ARBITRATION 2022

Contributing editors
Craig Tevendale, Vanessa Naish and Elizabeth Kantor
Herbert Smith Freehills LLP

LEXOLOGY
Getting the Deal Through

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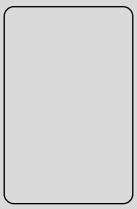

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Lexology Getting the Deal Through is delighted to publish the seventeenth edition of *Arbitration*, which is available in print and online at www.lexology.com/gtdt.

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

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Germany, Luxembourg, Mexico, New Zealand and Pakistan.

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

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

Lexology Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Craig Tevendale, Vanessa Naish and Elizabeth Kantor of Herbert Smith Freehills LLP, for their continued assistance with this volume.

LEXOLOGY
Getting the Deal Through

London
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Global overview

Craig Tevendale, Vanessa Naish and Elizabeth Kantor

Herbert Smith Freehills LLP

Commercial arbitration is a truly international forum for dispute resolution. It has grown in popularity as the global trading economy has transcended international borders and disputes increasingly arise between parties of different nationalities. The enforcement benefits – neutrality, confidentiality and flexibility of arbitration – have all enabled users from across the world to adopt this method of dispute resolution and shape it to suit their business needs.

The international practice of commercial arbitration is based on two fundamental building blocks: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration (1985), with the amendments as adopted in 2006 (the UNCITRAL Model Law). Yet there remains little similarly international governance of arbitral process or procedure. Instead, the practice of arbitration has evolved through the preferences and innovations of arbitration practitioners and users. As the use of arbitration expands into more jurisdictions, the knowledge brought by practitioners and users of arbitration cross-fertilises. This has led to an increasingly standardised approach and a general consensus of 'best practice' in international commercial arbitration. Indeed, *Lexology Getting the Deal Through – Arbitration* highlights that there has been a harmonisation of many aspects of arbitral procedure – from the application of arbitration instruments to the use of institutional rules and other soft laws and resources that guide the arbitral process (as further described below).

Despite an increasingly standardised approach to process, an international commercial arbitration can never divorce itself entirely from interaction with national laws. Parties who have chosen to arbitrate their disputes have made a conscious choice to exclude the jurisdiction of any relevant domestic courts. However, the effectiveness of an arbitration and whether the end product, the arbitration award, is enforceable, are still subject to the approach taken by the courts of seat and the courts at the place of enforcement. This reliance on domestic legal infrastructure at critical points in an arbitration can create significant pitfalls for the unwary. As this edition illustrates, there still remain many domestic idiosyncrasies that affect the enforceability of arbitral awards and that require the input and expertise of local counsel.

In contrast, investment arbitration can be far more detached from national legal systems than its commercial arbitration counterpart – for example, an ICSID arbitration (unlike an UNCITRAL investment arbitration) is not tethered to a particular seat, and there should be automatic recognition and enforcement of ICSID awards under the ICSID Convention (notwithstanding some exceptions). Nonetheless, it remains critical to be aware of procedural approaches that are derived from national practice in some jurisdictions. Given many practitioners of treaty arbitration also practise commercial arbitration, it is perhaps unsurprising that there is cross-pollination of commercial arbitral practice into treaty arbitration. A key example of this is the introduction of a provision on security for costs in the draft ICSID rules (which were published in November 2021 and are due to be tabled for a vote in early 2022). Security for costs is a common law provision that was first conceived as an interim remedy in the courts but has now permeated both commercial and investment arbitration. While the role of national courts may be reduced in ICSID arbitration, the practice of investment treaty arbitration is still being influenced by court and commercial arbitral practice and procedure, through the experience of practitioners and users.

Standardisation of arbitration law in domestic countries

The standardisation of commercial arbitration is in part attributable to two key global instruments: the New York Convention and the UNCITRAL Model Law. The ICSID Convention has also created a framework for the protection of international investments.

The New York Convention provides a standardised regime for the enforcement and recognition of arbitral awards within contracting states. This means that parties seeking to enforce arbitral awards in New York Convention signatory states should theoretically follow a consistent enforcement process. Parties seeking to challenge arbitral awards upon enforcement can only do so in limited, specific circumstances, otherwise the domestic courts have a limited role in the arbitral process.

The UNCITRAL Model Law on international arbitration is designed to assist states in reforming and modernising their laws on arbitral procedure to take account of the particular features and needs of international commercial arbitration. As set out on UNCITRAL's website, the Model Law 'reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world'. It is designed to ensure minimal court intervention. As the Model Law has been adopted in whole or in part in over 100 jurisdictions, this means that many international arbitrations are supported by a more or less consistent infrastructure, even if some states have departed from the exact original text to a greater or lesser extent.

Consistency of institutional rules

Neither of the above instruments sets out how an arbitration should be run. Indeed, many of the key questions that arise during an arbitral process are unaddressed in either. This lack of overarching governance of arbitral procedure has led arbitral institutions to become drivers and contributors to the evolution of international best practice in commercial arbitration.

For example, since 2012, we have seen the broad acceptance of emergency arbitrator provisions and provisions for multi-party and multi-contract disputes across all the main arbitral institutional rules. More recently, institutions have started to adopt early determination provisions, expedited procedures, and timescales for issuance of the award. Improvements in technology and the era of covid-19 have accelerated this sharing of best practice, including in the operation of virtual hearings and electronic communications.

Best practice has also extended to areas that are not limited to arbitration procedure, but that are societal issues. For example, institutions

have so far been pivotal in achieving greater gender diversity on arbitration tribunals, particularly in terms of the power to appoint the sole or presiding arbitrator. Hopefully, this progress can extend to regional and ethnic diversity soon.

While there is consistency in the type of provisions, however, institutional rules are not uniform and there remain considerable differences. To name just a few examples, the approach to and amount of fees, time limits and the institution's level of supervision and scrutiny all differ from one institution to another. This affords users with a choice of institution that will best cater for their needs while ensuring that the process will remain consistent with global 'best practice'.

Proliferation of soft law

The lack of overarching governance of process has also led to a proliferation of soft law, which users are free to adopt if they wish. These soft laws are intended to address complicated issues that arise from the confluence of parties from different jurisdictions – for example, in relation to the independence and impartiality of arbitrators, the taking of evidence and efficient conduct of arbitration proceedings, and the conduct of counsel. These soft laws have undoubtedly contributed to the harmonisation of international arbitration and form a key part of arbitral best practice. Examples are given below.

The International Bar Association guidelines on conflicts of interest

The requirement for the independence and impartiality of arbitrators is critical for the credibility of the arbitral system, and the International Bar Association (IBA) guidelines on conflicts are aimed at providing additional parameters to assist parties and arbitrators in identifying situations in which these criteria may be jeopardised. They apply to both commercial and treaty arbitration. Feedback collected by the IBA indicates that most international arbitrators consult the guidelines when deciding whether a conflict exists, leading the IBA to conclude that the Guidelines have 'gained wide acceptance within the international arbitration community'.

The IBA Rules on the Taking of Evidence and the Prague Rules

The IBA Rules on the Taking of Evidence provide a potential 'international' approach to evidence in arbitration. They aim to strike a balance between the civil and common law systems and can be applied as binding on the parties and tribunal or instead as a guide.

The Prague Rules on the Efficient Conduct of Proceedings are intended to provide a framework or guidance for tribunals and parties on how to increase the efficiency of arbitration by encouraging a more active role for arbitral tribunals in managing proceedings. As with the IBA rules on evidence, parties may decide to apply the Prague Rules as a binding document, or as guidelines.

IBA Guidelines on Party Representation

The IBA Guidelines on Party Representation seek to provide a regulatory framework for the conduct of counsel in international arbitration, where counsel from different jurisdictions are not subject to the same set of domestic ethical obligations and may have different views of the standard of conduct that applies to them. Like both the Rules of Evidence and the Guidelines on Conflicts, these rules are not mandatory, but can be adopted by the parties by agreement, or by the tribunal when it considers that these would assist in the smooth running of the proceedings.

Unlike their sister guidelines, they were greeted by a high degree of controversy. Indeed, the Swiss Arbitration Association (ASA) expressed serious reservations about them. In particular, the ASA took issue with the fact that the Guidelines grant the tribunal responsibility for deciding issues that are fundamentally alien to the arbitral process, and to the tribunal's mandate.

One lawyer's view of what is a fundamental ethical principle may be very alien to another's: Swiss lawyers' references to certain US principles appearing in the IBA Guidelines on Party Representation is evidence of exactly this. There was also considerable disquiet (now largely abated) about the introduction of the LCIA's Annex on the Conduct of Party Representatives.

Other guidance

There are many other organisations, bodies and resources that assist the global arbitration community but are too numerous to mention by name. One such example is the International Council for Commercial Arbitration (ICCA). The ICCA is an NGO devoted to promoting the use and improving the processes of arbitration. Its activities include convening congresses and conferences, sponsoring dispute resolution publications and promoting the harmonisation of arbitration rules, laws, procedures and standards. For example, it has produced guides and reports on topics such as data protection in arbitration, gender diversity in arbitral appointments and third-party funding.

These soft-law instruments and resources are helpful in assisting parties to navigate the multi-jurisdictional issues that arise in arbitration. They have shaped a more reliable global system, with which parties are increasingly familiar and comfortable, and importantly, they seek to create a more level playing field. However, while these instruments create certainty, and most likely save parties time and costs, a potential downside is that parties may defer to these instruments as easy solutions to complicated problems. In some cases, it may be beneficial to consider whether the needs of their particular case might be best met in other ways. There is also a question as to whether such instruments give undue prominence to certain legal systems (eg, the common law system) and whether in future a great choice of soft law instruments may develop to better reflect more diverse customs.

The importance of national law and state support

With increasing standardisation across institutional laws and soft law, it begs the question: why is *Lexology Getting the Deal Through – Arbitration* still so useful despite the increased standardisation and internationalisation of arbitration that we have described above?

First, state support is clearly important to any commercial arbitration in ensuring that the jurisdiction or jurisdictions at the seat and at the place of enforcement have a modern arbitration law and provide a framework and support for training the judiciary, and to ensure compliance with the New York Convention.

While some countries have embraced the internationalisation of dispute resolution and sought, for example, to introduce the UNCITRAL Model Law and other legislative support for arbitration, other countries have struggled with the concept of an international system that cannot be controlled, particularly where it affects or relates to their own system of law. Many state newcomers to the New York Convention express similar concerns about ceding control over certain aspects of their domestic law, such as, taxation, real estate and family law.

Indeed, there remain examples of circumstances where parties' decision to arbitrate is at risk of being contravened by a state court, for example in response to sanctions from other states or where states take a protectionist approach of resolution of disputes linked to their jurisdiction.

State courts have also reached their own conclusions on the 'public policy' exemption in article V(2)(b) of the New York Convention. For example, one court may interpret the provision to mean public policy at the place of enforcement, whereas another could look at principles of international public policy. This can lead to complex situations where

the same arbitral award is deemed to be enforceable in one jurisdiction but not another.

The differences in approach as between state courts become very apparent when enforcement or set aside is sought both at the seat of the arbitration and elsewhere, in circumstances where state courts are each required to apply their own domestic law. These differences have been thrown into sharp relief by the recent English Supreme Court case of *Kabab v Kout*, where the English and French courts have (so far) adopted different approaches to whether a third party was bound by the arbitration agreement. *Alstom Transport* is also facing a potentially similar situation in its dispute against Alexander Brothers Limited, where it has unsuccessfully attempted to set aside the award in Switzerland on grounds of corruption, and has so far been unsuccessful in its enforcement efforts in France (unless the latest decision is overturned), but could be successful in enforcement in England. These are two strongly pro-arbitration jurisdictions, recognised as safe seats of arbitration with excellent track records. Yet even here, the interaction of domestic law can cause significant differences in approach towards the same arbitration.

All of this goes to show that the practice of international arbitration cannot be completely divorced from the state courts who supervise and support it. This survey therefore remains extremely important and relevant to all users and practitioners in navigating the multi-jurisdictional arbitration landscape. We hope you find it useful.

Australia

Gitanjali Bajaj, Michael Robbins and Kabir Barat
DLA Piper

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Yes, Australia is a state party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention has been adopted in Schedule 1 of the International Arbitration Act 1974 (Cth).

Australia has not made any declarations or notifications under articles I, X and XI of the New York Convention.

Australia is a contracting party to the Convention on the Settlement of Investment Disputes.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Yes, Australia is party to 15 bilateral investment treaties with Argentina, China, the Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, the Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay respectively.

Additionally, Australia is party to 16 free trade agreements with 26 countries that contain investment provisions, such as non-discrimination obligations, investment protection, limitations on government measures and dispute settlement procedures.

Domestic arbitration law

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

Domestic arbitration proceedings in Australia are governed by a series of Commercial Arbitration Acts (CAAs) in each state or territory. These CAAs are substantially the same, based on the UNCITRAL Model Law (the Model Law) with some amendments.

International arbitration in Australia is governed by the International Arbitration Act 1974 (Cth) (IAA) as amended in 2010, 2015 and 2018. The IAA regulates the recognition and enforcement of foreign arbitral awards, by implementing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in Schedule 1 of the IAA). It also regulates the conduct of international commercial arbitration in Australia by implementing the Model Law with some amendments.

Domestic arbitration and UNCITRAL

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

The domestic CAAs in each state and territory, which govern domestic arbitrations (distinct from international arbitrations) are all based on the Model Law. There are necessary modifications, however, which adapt the legislation to the Australian domestic setting. For example, under the CAAs parties may seek assistance from the Supreme Court on issues such as deciding preliminary points of law (section 27J), and obtaining subpoenas requiring persons to attend before the arbitral tribunal for examination (section 27A), or to produce specified documents (section 27B).

International arbitrations are governed by the IAA, which implements the Model Law in Schedule 2 thereof. The IAA supplements the Model Law with additional provisions.

Mandatory provisions

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

While the Model Law (adopted in Schedule 2 of the International Arbitration Act 1974 (Cth)) mandatorily governs the procedure of all international commercial arbitrations seated in Australia, parties are generally free to adapt the arbitration proceedings to suit their needs. However, parties cannot diverge from the requirement under the Model Law that parties are treated with equality and are afforded a reasonable opportunity to present their case (article 18 of the Model Law).

Similarly, the domestic CAAs provide flexibility and autonomy with respect to the arbitration process with the main objective being 'to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense' (section 1C).

Substantive law

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

Parties are free to choose the substantive law applicable to the dispute, and arbitral tribunals are compelled to decide the dispute in accordance with the law chosen by the parties (article 28(1) of the Model Law, adopted in Schedule 2 of the IAA) and section 28(1) of the domestic CAAs.

In the absence of an agreement between the parties as to the substantive law of the dispute, the tribunal is empowered to apply the conflict of laws rules that it considers applicable to determine the substantive law.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

Name of institute	Address	Homepage
Australian Centre for International Commercial Arbitration (ACICA)	Level 16, 1 Castlereagh Street NSW 2000 Sydney Australia	https://acica.org.au/
Australian Disputes Centre	Level 16, 1 Castlereagh Street NSW 2000 Sydney Australia	www.disputescentre.com.au/
Resolution Institute	Suite 602, Level 6 Tower B, Zenith Centre 821–843 Pacific Highway Chatswood NSW 2067	www.resolution.institute/

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Generally speaking, the following types of matters are not traditionally arbitrable in Australia:

- criminal offences;
- divorce and child custody proceedings;
- property settlements;
- testamentary matters;
- grievances related to employment;
- intellectual property disputes (except arbitrators can issue determinations declaring the IP rights of parties);
- competition law disputes; and
- certain bankruptcy and insolvency matters.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The International Arbitration Act 1974 (Cth) (IAA) has adopted the definition of an 'arbitration agreement' (section 3 of the IAA) from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides that an arbitration agreement is 'an agreement in writing under which the parties undertake to submit to arbitration any disputes arising from a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration' (see also article 7 of the UNCITRAL Model Law and section 7 of the domestic Commercial Arbitration Acts (CAAs)).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement will no longer be enforceable if the arbitration agreement is null and void, inoperative or incapable of being performed (section 7(5) of the IAA).

Australian courts may enforce an arbitration agreement notwithstanding there may have been a recission, avoidance and termination of the underlying contract (*Hancock Prospecting v Rinehart* (2017) 257 FCR 442 at paragraph 360).

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The separability of arbitration agreements from the main agreement has been considered under common law in Australia. Unless an intention to the contrary is expressed, an arbitration clause will generally be treated as separable from the main contract, as reflected in article 16(1) of the UNCITRAL Model Law (adopted in Schedule 2 of the IAA) (see also, *Comandate Marine Corp v Pan Australia Shipping* (2006) 238 CLR 457 at 512).

Third parties – bound by arbitration agreement

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

The general rule in Australia is that non-parties cannot be bound by an arbitration clause without their consent. Some exceptions include where an arbitration agreement is assigned, and where an agent, acting within their authority, binds their principal.

Under section 7(4) of the IAA and section 2(1) of the domestic CAAs, a non-party to an arbitration agreement can rely on the agreement by claiming 'through or under' a party to the arbitration agreement.

Third parties – participation

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

Generally speaking, third parties cannot be joined to arbitration proceedings without their consent, and Australia's arbitration laws do not provide for joinder of third parties.

However, rules of the arbitral institutions, if adopted by parties, provide for joinder of third parties and consolidation of arbitral proceedings (see, for example, article 16 of the Australian Centre for International Commercial Arbitration (ACICA) Rules), but only where all parties involved consent to the joinder or consolidation.

In addition, third parties may be brought into arbitration proceedings by third party notices (ie, issuance of subpoenas). Subpoenas may be issued (with permission of the tribunal) to non-parties (section 23 of the IAA and section 27A of the domestic CAAs.

Groups of companies

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

The 'group of companies' doctrine has not received wide acceptance in Australia. However, Australian courts may pierce the corporate veil if the company structure has been used to perpetrate a fraud or to enable a person to avoid an existing legal obligation, or in situations of agency (ie, where a subsidiary company acts as an agent for its parent company).

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

There are no specific provisions or restrictions in the IAA or the domestic CAAs relating to multi-party arbitration agreements. Generally, if there are two or more parties to a contract, it is important to ensure

that each of the parties receive equal treatment in the formation of the tribunal and throughout the arbitration.

Consolidation is provided for under section 24 of the IAA and section 27C of the domestic CAAs.

Additionally, rules of the arbitral institutions, if adopted by parties, provide for joinder of third parties and consolidation of arbitral proceedings (see for example, article 16 of the ACICA Rules).

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Yes, under section 24 of the IAA, a party to arbitral proceedings may apply to the arbitral tribunal for separate arbitral proceedings to be consolidated. However, section 24 of the IAA does not apply automatically and the parties must opt-in for it to apply to their arbitration (see section 22(5) of the IAA). Similarly, section 27C of the domestic CAAs allow for an application to be made to the arbitral tribunal for consolidation on the same grounds as contained in the IAA.

Additionally, rules of the arbitral institutions, if adopted by parties, provide for consolidation of arbitral proceedings (see for example, article 16 of the ACICA Rules).

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

Any natural person is capable of being appointed as an arbitrator irrespective of their qualifications, licence to practise (in Australia or elsewhere), experience, residence or citizenship, so long as they are independent and impartial. Accordingly, there is no requirement for an arbitrator to be appointed from a list of arbitrators unless otherwise agreed by the parties.

It is not uncommon for retired judges to be appointed as arbitrators, but active judges in Australia do not take on such roles.

Article 11(1) of the UNCITRAL Model Law (the Model Law) (adopted in Schedule 2 of the International Arbitration Act 1974 (Cth) (IAA)) and section 11 of the domestic Commercial Arbitration Acts (CAAs) specially provide that a person cannot be precluded from acting as an arbitrator by reason of their nationality unless otherwise agreed by the parties.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Lawyers and former judges are regularly appointed as arbitrators in Australia. However, experts in industry may be appointed in appropriate cases. Some institutions such as the Australian Centre for International Commercial Arbitration (ACICA) promote more diversity in their institutional appointments, not only by gender but also age, geography, culture, ethnicity and professional background.

