696 S.E.2d 663 (Ga. 2010); *HL 1, LLC v. Riverwalk LLC*, 15 A.3d 725 (Me. 2011).

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The FAA contains no procedure for "appeal" of legal or factual determinations made by an arbitrator. That said, certain arbitral institutions have optional appellate arbitration procedures that parties can incorporate into their arbitration agreement, or agree to after the arbitration is ongoing. *See*, e.g., CPR Appellate Arbitration Procedure (2015).

Moreover, as indicated, *see* questions 9.2 and 10.1 *supra*, the FAA does contain procedures to vacate, modify, or correct an award. Under Section 12 of the FAA, 9 U.S.C. § 12, a motion to vacate, modify or correct an arbitral award must be served on the opposing party within three months after the award was filed or delivered. The action must be brought in the district where the award was made. When the challenge to an award is made in federal district court, the moving party must establish that the court has both subject-matter jurisdiction over the dispute, (i.e. the claim exceeds $75,000 and the parties are citizens of different states, or the claim arises under federal law), and also has personal jurisdiction over the parties.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The United States acceded to the New York Convention in 1970, and implemented its provisions in Chapter 2 of Title 9 of the U.S. Code, with two reservations. First, the United States recognises only awards made in another state that has ratified the Convention. Second, the United States applies the Convention only to matters recognised under domestic law as "commercial". Courts have construed these reservations narrowly. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

In 1990, the United States acceded to the Panama Convention and implemented its provisions in Chapter 3 of Title 9 of the U.S. Code.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The United States has a well-established policy in favour of arbitration, but an arbitration award is not self-executing and generally cannot be executed upon absent some action by a federal or state court.

At least as to domestic arbitration awards, and international arbitration awards rendered in the United States (non-domestic awards), the award must be "confirmed" before it can be enforced. The FAA, which governs confirmation in federal courts, requires the filing of a petition to confirm along with certain supporting documents (e.g., a copy of the agreement and a copy of the award). 9 U.S.C. §§ 9, 13. A petition to confirm a domestic award "may" be filed "at any time within one year after the award is made". 9 U.S.C. § 9. Notice of the petition must be filed on the adverse party. *Id.* "[T]he burden of proof necessary to avoid confirmation of an arbitration award is very high, and the district court will enforce the award so long as there is a barely colorable justification for the outcome reached". *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 103-04 (2d Cir. 2013).

In *CBF Industria de Gusa/S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir.), *cert. denied*, 138 S. Ct. 557 (2017), the Second Circuit recently held that, as to foreign arbitral awards rendered by tribunals seated *outside* the United States, there is no requirement to "confirm" the award in accordance with the procedures set forth in the FAA. Rather, the party wishing to enforce the award can bring a single action. The court explained that "confirmation", as used in the FAA sections enabling the New York Convention, "is the equivalent of 'recognition and enforcement' as used in the New York Convention for the purposes of foreign arbitral awards". *Id.* at 72.

Where parties to an arbitration agreement provide for New York state as the place of arbitration, they consent to the jurisdiction of New York federal and state courts to enforce the arbitration award. *See, e.g.*, *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006). Where foreign and out-of-state awards are concerned, and where the parties have not consented to New York jurisdiction, personal jurisdiction over the award debtor (or *in rem* or *quasi-in-rem* jurisdiction), as well as proper venue, must be established, and any *forum non conveniens* defence must be overcome. *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F. 3d 221 (2d Cir. 2014). The rules governing the enforcement of foreign arbitration *judgments* (as opposed to awards) are less clear. There is a split in the New York decisional law as to whether a party seeking to enforce a foreign judgment in New York courts must establish personal jurisdiction over the judgment debtor. *Compare Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S. 2d 285, 291 (4th Dep't 2001) (no personal jurisdiction requirement) *with Albaniabeg Ambient Shpk v. Engel S.p.A.*, 160 A.D. 3d 93 (1st Dep't 2018) (jurisdiction over the defendant or defendant's property required where the defendant is asserting substantive defences to the recognition of the foreign judgment).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

A valid and final arbitral award has the same effect under the principles of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) as the judgment of a court. *Pinnacle Env't Sys., Inc. v. Cannon Bldg. of Troy Assocs.*, 760 N.Y.S. 2d 253 (App. Div. 2003) (second arbitration barred by *res judicata* since it involved the same parties and issues); *Pujol v. Shearson/Am. Express, Inc.*, 829 F.2d 1201 (1st Cir. 1987); *Commw. Ins. Co. v. Thomas A. Greene & Co.*, 709 F. Supp. 86 (S.D.N.Y. 1989). *But see Falzone v. N.Y. Cent. Mut. Fire Ins.* 15 N.Y.3d 530 (2010) (the arbitrator's failure to apply collateral estoppel to preclude reconsideration of an issue decided in prior arbitration not reviewable).