Default appointment of arbitrators

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

The parties can determine a procedure for the appointment of arbitrators under both the IAA and the domestic CAAs.

Failing agreement, in relation to a three-member arbitral tribunal, each party must appoint an arbitrator and the two appointed arbitrators must agree on the appointment of a third, presiding arbitrator. In an arbitration with a sole arbitrator, the appointment is made pursuant to agreement by the parties.

A court or other competent authority can appoint an arbitrator where a party, the arbitrators or a third party (including an institution) fails to appoint an arbitrator in accordance with the parties' agreement or default regime.

ACICA is the only default appointing authority under the IAA.

Challenge and replacement of arbitrators

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

Under article 12(2) of the UNCITRAL Model Law (the Model Law) (adopted in Schedule 2 of the IAA), an arbitrator may only be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess qualifications agreed to by the parties.

The IBA Guidelines on Conflicts of Interest are often referred to for guidance on arbitrator challenges although these guidelines are not binding.

Additionally, rules of the arbitral institutions, if adopted by parties, provide for challenge in their respective rules (see for example, article 21 of the ACICA Rules).

Relationship between parties and arbitrators

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

The relationship between parties and arbitrators is often considered in quasi-contractual terms because, when an arbitrator accepts an appointment, he or she agrees to resolve the dispute between the parties and the parties in turn agree to remunerate the arbitrator for this.

Arbitrators must remain impartial and independent (article 12(1) of the Model Law (adopted in Schedule 2 of the IAA and section 12(2) of the domestic CAAs).

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Under article 12(1) of the Model Law (adopted in Schedule 2 of the IAA) and section 12(1) of the domestic CAAs, an arbitrator is required to 'disclose any circumstances likely to give rise to a justifiable doubt as to their impartiality or independence when they are approached in connection with possible appointment or at any time throughout the proceedings'.

Additionally, rules of the arbitral institutions, if adopted by parties, contain rules relating to arbitrators' duties of disclosure regarding impartiality and independence (see for example, article 20.3 of the ACICA Rules).

Immunity of arbitrators from liability

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

An arbitrator is not liable for anything done or omitted by the arbitrator in good faith in their capacity as arbitrator (section 28 of the IAA and section 39 of the domestic CAAs).

Additionally, rules of the arbitral institutions, if adopted by parties, provide for high levels of arbitrator immunity (see for example, article 53 of the ACICA Rules).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

A court must refer the parties to arbitration if an action is brought in court that is the subject of a valid arbitration agreement, provided a party so requests no later than when submitting the party's first statement on the substance of the dispute (article 8 of the UNCITRAL Model Law (the Model Law) (adopted in Schedule 2 of the International Arbitration Act 1974 (Cth) (IAA)) in respect of international arbitrations and section 8 of the domestic Commercial Arbitration Acts (CAAs). Additionally, section 7(2) of the IAA provides that courts are required to stay any pending court proceedings that concern a matter that is subject to an arbitration agreement.

Jurisdiction of arbitral tribunal

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

Article 16 of the Model Law (adopted in Schedule 2 of the IAA) provides for the principle of competence-competence and allows arbitrators to rule on their own jurisdiction.

Where a party seeks to challenge the jurisdiction of the tribunal, article 16(2) of the Model Law (and section 16(2) of the domestic CAAs) requires such a challenge to be brought no later than after the filing of the statement of defence.

If the arbitral tribunal makes a ruling that it has jurisdiction as a preliminary question, either party can ask a court specified in article 6 of the Model Law (and section 6 of the CAAs) (being any of the state or territory Supreme Courts or the Federal Court of Australia) within 30 days of that ruling, to finally decide the matter.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

The parties are free to agree on and choose the place and language the of arbitration. Failing such agreement, such matters are to be determined by the arbitral tribunal having regard to the circumstances of the case (articles 20 and 22 of the UNCITRAL Model Law (the Model Law) (adopted in Schedule 2 of the International Arbitration Act 1974 (Cth) (IAA)).

The parties are free to choose the substantive law applicable to the dispute and article 28(1) of the Model Law (and section 28(1) of the domestic Commercial Arbitration Acts (CAAs)) compels arbitral tribunals to decide the dispute in accordance with the law chosen by the parties. These apply equally to both the IAA as well as the CAAs.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Article 21 of the Model Law (adopted in Schedule 2 of the IAA) (and section 21 of the domestic CAAs) provides that unless otherwise agreed by the parties, the arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.

Additionally, rules of the institutions, if adopted by parties, provide for detailed procedural matters such as the formal requirements of a notice for arbitration (see for example, article 6.3 of the Australian Centre for International Commercial Arbitration (ACICA) Rules).

Hearing

28 | Is a hearing required and what rules apply?

Under article 24(1) of the Model Law (adopted in Schedule 2 of the IAA) and section 21 of the domestic CAAs, arbitral tribunals can conduct proceedings on the papers, subject to any contrary agreement of the parties. In practice, oral hearings are usually held unless the parties opt to proceed with the arbitration on a documents-only basis.

Evidence

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

Parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may conduct the arbitration 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 (article 19 of the Model Law as adopted in Schedule 2 of the IAA and section 19 of the domestic CAAs).

In practice, evidence is often given in the form of witness statements, which are subsequently orally verified at the evidentiary hearing, followed by cross-examination and re-examination of the witness.

The IBA Rules on the Taking of Evidence in International Arbitration are frequently referred to as a guide for taking evidence in proceedings, but do not have a mandatory application.

Court involvement

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

Article 27 of the Model Law (adopted in Schedule 2 of the IAA and section 27 of the domestic CAAs) provide that an arbitral tribunal or a party (with the tribunal's approval) may request assistance in the taking of evidence from a competent court, which may execute the request according to its rules on taking evidence. For example, under the CAAs, parties may seek assistance from the Supreme Court on issues such as deciding preliminary points of law (section 27J), and obtaining subpoenas requiring persons to attend before the arbitral tribunal for examination or to produce specified documents (sections 27A and 27B).

Thus, courts are empowered to intervene in arbitral proceedings but, by reason of article 5 of the Model Law as adopted in Schedule 2 of the IAA and section 5 of the CAAs, only to the extent provided for under the applicable provisions.

Confidentiality

31 | Is confidentiality ensured?

Yes, confidentiality is ensured pursuant to sections 23C and 23D of the IAA and sections 27E and 27F of the domestic CAAs. No confidential information relating to the arbitration may be disclosed unless there is a permitted exception such as obtaining the consent of all parties to the arbitral proceedings.

Confidential information is defined broadly in section 15 of the IAA and section 2 of the CAAs, and includes all matters filed in the proceedings.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

The UNCITRAL Model Law (the Model Law) (adopted in Schedule 2 of the International Arbitration Act 1974 (Cth) (IAA)) recognises that even though an arbitral tribunal may have the power to grant interim relief, sometimes recourse to a domestic court is necessary. Under article 17J of the Model Law, courts have the same power of issuing an interim measure in relation to arbitration proceedings. However, courts will generally only grant interim relief in arbitrations where urgent relief is sought: *Amcor Packaging (Aust) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 at [41], and they will exercise the power sparingly under article 17J of the Model Law and only if there are compelling reasons to do so: *Cape Lambert Resources Ltd v MCC Australian Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [127]–[129]. Mirroring provisions are included in section 17J of the domestic Commercial Arbitration Acts (CAAs).

Interim measures by an emergency arbitrator

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

The arbitration laws of Australia do not provide a mechanism for an emergency arbitrator to be appointed prior to the constitution of the arbitral tribunal.

However, the rules of the arbitral institutions, if adopted by parties, may include emergency relief provisions. For example, the Australian Centre for International Commercial Arbitration Rules provide that a party may request emergency interim measures of protection to be issued by an arbitrator appointed prior to the constitution of the arbitral tribunal (Rule 37.1(a)).

Interim measures by the arbitral tribunal

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

An arbitral tribunal in Australia may order interim relief under article 17 of the Model Law (adopted in Schedule 2 of the IAA) and section 17 of the domestic CAAs. The powers of an arbitral tribunal to award relief under those provisions are wide, and include, inter alia, any temporary measure to maintain or restore the status quo, pending determination of the dispute.

Sanctioning powers of the arbitral tribunal

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

The only sanctions that an arbitral tribunal may issue for improper conduct by parties or counsel is an award of costs, which is typically made at the broad discretion of the arbitral tribunal. Australian legal practitioners remain bound by professional rules of ethics and may be sanctioned by relevant professional bodies in the state or territory for unprofessional conduct, if found to be in breach.

AWARDS

Decisions by the arbitral tribunal

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

Yes, it is sufficient. Article 29 of the UNCITRAL Model Law (the Model Law) (adopted in Schedule 2 of the International Arbitration Act 1974 (Cth) (IAA)) and section 29 of the domestic Commercial Arbitration Acts (CAAs) provide that in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if authorised by the parties or all members of the tribunal. There are no consequences for the award in the case of a dissenting arbitrator.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

There are no specific restrictions on giving a dissenting opinion.

Form and content requirements

38 | What form and content requirements exist for an award?

Article 31(1) of the Model Law (adopted in Schedule 2 of the IAA) and section 31 of the domestic CAAs provides that the award shall be made in writing and shall be signed by the arbitrators. The award is also required to state its date and the place of arbitration under article 31(3) of the Model Law as adopted in Schedule 2 of the IAA and section 31(3) of the domestic CAAs.

Under article 31(2) of the Model Law as adopted in Schedule 2 of the IAA and section 31(2) of the domestic CAAs, the award must state the reasons upon which it is based, unless the parties have agreed otherwise.

Time limit for award

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

The IAA and the domestic CAAs do not impose time limits within which an award must be rendered. However, excessive delay in issuing the award may result in the award being set aside, but only where the delay has had an actual or potential impact on the decision-making process: *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd [2019]*

WASCA 16, decided under the superseded Commercial Arbitration Act 1985 (WA) but still provides useful guidance for the IAA as well as the CAAs.

Additionally, rules of the institutions, if adopted by parties, may provide time limits for rendering an award (see, for example, article 39.3 of the Australian Centre for International Commercial Arbitration (ACICA) Rules).

Date of award

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

Under article 33(1) of the Model Law (adopted in Schedule 2 of the IAA) and section 33(1) of the domestic CAAs, parties have 30 days from receipt of the award to request any corrections to or interpretations of the award by the arbitral tribunal.

Article 34(3) of the Model Law as adopted in Schedule 2 of the IAA and section 34(2) of the CAAs provides that 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 or, if a request had been made under article 33 of the Model Law and section 33 of the CAAs, from the date on which that request had been disposed of by the arbitral tribunal.

Types of awards

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

Arbitral tribunals may issue final awards, partial awards, interim awards and consent orders.

There are no specific limits on the types of remedies that can be awarded by an arbitral tribunal.

Termination of proceedings

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

The proceedings may be terminated if the dispute is settled. If requested by the parties, the arbitral tribunal shall record the settlement in the form of an arbitral award on agreed terms (Schedule 2 of the IAA, which adopts article 30 of the Model Law) and section 30 of the domestic CAAs.

In the event of a default, the arbitral tribunal may continue with the arbitration proceedings in default of appearance and make an award on the evidence before it (section 23B(2) of the IAA and section 25 of the CAAs).

Cost allocation and recovery

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

Article 27(1) of the Model Law (adopted in Schedule 2 of the IAA) and section 27(1) of the domestic CAAs provide that the costs of an arbitration shall be at the discretion of the arbitral tribunal.

However, the general position in Australia is that costs follow the event, with the unsuccessful party paying the costs of the successful party. The general rule may be displaced in certain circumstances, such as where the successful party fails on a particular issue or conducts itself in a manner that justifies it being deprived of costs. Depending on the applicable arbitral rules adopted by the parties, all costs that are reasonably incurred that relate to the arbitral proceedings are recoverable. These include administrative fees, attorneys' fees and related expenses.

Interest

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

The arbitral tribunal has the power to make an order for interest for both pre-award and post-award periods (see sections 25 and 26 of the of the IAA and sections 33E and 33F of the domestic CAAs). The tribunal may set a 'reasonable rate' of interest.

Generally, in the absence of agreement to the contrary, the rate of interest will be the maximum rate prescribed for judgment debts. In the Federal Court of Australia, the pre-judgment interest rate is currently 5.5 per cent and the post-judgment interest rate is 7.5 per cent.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Yes, both the parties and arbitral tribunal may initiate a correction or interpretation (Schedule 2 of the International Arbitration Act 1974 (Cth) (IAA), which adopts article 33 of the UNCITRAL Model Law (the Model Law), and section 33 of the Commercial Arbitration Acts (CAAs)).

The time limit for the arbitral tribunal to issue an interpretation or correction is within 30 days of the parties' receipt of the award, unless otherwise agreed (article 33(2) of the Model Law as adopted in Schedule 2 of the IAA and section 33(2) of the CAAs).

Challenge of awards

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

The grounds on which an award may be challenged are set out in article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in Schedule 1 of the IAA) and article 34 of the Model Law (adopted in Schedule 2 of the IAA) and section 34 of the domestic CCAs. They include:

- incapacity of a party or invalidity of the arbitration agreement;
- proper notice of the appointment of an arbitrator or of the arbitral proceedings was not given, or the party was otherwise unable to present its case;
- the dispute falls outside the arbitration agreement;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration; and
- the award is in conflict with public policy.

Levels of appeal

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

The grounds on which to challenge the outcome of an international commercial arbitration are narrowly circumscribed and set out in article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in Schedule 1 of the IAA). Having chosen to resolve their disputes via binding and final arbitration, parties will not be readily afforded a second chance to re-agitate their claims before national courts save for the limited grounds for challenge set out in article 34 of the Model Law (adopted in Schedule 2 of the IAA).

The same restrictions apply to domestic arbitration under the domestic CCAs except that section 34A thereof provides that an appeal to the court rests on a question of law arising out of an award, subject to the conditions therein that, importantly, require parties to have opted into the appeal procedure at the time of entry into the arbitration agreement.

The costs incurred are typically the legal fees and depend on the circumstances of the case. In a set aside application or application to recognise and enforce an award, Australian courts generally follow the principle that costs follow the event.

Recognition and enforcement

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

Articles III to V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in Schedule 1 of the IAA), articles 31(1), 34 and 35 of the Model Law (adopted in Schedule 2 of the IAA) and section 31(1) of the domestic CAAs provide the bases for the recognition and enforcement (or refusal thereof) of domestic and foreign awards. For an award to be recognised and enforced in Australia, it must be in writing and signed by the arbitrators; state its date and the place of arbitration; and state the reasons upon which it is based, unless the parties have agreed otherwise. A failure to provide sufficient reasons in an arbitral award may leave the award open to challenge.

According to section 9 of the IAA, for international arbitrations, the procedure of enforcement requires filing in a competent court:

- an originating application;
- an original or duly certified copy of the award;
- an original or duly certified copy of the arbitration agreement; and
- an affidavit stating:
    - the extent to which the foreign award has not been complied with, at the date the application is made; and
    - the usual or last known place of residence or business of the person against whom it is sought to enforce the foreign award or, if the person is a company, the last known registered office of the company.

In domestic arbitration, the documentary requirements for enforcement vary based on whether the action is being brought through the Federal Court of Australia or through one of the state or territory supreme courts. A party seeking to enforce an arbitral award must produce an original or certified copy of the award and the arbitration agreement (section 35(2) of the CAAs).

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

In most Australian state jurisdictions, the limitation period for commencing proceedings to enforce an arbitral award is six years. In Australia, limitation periods are considered a matter of substantive law and the relevant limitation periods will be those under the law chosen by the parties.

Enforcement of foreign awards

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

Under article V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in Schedule 1 of the IAA), Australian courts have discretion to enforce an award that has been set aside at the seat of arbitration. As Allsop CJ noted in *Ye v Zeng* [2015] FCA 1192, 'it does not follow from the fact that an award is set aside in the seat country that the award will not be enforced elsewhere.'

Enforcement of orders by emergency arbitrators

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

The enforcement of emergency arbitrator relief remains a developing area of law in Australia and will depend upon whether an emergency arbitration decision constitutes an award within the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in Schedule 1 of the IAA). Presently, the enforceability of emergency arbitrator decisions is not expressly recognised in Australia's arbitration laws.

On the other hand, rules of the arbitral institutions, if adopted by parties, may provide for emergency relief. For example, the Australian Centre for International Commercial Arbitration (ACICA) Rules contain procedures that permit the appointment of an emergency arbitrator who may grant any interim measures of protection on an emergency basis that he or she deems necessary and on such terms as he or she deems appropriate, in matters commenced under the ACICA Rules where no tribunal has yet been appointed.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The costs incurred are typically the legal fees and depends on the circumstances of the case. In enforcement applications, Australian courts generally follow the principle that the successful party will get its costs back on a party-party basis.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

The Australian legal system is a common law system with an adversarial process, and Australian legal practitioners in arbitration typically follow such practice in international arbitrations. Accordingly, most arbitration practitioners in Australia will tend towards a limited discovery process, and adopt the process of discovery requests pursuant to the Redfern schedule process as opposed to the more burdensome US-style discovery process. It is also quite common for witness statements to be given and stand as evidence in chief. In this regard, party officers often act as witnesses on behalf of the company they represent.

Professional or ethical rules

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

Australian legal practitioners are bound by the Legal Profession Uniform Rules in each state and territory, which cover both court and arbitral proceedings. The Rules require legal practitioners to maintain a paramount duty to the court (or tribunal) and the administration of justice. The Rules are in general alignment with the IBA Guidelines on Party Representation in International Arbitration.

Foreign legal practitioners would be bound by the ethical rules that apply in their own jurisdiction.

Third-party funding

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

Litigation funding is lawful in Australia and common in practice. There are no formal rules governing third-party funding in arbitration. Australian lawyers are prohibited from entering into contingency fee arrangements with clients, although this prohibition does not apply to litigation funders. Lawyers can, however, enter into conditional costs agreements, under which an uplift is calculated by reference to the legal fees charged, as opposed to the amount of the judgment or award.

Additionally, rules of the institutions, if adopted by parties, may provide for third-party disclosure obligations. For example, article 54 of the Australian Centre for International Commercial Arbitration Rules provides that parties are required to disclose third-party funding arrangements.

Regulation of activities

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

Anyone working in Australia will need to ensure that they meet any immigration visa requirements, which need to be assessed on a case-by-case basis. Australia applies a goods and services tax of 10 per cent to the sale of all goods and services. Specialist tax advice should be obtained as to whether this needs to be charged for services performed by foreigners in Australia.

Foreign legal practitioners would be bound by the ethical rules that apply in their own jurisdiction.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The International Arbitration Act 1974 (Cth) (IAA) was most recently amended in 2018, which has led to significant reform and has promoted Australia as an attractive regional seat for international arbitration. Similarly, the domestic Commercial Arbitration Acts (CAAs) of each state and territory adopt a uniform statute for domestic arbitration based on the UNCITRAL Model Law, which has resulted in a fairly uniform, harmonious and modern regime governing both international and domestic arbitrations in Australia. Therefore, there are no immediate legislative reforms planned for Australia's arbitration laws.

Australia has recently agreed to terminate its Investment Protection and Promotion Agreements (IPPAs) with Mexico, Vietnam and Peru subject to transitional arrangements, and has also agreed to terminate its IPPAs with Hong Kong and Indonesia, with no transitional arrangements.

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Australia has only been party to one reported investor–state case. That case was Philip Morris's challenge to Australia's tobacco plain packaging legislation in 2011, which was denied on jurisdictional grounds.

A second case against Australia was not pursued.

Austria

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Austria has ratified the following multilateral conventions relating to arbitration:

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

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Austria has signed 69 bilateral investment treaties, of which 62 have been ratified, namely with Albania, Algeria, Argentina, Armenia, Azerbaijan, Bangladesh, Belarus, Belize, Bolivia, Bosnia, Bulgaria, Cape Verde, Chile, China, Croatia, Cuba, the Czech Republic, Egypt, Estonia, Ethiopia, Georgia, Guatemala, Hong Kong, Hungary, India, Iran, Jordan, Kazakhstan, Kuwait, Latvia, Lebanon, Libya, Lithuania, Macedonia, Malaysia, Malta, Mexico, Moldova, Mongolia, Montenegro, Morocco, Namibia, Oman, Paraguay, Philippines, Poland, Romania, Russia, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, South Korea, Tajikistan, Tunisia, Turkey, Ukraine, the United Arab Emirates, Uzbekistan, Vietnam and Yemen.

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

Domestic arbitration law

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

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

Recognition of foreign awards is regulated in the aforementioned multilateral and bilateral treaties. Enforcement proceedings are regulated by the Austrian Enforcement Act.

Domestic arbitration and UNCITRAL

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

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

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

Mandatory provisions

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

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

Substantive law

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

An arbitral tribunal must apply the substantive law chosen by the parties, failing which it must apply the law that it considers appropriate.

A decision on grounds of equity is only permitted if the parties have expressly agreed to a decision in equity (article 603 CCP).

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

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

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

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

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

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

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

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

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

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must:

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

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

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

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

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

According to the UNCITRAL Model Law, the separability of the arbitration agreement from the main agreement is valid as a rule of law. Under Austrian law, such separability is derived from the parties´ intentions.

Third parties – bound by arbitration agreement

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

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

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

Third parties – participation

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

Normally, joinder of a third party to an arbitration requires the corresponding consent of the parties, which can be either express or implied (eg, by reference to arbitration rules that provide for joinder). Consent can be given either at the time the request for joinder is made or at an earlier stage in the contract itself. Under the law, the issue is largely discussed in the context of an intervention by a third party that has an interest in the arbitration. Here, it is argued that such a third-party intervener must be a party to the arbitration agreement or otherwise submit to the jurisdiction of the tribunal, and that all parties, including the intervener, must agree to the intervention.

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

Groups of companies

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

The group of companies doctrine is not recognised in Austrian law.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements can be entered into under the same formal requirements as arbitration agreements.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Consolidation of arbitral proceedings is not expressly governed by Austrian law. In doctrine, however, it is argued that it is permissible, provided that the parties and the arbitrators consent.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

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

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Whether designated by an appointing authority or nominated by the parties, arbitrators may be required to have a certain experience and background regarding the specific dispute at hand. Such requirements may include professional qualifications in a certain field, legal proficiency, technical expertise, language skills or being of a particular nationality.

Many arbitrators are attorneys in private practice; others are academics. In a few disputes, concerning mainly technical issues, technicians and lawyers are members of the panel.

Qualification requirements can be included in an arbitration agreement, which requires great care as it may create obstacles in the appointment process (ie, an argument about whether the agreed requirements are fulfilled).

Default appointment of arbitrators

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

Courts are competent to make the necessary default appointments if the parties do not agree on another procedure, and if one party fails to appoint an arbitrator; the parties cannot agree on a sole arbitrator; or the arbitrators fail to appoint their chairman.

Challenge and replacement of arbitrators

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

Challenge of arbitrators

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

Removal of arbitrators

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

Arbitrators can be removed, either by way of challenge or with the termination of their mandate. In both cases, it is ultimately the court that decides upon the request of one party. If early termination of the arbitrator's mandate occurs, the substitute arbitrator must be appointed in the same manner in which the replaced arbitrator was appointed.

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

Relationship between parties and arbitrators

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

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

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Pursuant to article 588 CCP, an arbitrator must disclose any circumstances that could raise doubts as to his or her impartiality or independence, or that are in conflict with the parties' agreement at any stage of the proceedings. Independence is defined by absence of close financial or other ties between the arbitrator and either of the parties. Impartiality is closely related to independence, but rather refers to the arbitrator's attitude. An arbitrator may be successfully challenged if objectively justified doubt as to his or her impartiality or independence can be established.

Immunity of arbitrators from liability

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

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

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

The law does not contain any express rules on the remedies available if court proceedings are commenced in breach of an arbitration agreement, or if arbitration is commenced in breach of a jurisdiction clause

(other than an adverse cost decision in proceedings that should not have been commenced in the first place).

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

Jurisdiction of arbitral tribunal

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

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

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

If the parties have not agreed on a place of arbitration and on the language of the arbitral proceedings, it is at the arbitral tribunal's discretion to determine an appropriate place and language. Pursuant to article 604 CCP, the parties are free to choose the substantive law. In the absence of such agreement, it is within the discretion of the arbitral tribunal to choose the law it deems appropriate. The tribunal may not decide ex aequo et bono unless the parties have given the respective authorisation.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

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

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

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

Hearing

28 | Is a hearing required and what rules apply?

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

Evidence

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

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

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

Court involvement

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

An arbitral tribunal may request assistance from a court to:

- enforce an interim or protective measure issued by the arbitral tribunal (article 593 CCP); or
- conduct judicial acts where the arbitral tribunal is not authorised to do so (compelling witnesses to attend, hearing witnesses under oath and ordering the disclosure of documents), including requesting foreign courts and authorities to conduct such acts (article 602 CCP).

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

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

Confidentiality

31 | Is confidentiality ensured?

The CCP does not explicitly provide for the confidentiality of arbitration, but confidentiality can be agreed upon between the parties. Further, in

court proceedings for setting aside an arbitral award and in actions for a declaration of the existence, or non-existence, of an arbitral award, or on matters governed by articles 586 to 591 CCP (eg, challenge to arbitrators), a party can ask the court to exclude the public from the hearing, if the party can show a justifiable interest for the exclusion of the public.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

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

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

The following remedies are available:

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

In support of non-pecuniary claims, the court can grant interim remedies similar to those mentioned above in relation to money claims. Search orders are unavailable in civil cases.

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

Interim measures by an emergency arbitrator

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

State law does not provide for an emergency arbitrator.

Interim measures by the arbitral tribunal

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

An arbitral tribunal has wide powers to order interim measures on the application of one party if it deems it necessary to secure the enforcement of a claim or to prevent irretrievable harm. Differing from interim remedies available in court proceedings, an arbitral tribunal is not limited to a set of enumerated remedies. However, the remedies should be compatible with enforcement law, to avoid difficulties at the stage of enforcement. Statutory law does not provide for a security for costs in arbitration proceedings.

Sanctioning powers of the arbitral tribunal

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

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

Arbitral tribunals may also order security for costs.

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

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

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

AWARDS

Decisions by the arbitral tribunal

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

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

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

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

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

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

Form and content requirements

38 | What form and content requirements exist for an award?

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

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

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

Time limit for award

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

State law does not provide for a specific period within which an arbitral award must be delivered.

Date of award

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

Under state law, the date of delivery of the award is relevant for both an application to the arbitral tribunal for correction or interpretation of the award, or both, or to make an additional award (see question 45) and any challenge to the award before the courts of law (see question 46). If the arbitral tribunal corrects the award on its own, the time limit of four weeks for such a correction starts from the date of the award (article 610(4) CCP).

Types of awards

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

The following types of awards are usual under arbitration law:

- award on jurisdiction;
- interim award;
- partial award;
- final award;
- award on costs; and
- amendment award.

Termination of proceedings

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

Arbitral proceedings can be terminated:

- if the claimant withdraws its claim;
- if the claimant fails to submit its statement of claim within the period determined by the tribunal (articles 597 and 600 CCP);
- by mutual consent of the parties, by settlement (article 605 CCP); and
- if the continuation of the proceedings has become impracticable (article (608(2)(4) CCP).

There are no formal requirements for such a termination.

Cost allocation and recovery

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

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

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

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

Interest

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

An arbitral tribunal would, in most cases, award interest for the principal claimed if permitted under the substantive law applicable. Under the law, the statutory interest of civil law claims is 4 per cent. If both parties are entrepreneurs and the default is reproachable, a variable interest rate, published every six months by the Austrian National Bank, would apply. At present, it is 8.58 per cent. Bills of exchange are subject to an interest rate of 6 per cent.

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

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

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

Challenge of awards

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

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

- the arbitral tribunal accepted or denied jurisdiction although no arbitration agreement or a valid arbitration agreement exists;
- a party was incapable of concluding an arbitration agreement under the law applicable to that party;
- a party was unable to present its case (eg, it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings);
- the award concerns matters not contemplated by, or not falling within the terms of the arbitration agreement, or concerns matters beyond the relief sought in the arbitration - if such defects concern a separable part of the award, such part must be set aside;
- the composition of the arbitral tribunal was not in accordance with articles 577 to 618 of the CCP or the parties' agreement;
- the arbitral procedure did not, or the award does not, comply with the fundamental principles of the Austrian legal system (public policy); and

- if the requirements to reopen a case of a domestic court in accordance with article 530(1), Nos. 1 to 5 of the CCP are fulfilled, for example:
  - the judgment is based on a document that was initially, or subsequently, forged;
  - the judgment is based on false testimony (of a witness, an expert or a party under oath);
  - the judgment is obtained by the representative of either party, or by the other party, by way of criminal acts (for example, deceit, embezzlement, fraud, forgery of a document or of specially protected documents, or of signs of official attestations, indirect false certification or authentication or the suppression of documents);
  - the judgment is based on a criminal verdict that was subsequently lifted by another legally binding judgment; or
  - the award concerns matters that are not arbitrable in Austria.

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

Levels of appeal

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

Instead of three procedural levels (the court of first instance, the court of appeal and the Supreme Court), article 615 of the CCP has been changed so that the decision about a claim challenging an arbitration award is made by just one judicial instance (ie, the decision is made by only one judicial entity and cannot be appealed against).

Article 616(1) of the CCP stipulates that the procedure that follows a claim challenging an arbitration award – or a claim regarding the declaration on the existence or non-existence of an arbitration award – is the same one as performed in front of a court of first instance. This means, in fact, that the Supreme Court must apply the same procedural rules as a court of first instance (eg, in the context of taking evidence).

Recognition and enforcement

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

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

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

Enforcement proceedings are essentially the same as for foreign judgments.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

There is no limitation period applicable to the commencement of enforcement proceedings. However, it is advisable to apply the 30-year statutory limitation period applicable to proceedings for enforcement of judgments under the law by analogy.

Enforcement of foreign awards

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

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

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

Enforcement of orders by emergency arbitrators

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

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

Cost of enforcement

52 | What costs are incurred in enforcing awards?

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

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

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

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

Professional or ethical rules

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

There are no specific ethical rules governing the conduct of arbitration practitioners. The Austrian Professional Code of Conduct for Lawyers

applies to all members of the Austrian Bar, including when acting as counsel or arbitrators.

Third-party funding

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

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

Regulation of activities

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

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

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The Vienna International Arbitral Centre (VIAC) has included rules on investment disputes with effect from 1 July 2021 (VRI) and simultaneously updated its Rules of Arbitration and Mediation (the Vienna Rules) applying to commercial disputes.

The VRI do not outline jurisdictional requirements as opposed to the ICSID Convention, which extends only to legal disputes arising directly out of an investment, between one contracting state and a national of another contracting state. The VRI provide for a framework regulating third-party funding that addresses the risk of conflicts of interest of arbitrators and security for costs. Furthermore, the VRI allows for a party to apply for the early dismissal of a claim, counterclaim or defence on the basis that it is outside the jurisdiction of the tribunal, inadmissible or lacking legal merit. An application for early dismissal is to be filed within 45 days of the constitution of the tribunal or the submission of the answer to the statement of claim, whichever is earlier. In addition, the VRI contain the possibility for amicus curiae submissions. In contrast to the Vienna Rules, the VRI stipulate that arbitrators shall have nationalities different from those of the parties unless otherwise agreed by the parties

It remains open whether the VRI will be able to replicate the popularity of the Vienna Rules, in particular with parties from the CEE/CIS region. VIAC has certainly laid a solid foundation.

The Vienna Rules 2021 entered into force on 1 July 2021 and apply to all proceedings commenced after 30 June 2021. The revision of the Vienna Rules was triggered by VIAC's drafting of the VRI. They are not a significant departure from their predecessor of 2018. Rather, the aim of the revision was to adapt the existing rules for commercial disputes to new needs and developments in the market.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

The New York Convention has been in force in Bulgaria since 1965.

Bulgaria adheres to the New York Convention, under the reservations that:

- it applies the convention to awards made in the territory of other contracting states; and
- regarding awards made in the territory of non-contracting states, Bulgaria applies the Convention subject to strict reciprocity.

Bulgaria further is a party to the European Convention on International Commercial Arbitration 1961 and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

Bulgaria is also a party to the European Charter Treaty (in force since 16 April 1998).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Bulgaria is a party to 64 bilateral investment treaties.

These include the BITs concluded by the EU with non-EU members and, notably, some of the BITs are between Bulgaria and other EU members.

Domestic arbitration law

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

Both international and domestic arbitration are regulated by the International Commercial Arbitration Act (ICAA), with few rules applicable only to international arbitration, and certain restrictions on domestic arbitration.

The Private International Law Code and the New York Convention apply to the recognition and enforcement of foreign arbitral awards.

The Civil Procedure Code defines arbitrability and regulates arbitration-related proceedings before courts.

Domestic arbitration and UNCITRAL

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

Bulgaria has adopted and closely follows the 1985 revision of the UNCITRAL Model Law. It has not yet implemented the 2006 revision.

Mandatory provisions

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

Certain provisions of the ICCA are mandatory (eg, those related to due process and challenges to arbitrators or awards). Most of the other provisions are non-mandatory.

Certain laws are mandatory for all arbitrators sitting in Bulgaria (eg, the Measures Against the Financing of Terrorism Act).

Substantive law

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

In the absence of an explicit choice of law, the tribunal will apply the law determined by the conflict of laws rules that it considers applicable (article 38(2) ICAA).

If both parties have a residence or seat in Bulgaria, the tribunal may apply foreign law only if the dispute has an international element that, according to Bulgarian private international law, would lead to the application of a foreign law (section 3(3), transitional and conclusive provisions of the ICCA).

The tribunal will always apply the terms of the contract and consider trade usages.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

Currently featuring 23 institutions, the leading institutional arbitrations are based in the capital Sofia. The Arbitration court with the Bulgarian Chamber of Commerce and Industry (BCCI) (https://www.bcci.bg/bcci-arbitration-court-en.html; Sofia 1058, 9 Iskar Str) and the Arbitration court with the Bulgarian Industrial Association (BIA) (https://en.bia-bg.com/service/view/21257; Sofia 1000, 16–20 Alabin Str) are the most frequently used. The Arbitration court with the BCCI applies closed list of arbitrators for domestic cases and in international cases permits the foreign party (or a party with predominant foreign participation) to appoint a foreign arbitrator who is not included in the lists. The Arbitration Court with the BIA also applies a closed list; however, it

permits the nomination of scholars or distinguished practitioners even if not included in the list whose nomination is subject to confirmation by the Presidium of the Court. The arbitration fees are determined at an ad valorem basis.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Under article 19(1) of the Civil Procedure Code, only disputes involving pecuniary rights are arbitrable. This excludes disputes concerning non-disposable rights (eg, family disputes). Antitrust and competition matters are also considered non-arbitrable; however, where the existence of unfair competition is established, the parties concerned may conclude an arbitration agreement to deal with compensation issues (although there have been no reported cases of this type). The same applies to IP rights, including patents.

The Civil Procedure Code further excludes from arbitration disputes that:

- concern rights in rem or possession of immovable assets;
- concern alimony;
- concern employment; and
- involve a consumer.

Awards on non-arbitrable disputes were explicitly proclaimed 'null and void' (article 47(2) International Commercial Arbitration Act (ICAA)).

Arbitrability is further limited in cases of insolvency. According to article 637(6) of the Commerce Act, after initiation of insolvency proceedings, new arbitration proceedings cannot be initiated – regardless of the existence of an arbitration agreement, all claims against the debtor must be filed before the insolvency court.

All arbitral proceedings pending at the time of the initiation of insolvency proceedings must be suspended. If the respective claim is subsequently included in the list of accepted claims, the arbitration will be terminated; if the claim is not accepted, the suspended proceedings will continue with the participation of the insolvency trustee.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must refer to one or more defined legal relationships, regardless of whether contractual.

It must be in writing. An agreement is 'in writing' if it is contained in signed documents or exchanged letters, telexes, telegrams or other means of communication. An implied agreement exists if the respondent – either in writing or by statement recorded in the transcript of a hearing – accepts for the dispute to be resolved through arbitration or participates in arbitral proceedings without objecting to the competence of the tribunal. In 2017, the law defined the forms of participation in arbitral proceedings that amount to implied acceptance (eg, submitting an answer to the claim, or evidence, or filing a counterclaim, or participating at a hearing without objecting to the jurisdiction – article 7(3) ICAA).

The capacity, powers and consent to enter into an arbitration agreement are regulated by the personal law (the law of the place of registration – for legal entities) of the parties. On the basis of strict interpretation of the arbitration agreement as a separate contract, different from the underlying agreement, Bulgarian case law imposes certain burdensome requirements on the parties when concluding the arbitration agreement. For example, a general power of attorney for concluding the underlying contract does not suffice to agree on an arbitration agreement, incorporated therein.

The agreement may also be contained in general terms and conditions, as far as the consent of the parties to incorporate them (and thus the consent to the arbitration agreement) in their contract may be established.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An agreement would not be enforceable in case of implied waiver (eg, party commencing proceedings in state courts and respondent not objecting in time).

The validity of the underlying contract does not, in principle, taint the arbitration agreement unless it leads to a lack of consent that excludes the consent to arbitrate as well.

The Supreme Court, in principle, endorses the validity of unilateral arbitration agreements and demonstrates pro-arbitration bias by interpreting pathological clauses in a manner to render them effective, if possible and as far as it reflects the true intention of the parties to arbitrate. However, recent judgments clarified the applicable test and to some extent narrowed the application of such clauses. The Supreme Court now accepts that an arbitration clause may give the right to one of the disputing parties to choose an institution, yet both parties shall have equal right to do so. Further, the arbitration clause shall define in a sufficient manner whether the consent of the parties is for ad hoc or institutional arbitration, and in the latter case – to define the criteria upon which the institution shall be chosen. If the arbitration agreement fails to comply with these requirements, it shall not be enforceable. Thus, the Supreme Court reconfirmed the position that an arbitration agreement that refers to non-existent or undefinable institution may not be converted into an agreement for ad hoc arbitration.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The independence of an arbitration agreement from the other terms of a contract is explicitly proclaimed in article 19(2) ICAA.

The Supreme Court invariably sustains that, being a contract, the validity and effect of the arbitration agreement shall be considered and interpreted separately from the underlying agreement in which it is incorporated.

Third parties – bound by arbitration agreement

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

Generally, an arbitration agreement binds only its signatories. It also binds the universal legal successors of the parties (eg, merger of companies).

The question of whether the assignment of the contract also assigns the arbitration agreement contained therein underwent substantial development in recent years.

Initially, the position in arbitration case law was that the assignment of a contract automatically makes the assignee a party to the arbitration agreement contained therein. The arbitrators listed with the Bulgarian Chamber of Commerce and Industry (BCCI) have even rendered a (then – mandatory for arbitrations administered by the BCCI, and after 2017 – only provisionally binding) decision confirming this practice. In few (not very recent) cases tribunals sitting within the arbitration court with the Bulgarian Industrial Association (BIA) have taken the same approach.