In addition, under Section 13 of the FAA, 9 U.S.C. § 13, once a court judgment is entered confirming the award, that judgment has "the same force and effect" as any other court judgment entered in an action, which necessarily includes its preclusive effects.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Violation of public policy is not one of the FAA's listed grounds for vacating an award but the courts have nonetheless recognised a public policy exception. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (refusing to enforce an arbitration award on public policy grounds is a "specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy"). The Supreme Court's ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), has resulted in some uncertainty in this area, but courts continue to apply the exception. *See, e.g.*, *Immersion Corp. v. Sony Computer Entertainment*, 188 F. Supp. 3d 960, 969 (N.D. Cal. 2016) ("[t]he court is not aware of any authority in this circuit suggesting that the judicially-created public policy defense is unavailable after *Hall Street*"); *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016) (physician-patient arbitration agreement adopting arbitration provisions of state Medical Malpractice Act but eliminating patient-friendly terms void as against public policy), *cert. denied*, 138 S. Ct. 132 (2017). In addition, Art. V (2) (b) of the New York Convention provides that recognition may be denied where it would be contrary to the public policy of the country where recognition and enforcement are sought.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The FAA has no provision expressly addressing confidentiality, and there is no case law establishing a general duty of confidentiality in arbitrations. Parties can, however, provide for confidentiality in their arbitration agreement. Institutional arbitral rules also typically recognise arbitrators to issue orders protecting the confidentiality of materials. CPR Arbitration Rule 20, for example, requires the parties, the arbitrators and the CPR to treat proceedings, related document disclosure, and tribunal decisions as confidential, subject to limited exceptions. Many state laws recognise the authority of the tribunal to issue protective orders and confidentiality orders. Publicly held companies, however, may be required by U.S. securities law to disclose the arbitration proceeding if it is material to the company's financial condition or performance. And post-award judicial proceedings to confirm or vacate will likely make the award public.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information from an arbitral proceeding may be voluntarily disclosed by a party unless prohibited by the parties' agreement, institutional arbitral rules, or confidentiality orders issued by the arbitrators. However, upon making the appropriate showing, third parties may obtain arbitral records by subpoena. *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 665-66 (7th Cir. 2009); *but see Fireman's Fund Ins. V. Cunningham Lindsey Claims Mgmt., Inc.*, Nos. 03CV0531 (DLI) (MLO), 03CV1625 (MLO), 2005 WL 1522783, at *3-4 (E.D.N.Y. Jun. 28, 2005) (rejecting a third party's request for a copy of a confidential award based on a strong public interest in honouring the arbitrating parties' expectation of confidentiality and the absence of extraordinary circumstances).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The FAA does not limit the remedies available in arbitration. Subject to the parties' agreement, arbitrators may award any type of relief, including damages, specific performance, injunctions, interest, costs and attorney's fees. On the other hand, an arbitration agreement that expressly eliminates certain relief will be enforced. *Archer & White Sales v. Henry Schein, Inc.*, 878 F.3d 488 (5th Cir. 2017) (enforcing the terms of an agreement that eliminated injunctive relief as an available remedy), petition for cert. filed, No. 17-1272 (Mar. 17, 2018). The Supreme Court has held that under the FAA arbitrators may award punitive damages unless the parties' agreement expressly prohibits such relief. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 60-61 (1995). The AAA Arbitration Rules permit any relief deemed "just and equitable" within the scope of the parties' agreement. Rule R-47(a).

13.2 What, if any, interest is available, and how is the rate of interest determined?

The FAA does not address interest. Whether interest is permitted, and at what rate, will depend on the agreement of the parties, the applicable institutional rules, and the substantive law governing the contract. AAA Arbitration Rule R-47(d)(i), for example, permits the inclusion of interest in the award "from such date as the arbitrator(s) may deem appropriate". *See Bergheim v. Sirona Dental Sys., Inc.*, 2017 WL 354182, at *4 (S.D.N.Y. Jan. 24, 2017). ("There is a presumption in favor of awarding pre-judgment interest running from the time of the award through the court's judgment confirming the award, at a rate prescribed by the state statutory law governing the contract.")

Federal law controls post-judgment interest in federal cases, including cases based on diversity of citizenship. Under federal law, once a court judgment confirming the award is entered, the award is merged into the judgment and the interest rate is governed by the federal post-judgment interest rate statute, 28 U.S.C. § 1961. *See Bayer Cropscience AG v. Dow Agrosciences LLC*, 680 Fed App'x 985, 1000 (Fed. Cir. 2017). ("[N]umerous circuits have concluded that once a federal court confirms an arbitral award, the award merges into the judgment and the federal rate for post-judgment interest presumptively applies"); *Tricon Energy Ltd. v. Vinmar Int'l Ltd.*, 718 F.3d 448, 456-60 (5th Cir. 2013) (same). The parties may contract around the statute if they clearly and expressly agree on a different post-judgment interest rate, and that rate is consistent with state usury laws. Or they can agree to submit the question of post-judgment interest to arbitration. *Tricon Energy*, 718 F.3d at 457.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Arbitrators may award fees and costs subject to the parties' agreement.