At the same time, upon strict interpretation of the arbitration clause in the assigned contract as an independent agreement,

the Supreme Court of Cassation (now consistently) rules that the assignment of a contract does not make the assignee a party to the arbitration clause. Consequently, the Supreme Court annuls awards based on 'assigned' arbitration agreements for lack of consent. In line with this practice, it is probable that Bulgarian state courts would refuse recognition of foreign awards against a non-signatory, even if the respective tribunal has accepted that the respondent was bound by the arbitration agreement (notably, there are no reported cases exploring this issue).

Under the influence of the Supreme Court's position and under penalty of the annulment of awards, the arbitration practice has changed and now tribunals sitting in Bulgaria terminate claims based on the assigned contract for lack of an arbitration agreement.

Under Bulgarian law, there exist no other grounds for extension of arbitration agreements to non-signatories. Bulgarian law does not recognise veil-piercing, alter ego or the group of companies doctrines. Incorporation by reference, which in other jurisdictions may be considered as a ground for extension of an arbitration agreement, is permissible in Bulgaria as an ordinary method for concluding an arbitration agreement (as far as the evidence clearly demonstrates that the party consented to arbitrate).

Similarly to court judgments, the award is binding on the universal and private successors of the parties; however, under no circumstances it may have an effect on everyone (ie, it cannot have an erga omnes effect).

Third parties – participation

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

The ICAA does not provide for third-party joinder or intervention. Both the BCCI and the BIA Rules provide that a joinder or intervention is admissible only with the consent of the parties (and in case of a joinder – the consent of the third party).

Regrettably, in a number of reported BCCI awards, the tribunals apply the 'additional consent' rule rather broadly and require additional consent even with regard to intervening parties that are parties to the same arbitration agreement, on the basis of which the proceedings between the original parties were initiated.

Groups of companies

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

Bulgarian law does not recognise veil-piercing or alter ego doctrines, nor the group of companies doctrine.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Although the ICAA is silent on this issue, multi-party arbitration is compatible with its principles. It is sufficient for more than two parties to consent to one arbitration clause to conclude that they have concluded a multi-party arbitration agreement. As regards clauses contained in different contracts, the consent of all parties shall clearly cover agreement to arbitrate with all other parties within one set of proceedings under one and the same arbitration agreement.

The rules of some local arbitral institutions contain basic provisions on multiparty arbitration. For example, both the BCCI and the BIA Rules regulate the constitution of tribunals in multiparty situations and provide default rules in case the parties fail to make a joint nomination.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Arbitration law is silent on consolidation, but the parties may include appropriate language in an arbitration agreement or refer to institutional rules that include such provisions. With one exception, the rules of the local institutions do not include consolidation provisions. However, cases have been reported where arbitrators, faced with a request for consolidation, have resolved the issue by applying their powers to determine an appropriate procedure.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

Since 2017, the law explicitly provides eligibility criteria for arbitrators sitting in Bulgaria. Only persons of full age and capacity, who have no criminal conviction, hold a university degree, have at least eight years of professional experience and have high morals may act as arbitrators.

Foreign citizens may act as arbitrators only in international arbitrations with a seat in Bulgaria.

Only Bulgarian citizens may sit as arbitrators in domestic arbitration, unless the predominant part of the capital of one of the parties is held by foreign person or entity, in which case foreigners may also sit as arbitrators.

Certain arbitral institutions impose further restrictions – for example, some institutions restrict the choice of arbitrators to their lists and permit the choice of unlisted arbitrators to international cases only.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

In Bulgaria, predominantly lawyers, academics and retired judges sit as arbitrators.

Default appointment of arbitrators

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

The International Commercial Arbitration Act (ICAA) contains explicit default provisions on the number of arbitrators and the formation of the tribunal.

Unless otherwise agreed, the tribunal consists of three arbitrators: each party appoints one, then the party-appointed arbitrators choose the chairperson.

If the respondent fails to nominate an arbitrator within 30 days of receiving the claimant's notice, or if the two party-appointed arbitrators fail to choose the chairperson within 30 days, the chairperson of the Bulgarian Chamber of Commerce and Industry (BCCI), on request of one of the parties, will act as an appointing authority. The chairperson of the BCCI will consider the qualification requirements contained in the arbitration agreement (and all other relevant circumstances) with a view to appointing an independent and impartial arbitrator.

For disputes that do not arise from commercial relations, the Sofia City Court shall act as appointing authority.

Some of the institutional rules defer from the above default procedure. For example, the BCCI Rules provide that the chairperson of the Court of Arbitration with the BCCI (and not the chairperson of the BCCI itself) will act as appointing authority in both commercial and civil matters; similarly, in cases administered by the arbitration court of the Bulgarian Industrial Association (BIA), the chair of the Court shall act as appointing authority.

Some institutional rules provide a default procedure for the appointment of arbitrators in multiparty arbitration.

There are no reported cases for failure to constitute a tribunal with a seat in Bulgaria.

Challenge and replacement of arbitrators

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

An arbitrator may be challenged if:

- the circumstances raise reasonable doubts regarding his or her impartiality or independence; or
- he or she is not eligible or does not possess the qualifications required by the arbitration agreement.

A party may challenge its own appointed arbitrator only on account of circumstances of which it was not aware at the time of making the appointment.

Further, the appointment may be terminated if the arbitrator becomes incapable of performing his or her functions or fails to act without a reasonable excuse (however, the Sofia City Court has ruled that delayed issuance of an award does not constitute grounds for termination).

Unless the parties agree otherwise, the challenge must be made within 15 days of the challenging party becoming aware of the formation of the tribunal or the circumstances giving rise of the challenge. Notably, some institutional rules provide for shorter terms for challenge.

Where the tribunal refuses to accept the challenge, the refusal may be appealed to the Sofia City Court. This provision is mandatory and cannot be derogated from by an agreement of the parties. In principle the tribunal may continue the proceedings and render an award while the challenge and appeal are pending. However, the Rules of some institutions, such as the BIA, provide that pending the ruling of the Sofia City Court on the challenge, the proceedings shall be held in abeyance. The ruling of the Sofia City Court is final.

In practice, the Sofia City Court has applied a strict interpretation of the 'reasonable doubt' test, granting the challenge only where the circumstances objectively lead to partiality or lack of independence.

An arbitrator can be replaced following:

- a successful challenge;
- his or her resignation; or
- his or her removal from office for incapability or unjustified failure to perform.

Parties may also replace an arbitrator by common consent. If replaced, the new appointment follows the initial procedure for the appointment of arbitrators.

The ICAA is silent on whether, following the replacement of an arbitrator, the proceedings start afresh with the new arbitrator participating or continue from where they were left off. It is, therefore, up to the tribunal to decide which approach to apply, always observing the principles of due process. The matter is addressed in some institutional rules. For example, the BCCI Rules provide that the tribunal may decide to repeat the hearings already conducted, thus endorsing the view that the proceedings may just as well continue without doing so.

Bulgarian law does not recognise truncated tribunals. Therefore, the proceedings may continue only after the replacement; otherwise, the award may be set aside.

Relationship between parties and arbitrators

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

In both ad hoc and institutional arbitration, the relations between parties and arbitrators are contractual in nature (even where the consent of the party is substituted by the appointing authority), yet with fundamental specifics following from the judicial character of arbitrator's activity. In all cases, arbitrators are and shall remain independent from the appointing party and shall preserve strict independence.

In institutional arbitration, the fees of the arbitrators are part of the fees collected by the institution and the parties do not have direct financial relations with the arbitrators.

In ad hoc arbitration the financial arrangements shall be made by the parties and the tribunal.

The services of the arbitrators are subject to VAT. Each arbitrator shall make arrangements for VAT compliance.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The main duties of the arbitrator include the duty to resolve the dispute, to complete the mandate, to remain independent and impartial and to conduct the arbitration fairly and without undue delay.

The arbitrator's duty to remain independent and impartial is reflected in the obligation to disclose all the grounds that may cause reasonable doubt as to his or her independence or impartiality and in the grounds for challenging the nomination of arbitrators. This obligation applies until the end of the proceedings. Domestic rules do not provide guidance, nor are there any reported cases about application of the IBA Guidelines on Conflict of Interest.

Some institutions have introduced ethical rules on conduct of arbitrators.

Immunity of arbitrators from liability

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

The ICAA is silent on arbitrator liability, but Bulgarian jurisprudence considers them to be liable for wilful misconduct, gross negligence and crimes committed in connection with the delivery of the award. Such liability is based on the law on torts.

Arbitrators do not benefit from judicial immunity. However, it is commonly accepted that they should not be held liable for a wrong decision that is not a result of a wilful misconduct, gross negligence or crime.

There has been only one court decision dealing with arbitrator liability for rendering an unenforceable award. The Supreme Court of Cassation mentioned in passing that arbitrators would not be liable for rendering an unenforceable award only as far as it was not a result of wilful misconduct.

An important exception concerning the non-arbitrable cases involving consumers was created in January 2017. An arbitrator who renders an award in a dispute involving a consumer is personally liable and the Minister of Justice may impose a fine of between 500 levs and 2,500 levs, and for a second offence a fine of up to 5,000 levs.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

Under penalty of implied waiver, the party against which a claim in court is brought despite an existing arbitration agreement shall object to the jurisdiction of the court no later than simultaneously with its statement of defence. The court, upon receipt of a timely objection, shall dismiss the proceedings and refer the parties to arbitration unless it finds the arbitration agreement to be 'null and void, inoperative or incapable of being performed' (article 8 ICAA). If the court continues to consider the case despite a timely objection for existence of an arbitration agreement, the decision of the court shall be inadmissible and shall be revoked upon appeal by the respective higher court.

Jurisdiction of arbitral tribunal

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

The challenge to the jurisdiction must be made on or before filing the response to the claim. Failure to challenge within this time frame precludes the possibility of doing it later, unless the grounds for jurisdictional challenge are non-waivable (eg, non-arbitrability of the claim). Participation in the constitution of the tribunal does not constitute a waiver of jurisdictional objections and the parties may raise them within the said time frame.

If a question is raised during the proceedings that falls outside the jurisdiction of the tribunal, the party concerned must object immediately. However, the tribunal may consider a late objection if the party making it can prove a reasonable excuse for its delay.

The tribunal shall rule on its own jurisdiction and if it upholds it the proceedings shall continue until rendering an award. The challenging party may then retest its objection as a ground for setting aside the award.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Unless otherwise agreed, in international arbitration the tribunal determines the language of the proceedings. This rule does not apply in domestic arbitration, where the default language is Bulgarian.

The International Commercial Arbitration Act (ICAA) applies only to arbitration with the seat in Bulgaria.

The tribunal will resolve the dispute according to the law chosen by the parties. Unless agreed otherwise, the choice of law will be construed to refer to the substantive law, not the rules on conflict of laws. Parties' freedom to choose the applicable substantive law is unlimited in international arbitration; according to section 3(3) ICAA, the freedom to chose foreign law in domestic arbitration applies only if the legal relation contains an international element that, according to the Bulgarian conflict-of-laws rules, leads to the application of foreign law.

In the absence of an explicit choice of law, or if the choice is 'inadmissible', the tribunal will apply the law determined by the conflict of laws rules that it considers applicable. Thus, the tribunal may determine the applicable conflict of laws rules and apply the law in accordance with them.

The tribunal will always apply the terms of the contract and consider trade usages.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

In ad hoc arbitration, unless otherwise agreed, the proceeding is considered commenced for all purposes when the respondent receives a request to refer a dispute to arbitration. The aim of this provision was for a simple notice of intention to arbitrate to suffice for the institution of proceedings. Thereafter, if the claimant fails to submit a statement of claim in the time frame agreed by the parties or determined by the tribunal, the proceedings will be terminated.

In practice, in most cases, the claimant sends a detailed statement of claim containing its grounds and request for relief. This approach is recommended, as the potential insufficiencies of a simple request (most often, insufficient individualisation of the cause of action) may cause uncertainty regarding whether and when the arbitration was properly commenced (with ensuing uncertainty regarding the legal effects of proper commencement – the most important of which being the termination of the limitation period).

The institutional rules provide that the arbitration is considered commenced for all purposes when the statement of claim is received by the secretariat. The institutional rules also provide specific requirements for the contents of the statement of claim. Among other things, it must include:

- individualisation of the parties;
- the circumstances giving rise to the claim; and
- a prayer for relief.

A procedure exists for the correction of insufficiencies in the statement of claim. If corrected, the date of commencement is considered to be the date of the initial submission of the statement; if not corrected, the statement of claim is returned and the proceedings are terminated.

Hearing

28 | Is a hearing required and what rules apply?

The parties are free to agree on the procedure. In the absence of such agreement, the arbitrators will apply the procedure they consider appropriate, subject always to the duty to ensure equal opportunities for the parties to present their case. The law also provides basic procedural rules aimed at ensuring the successful completion of the procedure, including a rule for exchange of written statements of claim and defence, rules on counterclaims, the open-hearing principle and documents-only arbitration by exception.

Institutional rules contain more detailed procedural rules.

If the parties do not agree on a documents-only arbitration, the tribunal will have at least one open hearing.

Before the covid-19 pandemic, distance hearings and the taking of evidence were conducted only in international cases administered by foreign institutions.

The Bulgarian Chamber of Commerce and Industry (BCCI) Rules (last revised in 2021) now contain specific regulations on distance hearings and taking of witness testimonies by videoconferencing.

The special Act on the Measures and Actions during the State of Emergency Declared by a Resolution of the National Assembly of 13 March 2020 and on Addressing the Consequences allowed for distance hearings during the lockdown and the extraordinary epidemiologic situation, and for two months of lifting thereof, but only for litigation in state courts. However, in compliance with orders of the Minister of Health to guarantee safety and also observing due process requirements, the institutions adopted flexible practices for remote hearings, which practices undergo rapid development.

Evidence

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

Each party bears the burden of proving the facts on which it relies. The ICAA does not consider the tribunal to be a passive observer, but rather allocates it a more proactive role. Thus, the tribunal on its own initiative may appoint expert witnesses or order the parties to grant access or produce goods or documents for examination. Further, it may on its own initiative (as well as on request of a party) request state courts to gather specific evidence (eg, to take the statement of a witness who is unwilling to appear). However, the tribunal must always give the parties equal opportunities to participate in the proceedings.

The ICAA does not contain further rules on the admissibility, relevance and weight of evidence, leaving it to the parties to tailor their own arbitration procedure. If the parties do not agree on the procedure, the tribunal will determine it. As a matter of practice, tribunals often apply rules similar to those on evidence contained in the Civil Procedure Code (ie, because they are reasonable and close to most parties' legitimate expectations).

The tribunal may:

- collect documentary evidence, witness statements of fact and expert witness statements;
- conduct site or object examination; and
- consider the explanation of the parties in the context of the circumstances of the case.

The arbitral tribunals tend to be more flexible and do not apply certain restrictions on admissibility of evidence, contained in the CPC, such as the restrictions to prove certain facts by witness testimony. Further, the arbitral procedure does not apply strict time bars to production of evidence, yet the tribunals may discipline the process by determining a deadline for the production of evidence by the parties.

Court involvement

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

The courts may intervene only in the instances and to the extent permitted by the ICAA. They may intervene in arbitral proceedings by taking the following actions:

- issuing interim or conservatory measures;
- collecting evidence that cannot be collected by the tribunal (usually because of a lack of coercive powers); and
- maintaining the integrity of the process (eg, challenging arbitrators, setting aside awards and controlling the enforcement stage).

In practice, the courts respect these limits and intervene only when explicitly permitted by the law.

Confidentiality

31 | Is confidentiality ensured?

The ICAA does not contain specific provisions on confidentiality. The doctrine highlights the confidentiality and privacy of the proceedings as distinguishing features of arbitration, as is also reflected in certain institutional rules (eg, the BCCI and Bulgarian Industrial Association Rules). However, unless the arbitration clause refers to institutional rules that contain explicit confidentiality provisions, the parties should incorporate specific provisions on confidentiality in their arbitration agreement.

The ICAA is silent on whether a party may use confidential information obtained within arbitral proceedings in subsequent proceedings. The answer depends on how the information is obtained and the type of subsequent proceedings.

If the information is obtained in proceedings under arbitration rules that do not contain explicit confidentiality provisions, the disclosing party can seldom prevent disclosure in subsequent proceedings.

If the information is obtained under an obligation of confidentiality, the receiving party most probably cannot use it in subsequent proceedings before the same institution or another that observes similar rules.

If the information is used before state courts, the judges will determine the matter by reference to the rules of evidence contained in the Civil Procedure Code. As the litigants have a duty to submit to the courts only the truth, a judge would most probably admit a relevant document on record regardless of the fact that it was produced in breach of confidentiality provisions contained in arbitration rules.

A party disclosing confidential information may also avail of the new Trade Secrets Protection Act (enacted in 2019).

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

On request of a party, either before the commencement of the arbitration or while the proceedings are pending, the state courts may order interim measures to:

- protect a party's rights that are the subject matter of the arbitration; or
- guarantee effective enforcement of an eventual favourable award.

The courts may issue identical measures to those issued in relation to pending litigation, including attachment of movable or immovable assets or receivables (including freezing bank accounts) or other appropriate measures. The measures may be in support both of arbitrations (domestic or international) with a seat in Bulgaria, or of arbitrations with seat abroad. The measures are directly enforceable by bailiffs.

The state court may require deposition of a counter-guarantee to cover potential damages of the respondent from an unsubstantiated restriction of its assets. As a matter of practice, the counter-guarantee is usually determined to be up to 10 per cent of the value of the claim and remains with the court until the interim measure is in place.

Interim measures by an emergency arbitrator

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

Bulgarian law and institutional rules do not provide rules for an emergency arbitrator.

Interim measures by the arbitral tribunal

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

On the request of a party, the tribunal may issue appropriate interim measures. However, the tribunal has no coercive powers and such measures are not enforceable through state courts; therefore, tribunal-ordered interim measures have little practical effect.

At the same time, a failure of a party to comply with tribunal-ordered measure may be considered by the tribunal in light of the 'all circumstances of the case'.

Sanctioning powers of the arbitral tribunal

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

The International Commercial Arbitration Act is silent on this issue.

The only remedy provided in the BCCI Arbitration rules is the power of the tribunal to draw adverse inferences from the conduct of the party that creates obstacles to the collection of evidence admitted by the tribunal. However, this power is primarily designed to assist the tribunal with regard to establishing the facts of the case, and in principle cannot be used as a sanctioning tool, although in some extreme situations it may have this effect.

With regard to counsel admitted to the bar in Bulgaria, the tribunal may inform the respective local bar, which in turn may initiate a disciplinary procedure.

AWARDS

Decisions by the arbitral tribunal

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

Unless the parties agree otherwise, the tribunal takes decisions by majority. If the tribunal cannot form a majority, the award will be rendered by the chair.

Unless the parties agree otherwise or it is on agreed terms, the award must contain reasons.

An award rendered by a majority or by the chairperson (ie, if a majority cannot be formed) is valid and binding.

The dissenting arbitrator will sign the award, indicating that he or she dissents, and will put his or her dissent in writing. The written dissent becomes part of the reasons of the award.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are explicitly permitted (article 39 International Commercial Arbitration Act (ICAA)); they must be presented in writing.

Some institutional rules (BCCI and Bulgarian Industrial Association) define a seven-day deadline to submit a dissenting opinion. Once the seven days have elapsed, the arbitrator is deemed to have withdrawn its dissent with the opinion of the majority.

Form and content requirements

38 | What form and content requirements exist for an award?

The award must be in writing and contain reasons. The arbitrators may dispose of the reasons if the parties agree or if the award is on agreed terms.

The award must state the date on which it was rendered and the place of arbitration.

The award must be signed by the arbitrators. If passed by a majority, the award need be signed only by the majority of the members; however, in such case the award must state the reasons for the missing signatures.

The award must be notified to the parties. It is considered notified on the date it is delivered to at least one of the parties. From this moment, the award becomes final, binding and enforceable.

Awards are not subject to registration with the state courts. Awards are registered with the secretariats of the institutions under the rules of which they have been rendered. The ICAA obliges the institutions to keep the files for at least 10 years, and the awards, reasoning thereto and the approved settlements must be kept for an indefinite period.

Time limit for award

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

The ICAA does not set a time limit for rendering an award. However, the parties may agree on a time limit either for rendering the award or for the closure of proceedings. An award rendered after the expiration of the agreed time limit is valid, yet it may be set aside on the grounds of article 47, item 6 of the ICAA (proceedings that do not comply with the agreement of the parties). Notably, there are no such reported cases.

Date of award

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

All time limits for challenging the award, its correction or interpretation, run from the date the award is delivered to the respective party (and not from the date of the award itself). The same applies for any orders for payment of post-award interest.

The date of the award might be relevant if the parties have agreed that the award should be delivered by a certain date, which is very rare in practice.

The Bulgarian Chamber of Commerce and Industry Rules provide that an award shall be rendered within a month after the close of the proceedings, which term may be extended by the tribunal itself up to two months. However, these terms are instructive only, and even if the award is delivered after the expiration of the term, the award remains valid and enforceable.

Types of awards

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

Bulgarian law contains explicit provisions with regard to 'final award' and 'award on agreed terms'. In practice, partial awards and interim awards are also used, although not very often. An interim award may not be enforced through state courts, as it is not final.

The arbitral tribunal may award the same remedies as state courts, including specific performance, liquidated damages, declaratory relief and refrain orders. On notification to the parties, domestic awards are enforceable as court judgments without limitations.

Termination of proceedings

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

The tribunal will terminate the proceedings by a ruling if it determines that it lacks jurisdiction, or if the claimant withdraws or waives the claim (in case of withdrawal and if the respondent objects to the termination, the tribunal may continue and render an award if it determines that the respondent has a legitimate interest to obtain an award on the merits). Further, the tribunal will terminate the case if it determines that the proceedings are inadmissible on another ground, and may not continue. Upon a settlement, the tribunal may terminate the proceedings by a ruling, or it may, upon joint request by the parties, render a consent award (reproducing the terms of the settlement agreement), which has the effect of a final award.

Cost allocation and recovery

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

The ICAA is silent on this issue. Each arbitral institution applies its own rules on costs; however, all institutions in Bulgaria structure the costs on an ad valorem basis.

The costs are allocated on the 'costs follow the event' principle; the parties may agree on a different manner of allocation of costs.

Lawyers' fees are negotiated with the client and are generally borne by the losing party. If the lawyers' fees are exaggerated (based on the amount in dispute and complexity of the case), the arbitrators may reduce the proportion allocated to the losing party.

State courts do not order security for costs.

A tribunal may order appropriate conservatory and provisional measures, which may also include security for costs. In practice, there has been no reported case of security for costs being ordered by arbitral tribunals; further, such orders would have very little practical effect, given the lack of coercive powers of the tribunals and the unenforceability of such orders through state courts.

Interest

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

Bulgarian law distinguishes between interest as a charge for borrowing money and interest as compensation for a delay in payment. Tribunals sitting in Bulgaria may award both types of interest.

In the Bulgarian legal tradition, interest is a concept of substantive law; therefore, tribunals may award interest as determined in the applicable law and the contract of the parties.

Regarding interest as a charge for borrowing money, the tribunal will award at the rate agreed between the parties.

Regarding interest as compensation (ie, late payment interest), where Bulgarian law applies and if the parties have not agreed on liquidated damages, the tribunal shall award statutory interest from the date of delay, at the annual rate of the basic interest rate of the Bulgarian National Bank plus 10 points per annum.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

On request of a party or on its own initiative, the tribunal may correct computational, spelling or any other factual mistakes. A party may also request interpretation of the award.

According to the International Commercial Arbitration Act (ICAA), a request for correction or interpretation must be made within 60 days of the date of notification of the award. The institutional rules often provide for a shorter period (both the Bulgarian Chamber of Commerce and Industry and the Bulgarian Industrial Association Rules provide for 30-day period).

The tribunal will hear the other party and decide on the request in a 30-day period.

The correction or interpretation will become part of the initial award.

The tribunal may further issue additional awards on matters that were not dealt with in the award (ie, *infra petita* awards).

Challenge of awards

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

The parties cannot exclude the power of the state court to review the award.

A domestic award may be challenged before the Supreme Court of Cassation on the following exclusive grounds:

- the party was under some incapacity at the time of concluding the arbitration agreement;
- the arbitration agreement was not concluded or is invalid under the law to which the parties have subjected it, or, failing any indication thereon, under Bulgarian law;
- the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was otherwise unable to present its case;
- the award:
  - deals with a dispute not contemplated by the terms of the submission to arbitration; or
  - contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or arbitral procedure:
  - did not conform with the agreement of the parties, unless such agreement was in conflict with a provision of the International Commercial Arbitration Act from which the parties cannot derogate; or
  - was otherwise not in accordance with the International Commercial Arbitration Act.

The 2017 reform abolished the 'non-arbitrability' and 'contradiction to Bulgarian public policy' as grounds for setting aside domestic awards. Awards resolving non-arbitrable disputes are now considered null and void and the courts will dismiss requests to issue a writ of execution on the basis of such awards (thus, the control over the arbitrability of the resolved dispute is vested with the district court, which considers an application for a writ of executions; if, nevertheless, such an award be challenged before the Supreme Court, it would proclaim it null and void). The contradiction to public policy, however, may no longer be invoked as a ground for challenge of domestic awards.

A request for setting aside must be made within three months of notification of the award. In the case of a request for correction, interpretation or supplementation of the award, this period runs from the day on which the tribunal has ruled on the request.

The court fee of the Supreme Court of Cassation for challenging an award is 4 per cent of its value.

An award is enforceable regardless of a pending challenge; the Supreme Court of Cassation may suspend the enforcement only if the challenging party provides a guarantee equal in value to the challenged award.

Levels of appeal

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

Final awards are not subject to appeal, they may only be set aside by the Supreme Court of Cassation.

Recognition and enforcement

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

Domestic awards are enforced through state courts as local judgments – the creditor must apply to the respective District Court to issue leave for enforcement (writ of execution). The applicant must produce a copy of the award and evidence that it was served to the debtor. The procedure is ex parte. The court may consider only whether the award is valid on its face (ie, signed and in writing and whether the dispute was arbitrable) and contains enforceable orders against the debtor. The court shall also consider whether the award resolves non-arbitrable dispute. The court collects a fee of 0.2 per cent of the awarded amount (but not less than 50 levs).

Article 3 of the ICAA explicitly provides that a state or state entity may be a party to international commercial arbitration. It follows that it cannot raise an immunity from jurisdiction defence.

State entities, however, benefit from limited immunity from execution: article 519(1) of the Civil Procedure Code prohibits enforcement of monetary obligations against state entities. However, other types of enforcement (eg, delivery of possession of movable or immovable assets) are generally possible, provided that the assets in question are not exclusive state property.

As regards foreign awards, to be enforceable in Bulgaria they must receive an exequatur by local courts (ie, recognition and permission for enforcement). The receipt of exequatur is subject to the provisions of the New York Convention and article 51 of the ICAA, which refers to articles 118 to 122 of PILA. The creditor must file a claim before the Sofia City Court, the decision of which is subject to appeal before the Sofia Court of Appeal, and thence to appeal before the Supreme Court of Cassation. The state fee is 50 levs.

The exequatur of a foreign award may be refused only on the grounds listed in article V of the New York Convention, or if the creditor may not prove the existence and finality of the award. The application for exequatur must be accompanied by a true copy of the award and certificate issued by the respective institution, or the tribunal in ad hoc arbitration, evidencing that the award has become final and binding; further, the creditor shall produce a true copy of the arbitration agreement upon which the award was rendered. Failure to produce this evidence is a ground for refusal of the exequatur.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

With regard to time limits to enforce, as a matter of Bulgarian law and under penalty of statutory preclusion, the party to whom the award is favourable should commence enforcement within five years of notification of the award.

Enforcement of foreign awards

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

Bulgarian courts have a pro-enforcement attitude and foreign awards are generally recognised and enforced in Bulgaria.

Enforcement of orders by emergency arbitrators

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

Orders of emergency arbitrators, as well as any interim or conservatory measure issued by arbitral tribunal are not enforceable through the courts.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

As regards domestic awards, the fee for obtaining a writ of execution from the state court is 0.2 per cent of the awarded amount, but not less than 50 levs.

Prior to enforcement, the foreign award must receive an exequatur through local courts. The court fee is 50 levs per court instance. The low amount of the fee aims at facilitating recognition of foreign awards and demonstrates the pro-enforcement attitude of the Bulgarian legislature. Upon obtaining a final court decision that recognises the foreign award and permits its enforcement in Bulgaria, the creditor shall obtain a writ of execution, the fee for which is 5 levs.

Upon obtaining a writ of execution, the creditor shall instruct a local private enforcement agent (bailiff) to conduct the actual enforcement. The fees of the bailiff are fixed in a separate ordinance and depend on the type of enforcement and the amount.

A separate set of costs are the legal costs for representation in the proceedings.

Similarly to the arbitration procedure, the allocation of the enforcement costs is based on the 'costs follow the event' principle. Thus, in principle, the debtor shall cover the costs of the creditor for the exequatur (in the case of a foreign award), for obtaining a writ of execution and for the enforcement itself.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Bulgarian law is part of the continental legal tradition and, over the years, has been influenced by French, Italian and German law, as well as Soviet law (during the socialist period, evidence of which may be found in certain institutes). Upon joining the EU, Bulgarian law was also modified and consolidated, which to a large extent made it predictable and

understandable to foreign parties. US-style discovery is inconsistent with the legal tradition and applicable rules.

Professional or ethical rules

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

There are no universally applicable rules, as the International Commercial Arbitration Act is silent on this issue.

Some institutions have developed their own ethical code for arbitrators; others have included certain provisions in their constitutive documents.

None of the arbitration institutions has developed ethical codes applicable to counsel. Lawyers admitted to the Bulgarian Bar (including foreign lawyers) must observe the Lawyers' Code of Ethics. Foreign lawyers must observe the rules of the bar to which they are admitted.

Third-party funding

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

There are no rules or restrictions on third-party funding. Some foreign funders are exploring or are already present on the Bulgarian market. However, as the market is relatively new, and small, there are no reported cases dealing with specific issues related to third-party funding.

Regulation of activities

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

Bulgaria is a member of the European Union. The eventual visa requirements depend on the nationality of the foreign arbitrator. There are no work permit requirements for sitting as an arbitrator, but if a foreign arbitrator exceeds the threshold for registration for VAT, he or she may be subject to registration for VAT purposes in Bulgaria.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

There are no imminent plans for reforming the arbitration law. The covid-19 pandemic has influenced the ways in which arbitration is conducted, particularly with regard to distance hearings and the process of taking evidence.

Bulgaria strictly observes its obligations as an EU member state; therefore, with a high degree of certainty, we expect that the development of the situation regarding bilateral treaties at EU level will predetermine the attitude of Bulgaria.

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Currently, there are three investment arbitrations pending against Bulgaria, the most substantial of which is ICSID case No. ARB/16/24, *ČEZ v Bulgaria*.

Canada

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Yes, Canada is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention came into force in Canada on 10 August 1986.

In the enabling legislation, the United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16 (2nd Supp.), Canada declared pursuant to article I of the Convention that the Convention would apply only to differences arising out of commercial legal relationships, whether contractual or not.

Canada is also party to several other conventions, including the ICSID Convention and USMCA.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Canada is party to over 50 bilateral investment treaties and other treaties with investment protection provisions.

Domestic arbitration law

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

Constitutionally, Canada is a federation, comprised of ten provinces, three territories and the federal government itself. The primary source of domestic arbitration law in Canada is federal and provincial or territorial legislation – each province or territory (province or provincial, as the case may be) has its own statutes for domestic and international arbitration, while federal legislation governs arbitrations involving federal entities (eg, Crown corporations). The New York Convention is incorporated into international arbitration legislation across the country, and is thus the source of recognition and enforcement of awards in international arbitrations.

Domestic arbitration and UNCITRAL

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

Each province's domestic arbitration legislation differs and the more modern pieces of provincial legislation are based to varying degrees on the Model Law – for example, British Columbia's recently overhauled domestic legislation more closely resembles the Model Law than other provinces, although it is not based on the Model Law per se. Accordingly, while domestic arbitration legislation, broadly speaking, differs from province to province, it is not possible to identify specific differences between provincial legislation and the Model Law that are true for all provinces. By contrast, the provinces' international arbitration legislation tends to be based upon the UNCITRAL Model Law, and most often incorporates the bulk of the Model Law.

Mandatory provisions

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

Domestic and international arbitration legislation tends to allow for the parties to agree to the applicable procedure, subject to certain mandatory provisions parties are not permitted to contract out of. For example, provincial legislation generally dictates that parties cannot contract out of provisions involving the fair and equal treatment of the parties, the setting aside and enforcement of awards, the extension of time limits for setting aside awards, and the seeking of a declaration of an arbitration's invalidity.

Substantive law

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

Parties are free to select the substantive law that the arbitral tribunal is required to apply. If the parties do not include a provision in their arbitration agreement with respect to the governing substantive law, then the substantive law is determining by interpreting the contract as a whole. This includes, for example, determining what law has the most substantial connection to the contract.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The Alternative Dispute Resolution Institute of Canada (ADRIC, whose website is available at https://adric.ca/) is currently the most prominent arbitral institution in Canada and has provincial branches. ADRIC offers

procedural rules and institutional administration of arbitrations, as well as accreditation for qualified arbitrators. The Canadian branch of the Chartered Institute of Arbitrators (whose website is available at https://www.ciarbcanada.org/) also plays a prominent role. In addition, there are regional institutions, which play a less prominent role in Canada, but tend to offer similar services in terms of procedural rules and the administration of disputes.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Criminal and quasi-criminal matters cannot be arbitrated. Family law matters can be arbitrated in some provinces but not in others; where it is allowed, the governing legislation tends to place greater limitations on the arbitration itself in terms the extent to which the parties can control the procedure, as well as the parties' ability to contract out of the governing legislation. For example, parties in Ontario cannot contract out of the right to appeal a question of law.

By contrast, IP, antitrust, competition law, securities transactions and intra-company disputes can be arbitrated.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Formal requirements vary between provinces and pieces of legislation. Whereas certain pieces of domestic legislation do not require that an arbitration agreement be in writing (eg, Ontario, international arbitration legislation – which is typically based on the Model Law – tends to require that the arbitration agreement be reduced to writing in one of three forms: (1) a document signed by the parties; (2) an exchange of communications that evidence an agreement to arbitrate; or (3) an exchange of pleadings in which a party alleges the existence of an arbitration agreement and the other party does not deny the allegation (see, for example, Ontario's international arbitration legislation, the International Commercial Arbitration Act, 2017, SO 2017, c 2, Sch 5.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

Given that an arbitration agreement is, fundamentally, a contract, the standard grounds for finding a contract unenforceable apply with equal force to an arbitration agreement.

For example, the recent case of *Uber Technologies Inc v Heller* considered the question of whether to refuse to enforce an arbitration agreement on the grounds of unconscionability or public policy, or both. A majority of the Supreme Court of Canada determined that the arbitration agreement in question – between Uber and one of its drivers – was unconscionable, while a minority of the Court found that the arbitration agreement was unenforceable as a matter of public policy based on the finding that the prospect of arbitration was illusory (that is, it was so prohibitively expensive for Heller that there was no real prospect an arbitration would occur).

Entering into an arbitration agreement under an incapacity is also a ground for finding the agreement inoperative at common law and under arbitration legislation (particularly domestic legislation) To the extent the Model Law is incorporated into arbitration legislation, the courts retain the discretion to determine that the arbitration agreement is 'null and void, inoperative or incapable of being performed'.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Domestic arbitration legislation generally provides that if the arbitration agreement forms part of another agreement, it is treated as a separate agreement for the purpose of jurisdictional issues and may survive a finding that the main contract is invalid.

International arbitration legislation – to the extent it is based on the Model Law – similarly provides that an arbitration clause is an independent agreement from the rest of the contract, and a decision that the contract is null and void does not render the arbitration agreement invalid.

In addition, Canadian common law recognises the doctrine of separability.

Third parties – bound by arbitration agreement

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

Canadian law does not recognise any principles unique to the arbitration context that bind third parties and there is no legislation in Canada that provides a court or an arbitral tribunal with the jurisdiction to implead strangers to the agreement to arbitrate.

In the construction context, this issue sometimes arises in the context of a subcontract (ie, the agreement between the main, or general, contractor and a subcontractor) that incorporates the terms of the prime contract (ie, the agreement between the general contractor and owner), which prime contract provides for arbitration of disputes arising in respect of the construction project.

Otherwise, typical rules of contract law apply with equal force in the arbitration context, such as where a non-party is the principal in an agency relationship with one of the parties, or where the corporate veil is pierced.

Third parties – participation

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

An arbitral tribunal does not have jurisdiction over persons who are not parties to the arbitration agreement. Unless there is a 'drag-along' provision in a contract that compels participation in an arbitration with another party – for example, a provision in a subcontract compelling a subcontractor to participate in an arbitration between general contractor and owner – third parties cannot be obliged to participate. For additional parties to join an arbitration, all parties must agree to the addition of the additional party (or parties).

That being said, there is some case law that suggests third parties can be compelled to participate as a witness.

Groups of companies

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

In Canada, privity of contract generally prevents non-signatory parties from arbitrating disputes with a signatory under the arbitration agreement. A third party must establish that the parties to an arbitration agreement intended for the third party to benefit from the

arbitration. That being said, there are certain circumstances where a parent company, for example, may be added as a party to an arbitration, such as where the parent company was intimately involved in the contractual relationship such that there was no substantive distinction between the parent company and the subsidiary. Generally, the 'group of companies' doctrine does not form a part of the Canadian common law.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The key requirement to creating a valid multi-party arbitration agreement in Canada is the consent of all of the parties involved. Ideally, the consent of all the parties involved would be within the same arbitration agreement. Even if multiple parties have signed similar contracts for the same project that each contain an identical arbitration clause, this is insufficient in demonstrating consent to a single arbitration. Thus, to ensure clarity and ease of consolidation, if desired by the parties, the arbitration agreement should expressly provide for multi-party arbitrations.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

In general, consolidations of separate arbitrations can only be ordered with the consent of all parties, unless the applicable arbitral rules expressly provide for the consolidation of arbitrations absent consent. Occasionally, tribunals and courts have found express or implied consent to order consolidation.

The domestic arbitration legislation of both Ontario and British Columbia provides mechanisms for consolidations of arbitrations by way of recourse to court. In Ontario, on the application of all the parties to more than one arbitration, the court may order that (1) the arbitration be consolidated, (2) the arbitrations be conducted simultaneously or consecutively, or (3) any of the arbitrations be stayed until any of the other arbitrations are completed. Importantly, this provision does not prevent the parties to more than one arbitration from agreeing to consolidate the arbitrations.

In British Columbia, if all parties to two or more arbitral proceedings agree to consolidate those proceedings, a party, with notice to the other parties, may apply to the Supreme Court for an order that the proceedings be consolidated. Similar to the provision in Ontario's domestic legislation, this provision above does not limit the parties' ability to consolidate arbitral proceedings without a court order.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

The arbitration agreement and the arbitral rules selected by the parties will govern the requirements relating to the number, qualifications and characteristics of the arbitrator. Under international arbitral legislation, unless otherwise agreed by the parties, no person can be precluded by reason of their nationality from acting as an arbitrator. That being said, it is an open question as to whether a sitting judge could act as an arbitrator; while this is a topic of current interest in other jurisdictions, it is not currently a live issue in Canada.