The general practice in U.S. courts is for the parties to bear their own costs and fees. The parties are free, however, to agree on a different rule of cost allocation in their arbitration agreement, including by adopting institutional arbitral rules that give arbitrators the authority to grant such relief. AAA Arbitration Rule R-47(c), for example, provides that the arbitrator, in the final award, shall assess fees, expenses and compensation and that the award may include attorneys' fees if all parties have requested such an award or it is authorised by law or an arbitration agreement. CPR Arbitration Rule 19 provides that the tribunal shall fix the costs of arbitration in its award, including fees.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Arbitral awards are subject to federal and state tax in the same manner as court judgments.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The FAA does not prohibit an unrelated third party from funding a party in an arbitration. State law addresses third-party funding through: (1) laws that regulate funders; (2) the doctrines of maintenance, champerty and barratry; and (3) rules regulating attorney conduct and the application of attorney-client privilege. For example, ABA Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a non-lawyer, except in narrow circumstances.

Contingency fees are allowed, pursuant to individual states' rules of professional conduct.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The United States signed the ICSID Convention and ratified the Washington Convention in 1965; its entry was effective on Oct. 14, 1966.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The United States has 20 bilateral free trade agreements in force and is a party to 42 Bilateral Investment Treaties. The United States is not a contracting party to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

U.S. BITs generally provide that investors and covered investments are afforded the better of national treatment (i.e. treated as favourably as the host party treats its investors and their investments) or most favoured nation treatment.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, waives immunity and gives United States courts jurisdiction to enforce arbitral agreements entered into and awards rendered against foreign states under specified circumstances. The statute authorises attachment of U.S. property of the foreign sovereign that is "used for a commercial activity" under specified circumstances as well. *Id.* § 1610.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

A divided U.S. Supreme Court, in *Epic Sys. Corp. v. Lewis*, __U.S.__, 2018 WL 2292444 (May 21, 2018), held (5-4) that class action waiver provisions in employer-imposed arbitration agreements are enforceable and do not violate the National Labor Relations Act. The Court observed that "[i]n the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings". The controversial decision resolves a split in the federal courts of appeals on the issue.

On Jul. 19, 2017, the Consumer Financial Protection Bureau published a final rule prohibiting providers of consumer financial services and products from relying on a pre-dispute arbitration agreement that bars a consumer from filing or participating in a class action. On Nov. 1, 2017, President Trump signed legislation overturning the rule.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The CPR Rules for Non-Administered Arbitration of Domestic and International Disputes became effective as of Mar. 1, 2018. Rule 15.7 requires the parties and the arbitrator(s) to use best efforts to ensure that the dispute will be submitted to the tribunal for decision within six months after the initial pre-hearing conference, and that the final award will be rendered within one month after the close of proceedings. Rule 9.2 authorises the arbitrator(s) to establish time limits for each phase of the proceeding. Rule 14 allows for emergency measures by an emergency arbitrator prior to tribunal selection. Under Rule 17.3, arbitrators, in apportioning costs may to take into account, *inter alia*, "the circumstances of the case" and "the conduct of the parties during the proceeding". "This broad power is intended to permit the arbitrators to apportion a greater share of costs than they otherwise might to a party that has employed tactics the arbitrators consider dilatory, or in other ways has failed to cooperate in assuring the efficient conduct of the proceeding".

CPR's new "Young Lawyer Rule", Rule 12.5 of the 2018 revised rules ("Evidence and Hearings"), seeks to increase opportunities for junior lawyers to take a more active role in arbitration hearings

by, for example, examining witnesses they helped to prepare and presenting arguments on the motion papers they drafted. Several federal judges have adopted rules, or issued standing orders, with the same goal. The new rule provides as follows:

In order to support the development of the next generation of lawyers, the Tribunal, in its discretion, may encourage lead counsel to permit more junior lawyers with significantly less arbitration experience than lead counsel to examine witnesses at the hearing and present argument. The Tribunal, in its discretion, may permit experienced counsel to provide assistance or support, where appropriate, to a lawyer with significantly less experience during the examination of witnesses or argument. Notwithstanding the contents of this Rule 12.5, the ultimate decision of who speaks on behalf of the client in an arbitration is for the parties and their counsel, not the Tribunal.

According to CPR President & CEO Noah J. Hanft: "While the 'Young Lawyer' Rule applies to all young lawyers, judges who have implemented it have reported that it has indirectly but naturally increased the opportunities for women and people of color—who tend to be underrepresented at the partner level—to play more active and substantive roles in the courtroom".

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