Other than the requirements of independence and impartiality, there are currently no uniform national arbitration qualification standards for arbitrators in Canada. Parties are free to specify required qualifications in their arbitration agreement but will often avoid doing so to avoid delay in the selection of an arbitrator or to avoid the possibility of the appointment of an arbitrator being challenged due to the arbitrator lacking one of the qualifications set out in the agreement.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Since there are no uniform qualification standards for arbitrators in Canada, parties are free to agree to the appointment of lawyers or non-lawyers, such as engineers or architects, as arbitrators. Before selecting an arbitrator, counsel and their clients should investigate the expertise and competency of likely candidates before submitting their names for appointment. Desirable skills parties should look for in an arbitrator include ensuring that the candidate understands the subject matter of the dispute, has a thorough knowledge of the arbitration process, is an effective communicator, and is impartial, fair and free from bias.

Default appointment of arbitrators

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

If the arbitration is administered by an institution and the parties cannot agree on an arbitrator, the institution's rules will typically provide a procedure for appointing arbitrators. If the selected rules do not provide a procedure for appointing arbitrators, the parties cannot agree on any of the proposed candidates and cannot reach an agreement on the procedure for appointing the arbitrator, the court may appoint the arbitrator on application by either party.

Challenge and replacement of arbitrators

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

Under international legislation, the appointment of an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence. Further, the appointment of an arbitrator may be challenged if they do not possess the qualifications agreed to by the parties, becomes unable to perform their functions, or fails to act without undue delay. Parties to an arbitration agreement are free to agree on a procedure for challenging the appointment of an arbitrator. Failing such agreement between the parties, a party who intends to challenge an arbitrator shall, within 15 days of becoming aware of the circumstances, send a written statement of the reasons for the challenge to the arbitral tribunal.

To initiate a challenge under domestic legislation in Ontario, British Columbia, Alberta, Manitoba, New Brunswick and Saskatchewan, a party must send to the arbitral tribunal a statement of the grounds for the challenge within 15 days of becoming aware of them. Domestic legislation in various provinces, including Ontario, provides that a party may challenge the participation of an arbitrator on grounds of reasonable apprehension of bias or a lack of qualifications that the parties have agreed are necessary.

Relationship between parties and arbitrators

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

Arbitrators must be independent, impartial and free from bias. The contractual relationship between the arbitrators and the parties is as set out in the arbitrator's terms of appointment.

Domestic legislation in Canada typically provides that, in the absence of an agreement as to the arbitrator's fees and expenses, the fees and expenses paid to an arbitrator cannot exceed the fair value of the services performed and the necessary and reasonable expenses actually incurred.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Both the international and domestic legislation in Canada require that an arbitrator be independent of the parties and act impartially. Under the international legislation, when a person is approached in connection with their possible appointment as an arbitrator, the candidate must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. This obligation continues throughout the arbitral proceedings. By way of example, under the domestic legislation in Ontario, before accepting an appointment as arbitrator, the candidate must disclose to all parties to the arbitration any circumstances they are aware of that may give rise to a reasonable apprehension of bias.

Immunity of arbitrators from liability

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

Generally, arbitrators are immune from civil liability, except in instances of fraud. In Canada, the limitation of arbitrators' liability is demonstrated in two ways. First, several institutional rules provide for a limitation of an arbitrator's liability, as do typical bespoke terms of appointment. Second, courts have regularly held that arbitrators are immune from legal action with respect to acts performed while exercising their duties as arbitrator. This immunity applies to contractual liability that arises out of the arbitration agreement, as well as to tort liability that arises from the arbitrator's acts and omissions.

The approach taken by Canadian courts in relation to arbitrator immunity reflects a policy decision to encourage the use of arbitration as an alternative dispute resolution method.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

Under domestic and international legislation, parties may apply to court for a stay of court proceedings if the matter is one that is to be submitted to arbitration pursuant to an arbitration agreement. That being said, the decision of a court to stay a proceeding will often turn on whether and to what extent any preconditions to arbitration have been met, and whether the arbitration agreement intends to provide the sole forum for dispute resolution in relation to the contract. If arbitration is not the sole forum and the preconditions have not been met, then a court may decline to stay proceedings.

Although domestic and international legislation across Canada contains fairly straightforward rules with respect to the time for objecting to an arbitral tribunal's jurisdiction, that same legislation is silent with respect to the time for objection to a court's jurisdiction over a dispute.

Jurisdiction of arbitral tribunal

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

Domestic and international arbitration both contain relatively straightforward rules with respect to the time for objection to an arbitral tribunal's jurisdiction. Under international legislation, a party must raise a jurisdictional dispute no later than the submission of a statement of defence. Similarly, if a jurisdictional issue arises in the course of the proceedings, a party wishing to object on jurisdictional grounds must raise the issue as soon as the subject matter of the jurisdictional issue is addressed in the arbitration.

Under domestic legislation in many provinces, any objection as to the tribunal's jurisdiction must occur no later than the start of the hearing, or if there is no hearing, no later than the time at which the party delivers its first statement to the tribunal.

With respect to who rules on jurisdictional disputes, the competence-competence principle is widely accepted across Canada – that is, the arbitral tribunal has the jurisdiction to rule on challenges to its own jurisdiction.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Parties are free to agree on the language in which the arbitration is to be conducted, failing which the arbitral tribunal is typically empowered to decide the language. In Canada, outside of Quebec, arbitration agreements almost invariably provide for the arbitration to be conducted in English. Of course, in Quebec, arbitrations may be conducted in French.

Similarly, the parties are free to agree on the place of the arbitration, failing which the arbitral tribunal will determine the place having regard to the circumstances of the case, including the convenience of the parties. If an arbitration is conducted under institutional rules, certain institutions specifically provide in those rules for the place of arbitration.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Under international legislation, an arbitration is generally initiated by a request that a given dispute be referred to arbitration. That being said, it is permissible for parties to agree to a different method by which to initiate arbitration. Similarly, domestic legislation typically provides that an arbitration can be initiated 'in any way recognised by law', which includes service of (1) a notice to appoint or participate in the appointment of an arbitrator, (2) a notice to appoint an arbitrator delivered to a third-party whom the parties have agreed will have the power to appoint an arbitrator, or (3) a notice demanding arbitration. The proper method by which to commence arbitration will therefore vary depending on the precise wording of the arbitration agreement.

Hearing

28 | Is a hearing required and what rules apply?

Hearings are typically not mandatory under domestic arbitration legislation, although certain statutes provide that the tribunal may hold hearings as it deems fit or must hold a hearing if a party to the arbitration requests it.

Evidence

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

Arbitrators generally have a broad discretion in respect of evidentiary rules. Generally, arbitrators are empowered to take evidence in the same manner as a court (ie, with respect to determining issues of admissibility and weight), and depending on the rules agreed to by the parties, may take a more relaxed approach to the admission of hearsay evidence.

Typically, instead of examination in chief, fact witnesses deliver their evidence via witness statements and are then cross-examined by opposing counsel. It is also common in the construction context to retain one or more experts to deliver opinion evidence and, in some cases, the tribunal itself may retain its own expert (depending on the terms of the arbitration agreement).

Court involvement

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

As part of the courts' curial jurisdiction, a tribunal can in most provinces apply to the court in order to enforce directions and awards; this includes, for example, recourse to court for the purpose of enforcing subpoenas to third-party witnesses. In addition, the tribunal can also apply to the court to determine a question of law. By contrast, courts cannot intervene in procedural objections and issues unless a party brings an application to set aside an award on grounds of procedural unfairness (eg, unequal treatment of the parties).

Confidentiality

31 | Is confidentiality ensured?

Confidentiality is not addressed in domestic or international legislation, although it is typically addressed in institutional rules and is often provided for in the arbitration agreement itself. That being said, there are common exceptions to confidentiality, such as where court intervention is required in order to enforce or set aside an award; in such circumstances, parties may move to have the court record sealed, but there is no guarantee of success in this regard. In the absence of a sealing order, it is possible that many relevant documents from the arbitration (including the pleadings and any awards) will become part of the public record. The production of arbitral documents in collateral proceedings, including the award, is currently unresolved in Canadian law.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Courts generally have a fairly wide discretion to grant interim relief if they are called upon by the parties or the tribunal. That being said, courts do not exclusively hold the authority to grant any particular forms of interim relief, given that arbitral tribunals are empowered (explicitly so under domestic arbitration) to grant equitable relief (including specific performance).

Where the tribunal has not yet been constituted and a party wishes to seek relief, and if the arbitration is not being conducted under institutional rules that provide for an emergency arbitrator, then the courts will by default have the exclusive authority to grant interim relief.

Interim measures by an emergency arbitrator

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

Canadian legislation does not currently include any provisions in relation to emergency arbitrators, although institutional rules typically address the issue.

Interim measures by the arbitral tribunal

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

Once the arbitral tribunal has been constituted, the tribunal has a wide discretion to grant interim relief. Under international legislation, the tribunal may order interim protection measures that the tribunal considers necessary in respect of the subject matter of the dispute and may require security from a party (or parties) in relation to interim measures. Domestic legislation also typically grants the tribunal a wide discretion to grant interim relief; in Ontario, for example, the tribunal may make orders regarding preservation or inspection of property, or both.

Sanctioning powers of the arbitral tribunal

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

Although Canadian arbitration legislation is silent specifically with respect to misconduct by parties or their counsel, such legislation is typically worded broadly with respect to a tribunal's ability to make costs awards such that a tribunal can plausibly make such awards against parties or their counsel in respect to abusive or vexatious conduct.

Similarly, various institutional rules provide that the parties' behaviour may be considered as a factor in the tribunal's ultimate costs award at the close of proceedings.

AWARDS

Decisions by the arbitral tribunal

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

Under international legislation, unless otherwise agreed to by the parties, the decision of an arbitral tribunal that is composed of more than one member must be made by a majority of all its members. However, if authorised by the parties or all members of the tribunal, questions of procedure may be decided by a presiding arbitrator.

Certain domestic legislation, such as that of Ontario, provides that if an arbitral tribunal is composed of more than one member, a decision of the majority will stand as the decision of the arbitral tribunal. If there is no majority or unanimous decision, the decision of the chairperson will govern. Similarly, domestic legislation in British Columbia provides that in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal must be made by a majority of all its members. However, if there is no majority decision, the decision of the presiding arbitrator will govern. If authorised by the parties or all the members of the tribunal, questions of procedure may be decided by the presiding arbitrator.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Arbitration legislation in Canada is silent in relation to an arbitrator's ability to deliver a dissenting opinion. Various provinces require in their domestic arbitration legislation that an arbitral tribunal provide reasons for an arbitral award, unless the award is made on consent or the parties agree otherwise. Therefore, the tribunal does not require specific legislative authority to deliver a dissent. Nor will the existence of a dissent invalidate a majority award.

Form and content requirements

38 | What form and content requirements exist for an award?

International legislation provides that an award must be made in writing and be signed by the arbitrators. The award must also state the date and place of the arbitration. Unless the parties agree that the tribunal need not provide reasons or if the award is on consent, the award must include the tribunal's reasons.

Domestic legislation similarly provides that an award must be made in writing and, other than awards made on consent, must state the reasons on which it is based. Similar to international legislation, domestic legislation mandates that the award indicate the place and date on which it was made and must be dated and signed by all members of the arbitral tribunal, or by a majority if an explanation of the omitted signature is provided.

Time limit for award

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

International legislation is silent with respect to time limits for the delivery of an award.

The time limit for delivery of an award in domestic arbitration legislation varies among provinces. In British Columbia, unless otherwise agreed to by the parties or directed by the tribunal, the tribunal must issue an award within 60 days of the later of (1) the close of the hearing and (2) the last written submissions received by the tribunal. However, under the expedited procedures of British Columbia legislation, the tribunal must issue an award within 30 days of the last written submissions received by the tribunal where no oral hearing has been ordered, or within 45 days of the conclusion of the oral hearing, if ordered.

Under the domestic arbitration legislation in Nova Scotia, the arbitrator shall render a decision within 10 days of the completion of the arbitration. Whereas under domestic legislation in Prince Edward Island, Newfoundland and Labrador, and the Northwest Territories, the domestic legislation provides that the tribunal shall render their award within three months of entering on the reference.

Domestic legislation in various provinces such as Ontario, Alberta and Prince Edward Island consider the authority of a court to extend the time within which a tribunal is required to make an award, whether or not the time for rendering the award has expired.

Date of award

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

For the purpose of correcting typographical errors in the award, international arbitration legislation typically provides for a deadline of 30 days from the date of the award. Similarly, a party can, with notice to the other party and within 30 days of receipt of the award, request the tribunal to (1) make an additional award as to claims presented in the arbitral proceedings but omitted from the award, or (2) correct any typographical error in the award, or, if agreed to by the parties, give an interpretation of a specific point of the award. Also, an arbitral tribunal can extend the period of time within which it can make a correction, interpretation or an additional award.

Relatedly, international legislation generally limits the time to make an application for setting aside an award to three months after the date on which the party making that application received the award or, if a request had previously been made to correct, interpret or make an additional award, from the date on which that request had been disposed of by the arbitral tribunal.

Domestic arbitration legislation is more varied from province to province. In Ontario, for example, a party has 30 days following receipt of the award to request that the arbitral tribunal explain any matter. Similarly, some domestic legislation (eg, Ontario and British Columbia) allows for a tribunal, on its own initiative within 30 days of making an award or at a party's request made within 30 days of receiving the award, to correct any typographical error in the award.

In Ontario, the domestic legislation also allows the tribunal, on its own initiative, to amend the award to correct an injustice caused by an oversight of the tribunal. This same legislation also allows for the tribunal, on its own initiative at any time or at a party's request made within 30 days of receiving the award, to make an additional award to deal with a claim that was presented in the arbitration but omitted from the earlier award.

Types of awards

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

Under both international and domestic legislation, arbitral tribunals have the authority to order interim remedies (unless otherwise agreed by the parties). Tribunals can also deliver partial awards and final awards, as well as order security for costs when a party seeks an interim measure of protection. Consent procedural orders and awards are also permissible.

In addition, tribunals typically have jurisdiction to grant several types of relief in addition to compensation. Domestic legislation in Ontario, for example, allows an arbitral tribunal to order specific performance, injunctions and other equitable remedies. The domestic legislation in British Columbia mirrors Ontario's provision in this regard.

Termination of proceedings

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

Pursuant to international legislation, proceedings may be terminated in ways other than by the rendering of an award. Under the Model Law, unless otherwise agreed to by the parties, if, without showing sufficient

cause, the claimant fails to communicate their statement of claim, the arbitral tribunal is required to terminate the proceedings. Additionally, if the parties settle the dispute during arbitral proceedings, the tribunal is required to terminate the proceedings. Best practices typically dictate documenting a settlement by way of consent award.

Similarly, under domestic legislation such as legislation in Ontario and British Columbia, the arbitral tribunal must terminate the arbitration if the parties settle the dispute during arbitration. Other domestic legislation, such as that of British Columbia, also allows a tribunal to terminate the proceedings in relation to the party's claim if, after the commencement of proceedings, a party fails to comply with a procedural time limit.

Cost allocation and recovery

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

Across Canada, both domestic and international legislation typically provide arbitral tribunals with the discretion to award costs (which may include, among other things, the fees and expenses of the arbitrators and expert witnesses, legal fees and expenses, any administration fees and any other expenses incurred in connection with the arbitral proceedings).

Generally, when it comes to awarding costs, arbitrators may be bound by the rules of cost allocation in provincial court proceedings if the parties have agreed to such an approach; however, generally speaking the discretion accorded to arbitrators is much more flexible than under the rules of court. Typically, this means that the successful party will be indemnified for part of its costs, except for rare circumstances in which full indemnification may be ordered. Typically, a party will seek either 'partial indemnification' or 'substantial indemnification', with the former category typically ranging anywhere from 25–50 per cent of costs and the latter ranging up to about 75 per cent.

Interest

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

International arbitration legislation does not provide that a tribunal can award interest, although an entitlement to interest based on the underlying contract will typically form the basis of an award of interest where appropriate. By contrast, some domestic legislation provides the arbitral tribunal with the same power as a court with respect to the ability to grant interest. For example, Ontario's domestic legislation provides that the sections regarding pre-judgment and post-judgment interest of the Courts of Justice Act apply to an arbitral tribunal (for the Courts of Justice Act. Further, the domestic legislation in British Columbia allows for the tribunal, unless otherwise agreed to by the parties, to award simple or compound interest for the time period and at the rate that the tribunal considers appropriate.

In any event, parties can provide the tribunal with the power to award interest in their arbitration agreement.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

The Model Law provides for the arbitral tribunal to correct any computation, clerical or typographical error in the award on its own initiative within 30 days of the date of the award.

Also, a party may request (if it so agreed by the parties) that the tribunal provide an interpretation of a specific point of the award. Interestingly, the arbitral tribunal may extend, if necessary, the period of time within which it makes a correction, interpretation or an additional award.

Similarly, domestic legislation in both Ontario and British Columbia allows for a tribunal, on its own initiative within 30 days of making an award or at a party's request made within 30 days of receiving the award, to correct any computation, clerical or typographical error in the award. The Ontario legislation also the arbitral tribunal, on its own initiative at any time or at a party's request made within 30 days of receiving the award, to make an additional award to deal with a claim that was presented in the arbitration but omitted from the earlier award.

Challenge of awards

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

For awards under domestic legislation, grounds for challenging an award vary from province to province, but tend to include some combination of:

- a party having entered into the arbitration agreement while under an incapacity;
- the arbitration agreement is invalid;
- the arbitral award exceeds the tribunal's jurisdiction;
- the composition of the tribunal was contrary to the arbitration agreement or the legislation;
- the subject matter of the dispute was not arbitrable;
- one of the parties was not treated equally or fairly (such as by not being able to present its case or respond to the other party's case);
- an arbitrator exhibited a reasonable apprehension of bias; or
- the award was obtained by fraud.

For awards under international legislation, grounds for challenging the award tend to be limited those articulated in the Model Law. This therefore includes:

- a party having entered into the arbitration agreement while under an incapacity;
- a party having not received notice of the appointment of an arbitrator of the arbitration, or was deprived of the opportunity to present its case;
- the arbitral award exceeds the tribunal's jurisdiction;
- the composition of the tribunal was contrary to the arbitration agreement or the legislation;
- the subject matter of the dispute was not arbitrable;
- the award was set aside by a competent authority in the jurisdiction in which the award was made; or
- enforcement of the award would be contrary to public policy in the jurisdiction where enforcement is sought.

Levels of appeal

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

The question of whether an appeal is available at all will depend upon the wording of the arbitration agreement and the wording of the applicable legislation, including whether the arbitration legislation allows the parties to contract out of a statutory right to appeal. For example, in Ontario, the domestic legislation provides for a right to appeal on questions of law, but not questions of fact. That legislation also allows parties to contract out of that appeal right, such that an arbitral award may be final and binding. In practice, it is often the case that the parties

provide in the arbitration agreement that arbitral awards shall be final and binding.

Otherwise, and depending on the province, there are typically either one or two levels of appeal. Under one model, an award may first be appealed to the province's superior court (ie, its trial-level court) and then to the court of appeal. Under the second model, appeals may lie directly to the court of appeal. Parties may seek leave of the Supreme Court of Canada to appeal a decision from the court of appeal, but leave is rarely granted and, broadly speaking, is only granted on issues of national importance.

The successful party in a court proceeding is typically awarded some portion of their legal costs, the percentage of which may vary according to a number of factors (including consideration of settlement offers, and the extent to which the winning party was successful).

Recognition and enforcement

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

International legislation provides for Model Law and New York Convention recognition and enforcement rights. Creditors of international arbitral awards generally have access to the same enforcement remedies available to domestic litigants. Award creditors may apply for recognition and enforcement of arbitral awards in the appropriate provincial courts. In Ontario, the Superior Court of Justice - Commercial List is a specialised commercial court intended to provide more efficient procedures and experienced judges for commercial matters, including in respect of arbitration.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

In Ontario, the limitation period for enforcing an award is 10 years from the date the award was received. This limitation period is the same in the domestic legislation as it is in the international arbitration.

Limitations periods vary in length as among Canada's other provinces, the legislation for some of which is silent on this issue.

Enforcement of foreign awards

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

Given the implementation of the New York Convention in Canada, and given the judicial policy of supporting arbitration, Canadian courts are generally receptive to recognising foreign awards, subject to the exceptions identified in article V of the New York Convention. Accordingly, while parties in Canada may contest an application to enforce a foreign award, they must show good cause consistent with the New York Convention.

Enforcement of orders by emergency arbitrators

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

Orders by emergency arbitrators are generally not addressed in domestic legislation. That being said, institutional rules generally provide for recourse to an emergency arbitrator, such that an award from an emergency arbitrator can be enforced in court by way of urgent application to court for an injunction. Due to the lack of applicable domestic arbitration, and due to the relatively recent implementation of emergency arbitrator provisions in institutional rules, there is a dearth of relevant case law in Canada.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

It is difficult to articulate any general proposition as to the costs associated with seeking enforcement of an arbitral award. For example, the costs of enforcement may vary depending on whether the enforcement is contested and whether the judicial decision in respect of enforcement is appealed to a higher court.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Canada is a bijural jurisdiction. Nearly all provinces and territories are common law jurisdictions, except for Quebec, which is Canada's only civil law jurisdiction. Accordingly, most Canadian arbitrators will have a common law background, and will therefore tend closer towards UK or US-style discovery than the civil law's narrower approach.

That being said, Canadian common law arbitrators tend to adopt a 'middle of the road' approach by limiting or altering the scope and form of certain components of discovery, such as (1) by allowing for the giving of evidence by way of witness statement rather than direct examination, and (2) conducting documentary discovery by way of Redfern schedules rather than US-style fulsome documentary discovery.

Professional or ethical rules

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

In Canada, lawyers are held to rules of professional conduct that are set out in legislation or rules of professional ethics established by the province's regulating body (eg, the Law Society of Ontario).

Third-party funding

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

Although third-party funding was historically prohibited or heavily restricted due to it being considered champertous, these restrictions have loosened in recent years such that third-party funding has grown more common. That being said, restrictions on third-party funding vary from province to province, such that parties would be advised to consult with a lawyer regarding restrictions on such funding.

In the construction context, third-party funding remains uncommon in both arbitration and litigation.

Regulation of activities

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

There are no particularities in regard to arbitration in Canada in respect of which a foreign practitioner need be overly concerned.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Two topics of recent and current interest in Canada are the applicability of arbitration agreements in standard-form consumer contracts and the applicability of arbitration agreements to receivers in instances of bankruptcy or insolvency.

On the former topic, a minority of the Supreme Court of Canada in *Uber Technologies Inc v Heller* considered the possibility that an arbitration agreement can be found unenforceable on the basis of public policy if in practice there exists no real prospect of the arbitration actually occurring, given that there would be no real prospect of access to justice. Given that this position was expressed by a minority of the court, it is not presently binding law in Canada, but it remains to be seen whether this position is taken up by lower courts in subsequent case law.

On the latter topic, the Supreme Court of Canada recently heard oral arguments from an appeal of a lower-court decision in which the British Columbia Court of Appeal found that arbitration agreements entered into pre-insolvency were not binding on the insolvent company's receiver, based on the doctrine of separability and the receiver's right to abrogate executory contracts.

Another notable development in the construction sector over the past few years has been the implementation of statutory adjudication for construction disputes. Initially implemented in Ontario, it has subsequently been implemented in other provinces.

With respect to legislative reform, there has been a growing interest in Ontario in overhauling the province's domestic legislation to ensure greater consistency with international arbitration practice and incorporate industry norms more common of commercial disputes (eg, providing for opt-in rights of appeal from arbitral awards rather than the current default of opt-out rights).

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

The People's Republic of China is a contracting state to the 1958 New York Convention, with accession taking force on 22 April 1987. China made a reciprocity reservation and a commercial reservation pursuant to article I of the Convention.

The Convention is extended to Hong Kong Special Administrative Region (SAR) in 1997 upon China's resumption of the exercise of sovereignty, and Macau SAR in 2005.

As separate jurisdictions in one country, mainland China and Hong Kong SAR signed bilateral arrangements on mutual recognition and enforcement of arbitral awards in 2000. A similar arrangement was made between mainland China and Macao SAR in 2007.

China is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which took effect upon China from 6 February 1993, but Chinese government would only consider submitting to the jurisdiction of the ICSID disputes over compensation resulting from expropriation and nationalisation, pursuant to article 25(4) of the Convention. Extension of the ICSID Convention to Hong Kong SAR and Macau SAR is not disputed, most recently in *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania* (ICSID Case No. ARB/15/41).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Up to 25 November 2021, China has concluded 145 bilateral investment treaties (BITs), of which 107 are in force, 19 are signed but not in force and 19 are terminated.

China is a contracting party to the China–Japan–Korea Agreement for the Promotion, Facilitation and Protection of Investment. This trilateral treaty became effective on 17 May 2014 and it provides a wide range of options to resolve an investment dispute, which, inter alia, includes ICSID arbitration and arbitration under the UNCITRAL Rules.

On 15 November 2020, China signed a Regional Comprehensive Economic Partnership Agreement (RCEP) with 14 countries in the Pacific-Asia area, of which Chapter 10 deals with investment disputes, with no investor-state dispute resolution mechanism provided for.

It is China's position that treaties and agreements on investment and trade do not automatically extend to Hong Kong SAR, Macao SAR and Taiwan.

Domestic arbitration law

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

Mainland China's primary sources of law relating to arbitration are:

- the Civil Procedure Law (1991);
- the Arbitration Law (1994);
- the Law on the Applicable Law to Foreign-related Civil Relations (2011);
- the General Principles of Civil Law (2017) (to be superseded by the Civil Code from 1 January 2021);
- the Contract Law (1999) (to be superseded by the Civil Code from 1 January 2021); and
- various judicial interpretations of the Supreme People's Court (SPC) with regard to arbitration, including the implementation of the New York Convention in mainland China.

The Civil Procedure Law and the Arbitration Law generally apply to both 'foreign-related' and domestic arbitrations. The concept of 'foreign-related' is defined by the Interpretation of the Supreme People's Court on Several Issues Concerning the Law Applicable to Foreign-Related Civil Relation (2012), according to which an arbitration is foreign-related if any of the following conditions are met:

- either party or both parties are foreign citizens, foreign legal persons or other organisations or stateless persons;
- the habitual residence of either party or both parties is located outside the territory of China;
- the subject matter is located outside the territory of China;
- the legal fact that leads to the establishment, change or termination of a civil relationship happens outside the territory of China; or
- other circumstances under which the civil relationship may be determined as foreign-related.

On 30 December 2016, a judicial interpretation stipulates that an arbitration agreement between or among free trade zone (FTZ)-registered wholly foreign-owned enterprises that provides for arbitration outside of mainland China should not be held invalid as it is tantamount to the existence of a foreign element.

An arbitration is foreign if it is seated outside the territory of China; an arbitration is of Hong Kong/Macao/Taiwan if it is seated there. In August 2020, Guangzhou Intermediate People's Court of China ruled that an award rendered by ICC in Guangzhou, China should be regarded as a Chinese 'foreign-related' arbitral award, instead of a foreign award

or non-domestic award under article I of the New York Convention, ending a two decades-long controversy.

Domestic arbitration and UNCITRAL

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

China's arbitration legislation is not based on the UNCITRAL Model Law (the Model Law), but the draft of the Arbitration Law was significantly influenced by the Model Law. The differences between the Arbitration Law and the UNCITRAL Model Law are, inter alia, as follows:

- the Arbitration Law covers both domestic and foreign-related arbitration, over both civil and commercial disputes;
- the Arbitration Law still requires an arbitration agreement to be in writing;
- ad hoc arbitration is not permitted in mainland China;
- arbitrators do not have the power to rule their own jurisdiction under the principle of competence-competence, as the Arbitration Law assigns the power to the court or arbitration commissions (the latter, however, often delegates such power to the arbitrators);
- the Arbitration Law requires that the arbitration commission must forward a party's application for interim preservation measures to a competent court for determination, and there is no authorisation for the tribunal to grant interim relief; and
- The Arbitration Law imposes a more crucial scrutiny on domestic arbitral awards that may be set aside or refused to be enforced for limited substantive reasons, in addition to jurisdictional or procedural issues.

Mandatory provisions

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

In the case of arbitration seated in mainland China, certain provisions contained in the Arbitration Law are mandatory and the parties are not allowed to deviate from them. The following is an indicative list of such provisions:

- the scope of arbitration must be contractual or property-related dispute between parties on equal footing (article 2);
- the parties must be afforded with the right to due process (eg, right to be notified, make a defence, challenge the arbitrator, provide evidence and present arguments);
- the arbitration agreement must be in writing and contain required elements (article 16);
- for domestic arbitration, the qualification of an arbitrator must satisfy the minimum conditions (article 13);
- the parties may challenge the validity of an arbitration agreement before an arbitration commission or a competent court (article 20);
- the arbitration commission must forward a party's application for interim preservation measure for evidence or property to the competent court (articles 28, 46 and 68); and
- the parties may apply for setting-aside or non-enforcement of the arbitral awards on limited grounds (articles 58, 63, 70 and 71).

Substantive law

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

For foreign-related arbitration, the parties may freely decide on the law applicable to the merits of the case. For domestic arbitration, the substantive law shall be mainland Chinese law.

The Law on the Applicable Law to Foreign-related Civil Relations sets out a number of useful rules according to which judges of the courts may decide which law shall be applied if the dispute is foreign-related. Whether they are binding on arbitrators is disputed; because the tribunal's application of law is basically immune from judicial challenge, this is largely an unchartered territory.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

In mainland China, the most prominent arbitral institution is the China International Economic and Trade Arbitration Commission (CIETAC) (www.cietac.org). CIETAC plays a leading role in administering foreign-related commercial and maritime arbitration cases. Other prominent arbitration commissions are the China Maritime Arbitration Commission (CMAC) (www.cmac-sh.org), the Beijing Arbitration Commission or Beijing International Arbitration Center (BAC/BIAC) (www.bjac.org.cn), Shanghai International Arbitration Center (www.shiac.org) (SHIAC) and Shenzhen Court of International Arbitration (SCIA) (www.scia.com.cn).

HKIAC, ICC, SIAC and SCC have opened representative offices in mainland China.

All of the above-mentioned leading institutions have their own panel of arbitrators, but parties may nominate an arbitrator outside the panel, subject to confirmation by the institution. Their rules do not impose restrictions on place of arbitration, language of arbitration or applicable law.

Generally, arbitration institutions in mainland China collect arbitration fees by value of claim. The claimant shall deposit a lump sum fee when filing its case, including the administrative fee and the tribunal's remuneration. Apart from arbitration fees, the institutions may charge the parties for any other additional and reasonable actual costs, like arbitrators' special remuneration, the travel and accommodation expenses, engagement fees of stenographer, and the costs and expenses of experts, appraisers or interpreters. BAC/BIAC is leading its peers in reforming the arbitration fees, featured with reduced costs for high-stake disputes and more remuneration for the arbitrators.

There are 253 more arbitration commissions located at major cities across mainland China, handling primarily domestic cases.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Articles 2 and 3 of the Arbitration Law are the primary legal resources dealing with the issue of arbitrability. Both contractual and other disputes related to property are arbitrable if they occur between parties on an equal footing, related to economic interest and covered by an arbitration agreement.

Under the Arbitration Law, the non-arbitrable subject matter are disputes over marriage, adoption, guardianship, child maintenance and inheritance, and administrative disputes falling within the jurisdiction of the relevant administrative organs according to law (article 3).

Disputes over the validity of a registered trademark or patent, disputes relating to monopoly agreement or acts, and disputes concerning 'administrative contracts', being contracts entered into by a government entity in exercise of itsgovernmental power, and including contracts for public-private partnership (PPP) and for land use right transfer, are not arbitrable according to judicial interpretations and cases rendered by the Chinese courts. However, disputes over copyrights and securities transactions may be resolved through arbitration.

Requirements

9 What formal and other requirements exist for an arbitration agreement?

The Arbitration Law provides that an arbitration agreement shall not be made orally and it must be in writing. The Contract Law (1999) stipulates that 'in writing' means a contract, letter or electronic message that is capable of expressing its contents in a tangible form (article 11). Incorporating an arbitration clause existing in another document, or standing general terms and conditions, can serve to satisfy the 'in writing' requirement. An arbitral award made with no written arbitration agreement is exposed to the risk of non-enforcement or being set aside.

Failure to meet the formal requirement of the arbitration agreement can sometimes be cured if the party who could raise an objection does not object (for example, article 5 of the 2015 China International Economic and Trade Arbitration Commission (CIETAC) Rules). When local or state entities engage in commercial transactions and conclude arbitration agreements, they are treated as parties on equal footing with their counterparts; therefore, no requirement for co-signing or approval is imposed.

Enforceability

10 In what circumstances is an arbitration agreement no longer enforceable?

If the law applicable to an arbitration agreement is mainland Chinese law, an arbitration agreement must satisfy the statutory requirements to be valid and enforceable. Article 16 of the Arbitration Law specifies that an arbitration agreement must contain the following three elements:

- an intention to submit disputes to arbitration;
- the matters to be arbitrated; and
- the designation of an 'arbitration commission' to resolve the dispute.

Accordingly, mainland Chinese law and practice have developed the following doctrines, under which an arbitration agreement will be deemed as invalid, non-enforceable or no longer binding:

- the arbitration agreement designates no institution or two institutions, and in the latter case no supplemental agreement can be reached;
- the arbitration agreement itself is avoided, rescinded or terminated by a party or the parties; however, the avoidance, rescission, or termination of the underlying contract is without prejudice to the validity of the arbitration agreement.
- with regard to the insolvency, the Bankruptcy Law (2006) recognises that the bankruptcy administrator may continue on behalf of the bankrupt enterprise to participate in arbitration proceedings that are started before the application for bankruptcy is accepted by the people's court;
- the bankruptcy administrator is entitled to apply for setting-aside of an arbitral award (article 7 of the Judicial Interpretation to Bankrupt Law (III));
- according to the Interpretation to the Arbitration Law (2008), after the decease of a party, the arbitration agreement is still binding on his or her successor in interests (article 8); and
- either or both parties to the arbitration agreement are incapable or restricted in civil acts.

Due to historical misunderstanding of 'hybrid arbitration', arbitration clauses rendered before 2012 selecting the ICC Arbitration Rules without specifically designating ICC, are not regarded as having selected ICC as administering institution, which has led to the invalidation of several arbitration agreements and non-enforcement of ICC awards.

Separability

11 Are there any provisions on the separability of arbitration agreements from the main agreement?

The doctrine of separability of arbitration agreement is adopted by article 19 of the Arbitration Law, which provides that an arbitration agreement shall exist independently, and that any changes to, rescission, termination or invalidity of the underlying contract shall not affect the validity of the arbitration agreement.

The latest judicial decision made by the International Commercial Court of the SPC confirmed that the doctrine of separability applies to the issue of formal validity, so an arbitration agreement can be reached by exchange of draft contracts, even if the underlying contract is not properly formed.

Third parties – bound by arbitration agreement

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

Generally, third parties are not bound by an arbitration agreement under mainland Chinese law except in the following circumstances:

- assignment of rights or obligations: the arbitration agreement shall have a binding force upon the assignee;
- merging or splitting of an entity: the arbitration agreement shall be binding upon the successor;
- decease of a party: the arbitration agreement shall be binding upon the inheritor who inherits his or her rights and obligations; and
- with regard to the insolvency, the Bankruptcy Law (2006) recognises that the bankruptcy administrator may continue on behalf of the bankrupt enterprise to participate in arbitration proceedings that are started before the application for bankruptcy is accepted by the people's courts.

Third parties – participation

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

The Arbitration Law includes no provision with respect to third-party participation in arbitration, such as joinder or third-party notice. These issues are predominantly regulated by institutional rules.

Groups of companies

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

The doctrine of 'piercing the corporate veil' is admitted in court litigation, but not applicable to arbitration under Chinese law. Arbitral award rendered against a party by 'piercing the corporate veil' will be exposed to a high risk of setting-aside, or non-enforcement.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

The issue of multiparty arbitration or consolidation of arbitration is often addressed by the arbitration institution's rules of procedure.

For example, the 2015 CIETAC Rules contain a significant number of rules regarding multiparty arbitration as follows:

- assumption of two sides only for each multiparty arbitration: there will be only two sides (ie, the claimant side and the respondent side) in a multiparty arbitration. If either side fails to jointly appoint or to jointly entrust the chair of CIETAC to appoint an arbitrator, the chair of CIETAC shall appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator (article 29);
- joinder of additional parties to the existing arbitration: during the arbitral proceedings, a party may apply to CIETAC to have an additional party join its side (article 18.5); and
- consolidation of two or more arbitrations with multiple parties: CIETAC may decide to consolidate several separate arbitrations into one arbitration proceeding that was first commenced (article 19.2).

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Arbitration Law is silent on whether an arbitral tribunal may consolidate separate arbitral proceedings. This issue is left for the arbitration rules to regulate.

For example, under article 19 of the 2015 CIETAC Rules, a party may apply for consolidation of arbitration proceeding, provided either of the conditions are met:

- all of the claims in the arbitrations are made under the same arbitration agreement;
- the content of arbitration agreements are identical or compatible and the arbitrations involve the same parties as well as legal relationships of the same nature;
- the content of arbitration agreements are identical or compatible and the contracts involved consist of a principal contract and its ancillary contract or contracts; or
- all the parties to the arbitrations have agreed to consolidation.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

Under article 13 of the Arbitration Law, a Chinese national may be appointed as an arbitrator if he or she has:

- at least eight years' experience working in the field of arbitration;
- at least eight years' experience working as a lawyer;
- previously served as a judge for at least eight years;
- a senior title in the legal research or legal education field; or
- knowledge of the law, and holds a senior title or has acquired an equivalent professional level in fields such as economic relations and trade.

The arbitration commissions may impose more stringent standard for application to be involved in their panel of arbitrators.

Appointments of foreign nationals as arbitrators are more flexible. Under article 67 of the Arbitration Law, a foreign-related arbitration commission may appoint foreigners with 'professional knowledge in law, economy and trade, science and technology and other fields' as arbitrators.

The SPC imposed a stringent restriction in 2004 to prohibit incumbent judges to act as an arbitrator. There are no specific laws or rules that expressly prohibit retired judges from acting as arbitrators.

Each mainland Chinese arbitration institution has established its panel of arbitrators, and the parties to an arbitration agreement are required to select and appoint arbitrators from these lists (the closed panel approach), while a few leading arbitration institutions permit the parties to select and appoint arbitrators from outside the lists (the open-panel approach).

In the case of ad hoc arbitration between or among the FTZ-registered entities, the parties are allowed to choose arbitrators by agreement or take a non-list approach, but it is generally considered that the ad hoc arbitrator must nevertheless meet the criteria set out by the Arbitration Law.

Parties are permitted to stipulate, by agreement, requirements or restrictions for arbitrators such as nationality, language or expertise; restrictions on gender or religion is unheard of.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Practising lawyers, law professors, in-house counsel, industry experts and retired judges are frequent nominees sitting as members of arbitral tribunals.

Gender diversity is not frequently discussed; there are many female elites in the arbitrator community, though the number is believed to be much smaller than male arbitrators.

Default appointment of arbitrators

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

The default appointment mechanisms set out by the Arbitration Law are twofold: first, the number of arbitrators of an arbitral tribunal shall be either one or three (article 30); second, if the parties fail to agree on a method for forming the arbitral tribunal, or to appoint the arbitrators within the time limit specified in the rules of arbitration, the arbitrators shall be appointed by the chair of the arbitration commission (article 32).

Courts are not allowed to intervene in the selection of arbitrators under mainland Chinese law.

Challenge and replacement of arbitrators

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

The party may challenge an arbitrator on any of the following grounds if the arbitrator (article 34):

- is a party or a close relative of a party or of a party's representative;
- is related in the case;
- has some other relationship with a party to the case or with a party's agent that might affect the impartiality of the arbitration; or
- meets a party or his or her agent in private, accepts an invitation for treatments by a party or his or her representative or accepts gifts presented by any of them.

The Arbitration Law provides that if a party challenges an arbitrator, it shall submit its challenge no later than the closing of the final hearing, or before the conclusion of the last hearing if reasons for the challenge only became known after the commencement of the first hearing (article 35). The challenge shall be decided by the chair of the arbitration commission, or the arbitration commission if the chair is serving as an arbitrator (article 36).

Under most institutional rules, arbitrators are obliged to disclose any facts or circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The parties may challenge the arbitrator based upon the fact disclosed.

An arbitrator may also be replaced if an arbitrator is prevented de jure or de facto from fulfilling his or her duty, or failed to fulfil the duty as required or within the time limit.

In deciding disclosures or challenges, institutions largely rely on their own codes of conduct for arbitrators. Almost all Chinese arbitration commissions have maintained their own codes of conduct for arbitrators. The IBA Guidelines on Conflicts of Interest in International Arbitration are sometimes relied on as a persuasive authority.

Relationship between parties and arbitrators

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

In mainland China, arbitration is viewed as a professional service rendered to the parties by arbitrators according to rules of law. Arbitration Law requires that an arbitrator shall refrain from having any relationship with the party or the party's representative that may influence the impartiality and independence of that arbitrator. The 2015 China International Economic and Trade Arbitration Commission (CIETAC) Rules also provide that an arbitrator shall not represent either party, and shall be and remain independent of the parties and treat them equally.

Arbitrators are entitled to receive remunerations as well as compensation for actual costs and expenses incurred. The levels of remuneration are fixed by each arbitration institution according to its own internal fee schedule, mostly unpublished. However, CIETAC Hong Kong Arbitration Centre, SCIA and BAC/BIAC recognise that the parties may agree on the levels of remuneration to arbitrators in international arbitration.

The 2019 BAC/BIAC Rules have made a significant change to the Arbitration Fee Schedule, which now separates the administrative fee from the remuneration to arbitrators. The hourly-rate approach may be selected by the parties by agreement.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The Arbitration Law is silent on the issue of whether an arbitrator has a duty of disclosure regarding impartiality and independence, but article 34 sets out a list of circumstances in which an arbitrator must refrain from serving as an arbitrator due to conflict of interest.

Institutional arbitration rules usually have detailed rules requiring an arbitrator to disclose any circumstance that may affect his or her impartiality and independence, and the duty of disclosure shall be continuous during the entire arbitral process. Article 31 of the 2015 CIETAC Rules provides that an arbitrator shall sign a declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, and that if circumstances that need to be disclosed arise during the arbitral proceedings, the arbitrator shall promptly disclose such circumstances in writing. The parties and other members of the arbitral tribunal shall be afforded the opportunity to view or comment on the declaration or disclosure of an arbitrator.

Immunity of arbitrators from liability

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

An arbitrator shall bear civil or criminal liabilities and the arbitration commission shall remove his or her name from the list of arbitrators under either the following circumstances under the Arbitration Law (article 38):

- where an arbitrator meets a party or his or her agent in private, accepts an invitation for treatments by a party or his or her representative or accepts gifts presented by any of them; or
- while arbitrating the case, the arbitrator has accepted bribes, resorted to deception for personal gains or perverted the law in the ruling.

It is generally understood that an arbitrator is exempted from personal liabilities beside the above two scenarios, and Chinese law is silent on the specific rules for determining the amount of compensation and the procedure to hold an arbitrator accountable for civil liability.

An arbitrator who deliberately renders an award in violation of the law or against the facts may be sentenced with imprisonment of up to seven years' detention under article 399 of the Criminal Code.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

The Arbitration Law affirms the principle that a valid arbitration agreement will exclude a court's jurisdiction over the same dispute. If one party commences an action in a court without declaring the existence of the arbitration agreement and, after the court has accepted the case, the other party submits the arbitration agreement prior to the first oral hearing conducted by the court, the court shall dismiss the case unless the arbitration agreement is found to be null and void. However, if the other party has not raised an objection to the court's acceptance of the case prior to the first oral hearing, the party shall be deemed to have waived its right of arbitration under the arbitration agreement and the court will proceed (article 26).

Jurisdiction of arbitral tribunal

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

Under the Arbitration Law, the arbitral jurisdiction is reserved for determination by either an arbitration institution or a people's court (article 2). The arbitration institution may also delegate its power to the arbitral tribunal, who may either make a separate decision on jurisdiction during the arbitral proceedings or incorporate the decision in the final arbitral award.

An objection to jurisdiction shall be raised in writing before the first oral hearing or before the respondent's submission of the first substantive defence if no hearing is to be held (article 6 of the 2015 China International Economic and Trade Arbitration Commission (CIETAC) Rules and article 6 of the BAC Rules).

The parties are allowed to raise jurisdictional objections within time limit. In September 2020, the Guangzhou Intermediate Court of China ruled that an award rendered by tribunal regardless of the jurisdictional

objection raised by a party deprived the party's right to due process; therefore, the award shall be set aside.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

There is no expressed default mechanism under the Arbitration Law. Different arbitral institutions have provided their respective rules to this point.

For example, the China International Economic and Trade Arbitration Commission (CIETAC) provides that absent prior agreements of the parties, the place of arbitration shall be the domicile of CIETAC or its sub-commission or arbitration centre administering the case (CIETAC article 7). And the language of arbitration to be used in the proceedings shall be Chinese (CIETAC article 81). CIETAC may also determine the place of arbitration to be another location or designate another language as the language of arbitration having regard to the circumstances of the case (CIETAC article 7 and 81). The arbitral tribunal has broad discretion as to the applicable substantive law in a given case (CIETAC article 49).

Commencement of arbitration

27 | How are arbitral proceedings initiated?

For initiating an arbitral proceeding under the Arbitration Law, the claimant or claimants shall submit a duly executed request for arbitration to the pertinent arbitral institution, with one copy for each of the respondent or respondent, and arbitrators (article 22). The request for arbitration shall contain (article 23):

- the basic information and address of the parties;
- the arbitration agreement relied on by the claimant;
- the requested relief and facts and grounds on which the claim is based; and
- evidence to support the claims, the name and address of the witness or witnesses.

Hearing

28 | Is a hearing required and what rules apply?

According to the Arbitration Law, a hearing is a must for an arbitral proceeding unless the parties agree to not hold a hearing (article 39).

There is no requirement under the Arbitration Law that the hearing must be in person. Therefore, in light of the covid-19 pandemic, virtual hearings have been widely adopted.

Evidence

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

According to the Arbitration Law, the parties shall produce evidence in support of their claims. An arbitral tribunal may collect on the evidence it considers necessary (article 43). However, the Arbitration Law is silent on the admissibility, relevance and evidentiary weight of the evidence, which are subject to the tribunal's decision.

CIETAC has published its Guidelines on Evidence, which provides a set of non-binding regulations on the taking of evidence in the arbitral proceeding.

Parties in international cases are increasingly seeking guidance from the IBA Rules on the Taking of Evidence in International Arbitration.

Court involvement

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

The arbitration commission would forward to the court when a party requests for interim preservation measures pursuant to the Arbitration Law (article 28).

The court will also intervene if a party challenges the validity of the arbitration agreement at the court before the first hearing of the arbitration.

Except the above, the court would not intervene in the arbitral proceeding, until the proceeding for the setting-aside or enforcement of the award (article 58).

Confidentiality

31 | Is confidentiality ensured?

Yes. The Arbitration Law provides that the hearing shall not be conducted in public. And institutional rules wouldusually provide for the duty of confidentiality of the participants of the arbitration, with varying details.

However, confidentiality is far from 'ensured', because information disclosed in the setting-aside or enforcement proceedings may be publicised if reflected in the court ruling, and the damage caused by a violation is hard to ascertain.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Preservation of property, preservation of evidence and preservation of act may be ordered by the court to support arbitration, parallel or in cases of urgency prior to the arbitration proceeding.

The traditional notion is that only the courts have the power to order interim measures, but from a practical point of view the tribunal may issue orders restraining the parties, demanding production of evidence and so on, though without execution power enjoyed by the state courts.

Interim measures by an emergency arbitrator

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

The Arbitration Law is silent on the emergency arbitrator. The current rules of CIETAC, BAC, SHIAC, SCIA all provide for a set of rules on emergency arbitrator.

Interim measures by the arbitral tribunal

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

Though under the Arbitration Law the power to order interim 'preservation' measures rests on the pertinent court, the arbitral tribunal may nevertheless issue procedural orders and orders related to the status quo, evidence, act and so on.

There is no known case of security for costs ordered by an arbitral tribunal or a court, and there is no expressed guidance in the Arbitration

Law or arbitration institution rules. The common view in mainland China is that parties should be entitled to their day in the court, and security for costs is likely to be regarded as an unreasonable burden.

Sanctioning powers of the arbitral tribunal

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

There is no such sanction provided pursuant to the Arbitration Law. Different arbitration institution rules, however, would usually adopt the cost allocation as a mean to sanction the parties who use 'guerrilla tactics' in an arbitration (CIETAC article 52 and BAC article 52). There are no express rules that the counsel may be subject to sanctions by the arbitral tribunal or domestic arbitral institutions.

AWARDS

Decisions by the arbitral tribunal

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

According to the Arbitration Law, an award shall be made based on the opinion of the majority of arbitrators. If the tribunal fails to form a majority decision, the award shall be given in accordance with the opinion of the presiding arbitrator (article 53).

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

The dissenting arbitrator may issue a dissenting opinion that will enter into the record, but it would not constitute a part of the award (article 53).

Form and content requirements

38 | What form and content requirements exist for an award?

Unless otherwise agreed by the parties, an award shall include the arbitration claims, the matters in dispute, the grounds upon which an award is given, the results of the judgment, the responsibility for the arbitration fees and the date of the award (article 54).

Time limit for award

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

The Arbitration Law is silent on the time limit for award and the arbitral institutions have their respective rules on this.

Taking the China International Economic and Trade Arbitration Commission (CIETAC) as an example, an award shall be rendered six months from the constitution of the arbitral tribunal for an ordinary procedure (CIETAC article 48), and three months from the constitution of the arbitral tribunal for a summary procedure (CIETAC article 62). The time limit could be extended if necessary for the tribunal to discharge their mandate, and in practice are usually extended, and such extension does not require the parties' consent.

Date of award

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

An award shall become legally binding on the date it is rendered (article 57). The parties may, within 30 days of the receipt of the award, request the arbitral tribunal to correct any typographical errors, calculation errors or matters that had been awarded but omitted in the award (article 56). And an application for setting aside the award shall be submitted within six months after receipt of the award (article 59).

Types of awards

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

Pursuant to the Arbitration Law, the possible types of awards includes the following: final awards, partial awards, interim awards, and consent order or award (articles 55, 54 and 51). The arbitral tribunal may grant declaratory relief, specific performance, permanent injunctions or monetary compensation.

Termination of proceedings

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

Other than concluded with an award, an arbitral proceeding could also be terminated due to the lack of jurisdiction, the withdrawal of the claims and counterclaims, or in the case that the claims and counterclaims are deemed as withdrawn if the applicant fails to appear without due cause (article 42).

Cost allocation and recovery

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

The Arbitration Law is silent on cost allocation. Different arbitral institutions have provided their respective rules in this regard.

For example, CIETAC and BAC provide that, unless otherwise agreed by the parties, the costs following the event rule shall apply, and the arbitral tribunal has broad discretion to decide the exact ratio and amount on a case-by-case base after taking into consideration the relevant circumstance in a given case (CIETAC article 52, BAC article 52).

The costs, which are recoverable, are relatively broad, that is, an arbitral tribunal would order all the reasonable costs incurred in the arbitral proceeding (CIETAC article 52, BAC article 52).

Interest

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

Unless otherwise agreed by the parties, interest would be awarded for the principal claims, and the exact rate would be determined pursuant to the applicable substantive law.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Pursuant to the Arbitration Law, the parties may, within 30 days of the receipt of the award, request the arbitral tribunal to correct any

typographical errors, calculation errors or matters that had been awarded but omitted in the award, and the arbitral tribunal also could correct on its own initiative in due course (article 56). The mechanisms are also provided for and detailed in institutional rules.

Both the Arbitration Law and the rules of arbitral institution are silent on the interpretation of an award.

Challenge of awards

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

The grounds for setting-aside or non-enforcement of awards vary with the type of the award.

For a purely domestic arbitration, the award may be set aside on the following grounds (article 58), upon a party's request:

- there is no arbitration agreement between the parties;
- the matters of the award are beyond the extent of the arbitration agreement or are not arbitrable;
- the composition of the arbitral tribunal is in contrary to due process;
- the evidence on which the award is based is falsified;
- the other party has concealed evidence which is sufficient to affect the fairness of the outcome; or
- the arbitrator has demanded or accepted bribes, committed graft or perverted the law in making the arbitral award.

For a foreign-related arbitration, the award may be set aside on the following grounds (article 70, which refers to article 274 of the Civil Procedure Law):

- there is no arbitration agreement between the parties;
- the respondent was not duly notified to appoint an arbitrator or to take part in the arbitral proceedings or the respondent was unable to present his or her opinions for reasons for which he or she is not responsible;
- the composition of the arbitral tribunal or the arbitral procedure was not in conformity with the rules of arbitration; or
- matters decided in the award exceed the scope of the arbitration agreement or are not arbitrable.

The court may, on its own initiative, set aside an award that is in violation of public interests.

Levels of appeal

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

The arbitral award is final and binding and there is no appeal for an award; however, the award could be set aside before a competent court, or enforcement may be denied. For granting setting-aside or non-enforcement, the competent court shall report to the Higher People's Court for an approval and in foreign related cases to the Supreme People's Court. No further costs could be incurred by such reporting system.

The application fee for setting aside an award is just nominal, and such fee shall be borne by the losing party.

Recognition and enforcement

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

Enforcement of the award may be refused based on the same grounds for setting aside (article 63 of Arbitration Law; article 274 of the Civil Procedure Law).

For a foreign award, recognition and enforcement could only be refused pursuant to article V of the 1958 New York Convention, or due to statute of limitation, which is two years for enforcement actions.

The application of recognition and enforcement of an award shall be made directly to the competent Intermediate People's Court. In general, Chinese court appears to be arbitration-friendly in the past few years, and the rate of recognition and enforcement of convention awards is around 85 per cent.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The limitation period for the enforcement of an arbitral award is two years, and such period starts from the last day of the performance provided in the arbitral award (Civil Procedural Law, article 239).

Enforcement of foreign awards

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

It has not been tested before.

Enforcement of orders by emergency arbitrators

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

No. The Arbitration Law is silent on emergency arbitration. Currently the orders made by emergency arbitrators are not enforceable in China.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

No enforcement fee is charged against the applicant; the fees will be levied upon the obligor under the award.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Civil law tradition and culture still dominates arbitration seated in mainland China, though arbitration proceedings are largely adversarial mixed with some inquisitorial features. Therefore, memorial style is more commonly used in legal submissions, production of documents is only ordered in a narrow and specific fashion, documentary evidence is more relied on than witness statements, and examination of witnesses is usually very short in hearings.

Professional or ethical rules

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

There are several professional and ethical rules applicable to Chinese lawyers, with a few special provisions regulating arbitration related activities, such as conflict of interest arising out of arbitrator appointment or arbitration representation, prohibition of ex parte communication with arbitrators and so on. There is known inconsistency with the IBA Guidelines on Party Representation in International Arbitration.

Arbitral institutions have their respective professional codes of conduct for arbitrators.

Third-party funding

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

There are no expressed rules on third-party funding of arbitral claims in China, which are not prohibited.

Regulation of activities

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

The most important things to watch are:

- legal privilege is not expressly provided for and thus is still an issue of dispute; the conflict of law rules on privilege is also not clear;
- foreign practitioners are allowed to practise before an arbitral tribunal in China, however, they may not practise Chinese law or give opinions on Chinese law; and
- arbitrators may be subject to criminal liabilities for rendering awards intentionally in violation of the law or against the facts.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Hot topics in arbitration

The currently effective Arbitration Law was first promulgated in 1994 and revised in 2009 and 2017. On 30 July 2021, the Ministry of Justice of the PRC issued a draft amendment to the Arbitration Law for public comments (the Draft Amendment), which may change the landscape of arbitration in China. The key proposed changes are as follows:

- The Draft Amendment recognises the concept of seatof arbitration and established a supervisory regime pillared on the concept instead of on the place of the administering arbitration organisation.
- The Draft Amendment enlarges the scope of arbitrable matters, no longer requiring the arbitrants to be 'subjects of equal status' so as to open the gate for investor-state arbitration and sports arbitration.
- The Draft Amendment permits parties to refer to ad hoc arbitration seated in China for the first time, though limited to foreign-related commercial disputes.
- The Draft Amendment adopts the doctrine of competence-competence and goes further. Any challenge to a tribunal's jurisdiction must be submitted to the tribunal itself first, and any jurisdictional challenge submitted to a court without first being decided by an arbitral tribunal would not be considered.
- The Draft Amendment empowers arbitral tribunals to grant interim relief, the scope of which is extended from preservation of property and evidence to other types of interim measures. Parties are also allowed to appoint emergency arbitrators.
- With respect to judicial review of arbitration, the Draft Amendment further unifies the standard of judicial review for domestic and foreign-related arbitration, shortens the limitation of time for setting-aside application, and removes the 'non-enforcement' device under which the losing party may resist the enforcement of arbitral award without seeking setting-off.

The Draft Amendment is expected to be sent to the Standing Committee of the National People's Congress for voting within 2022.

Investment treaties and investment arbitration

There are three pending cases before ICSID in which China is the respondent.

No.	Date Registered	Case	Instrument invoked	Applicable rules	Status of proceeding
1	29 June 2020	*Macro Trading Co Ltd v People's Republic of China*(ICSID Case No. ARB/20/22)	BIT China–Japan 1988	ICSID Convention - Arbitration Rules	Pending

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No.	Date Registered	Case	Instrument invoked	Applicable rules	Status of proceeding
2	16 September 2020	*Goh Chin Soon v People's Republic of China* (ICSID Case No. ARB/20/34)	BIT Singapore–China 1985	ICSID Convention - Arbitration Rules	Pending
3	21 June 2017	*Hela Schwarz GmbH v People's Republic of China* (ICSID Case No. ARB/17/19)	BIT China–Germany 2003	ICSID Convention - Arbitration Rules	Pending

There are also ad hoc arbitration proceedings to which China is a party.

France

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

France has been a signatory to the New York Convention since 20 November 1958. This Convention has been in force since 26 June 1959.

In accordance with its article I§3, France declared that it will apply the Convention on the basis of reciprocity, for the recognition and enforcement of awards made only in the territory of another contracting state. Referring to its article X§1-2, France declared that the application of the Convention will extend to all the territories of France.

France is also a contracting party to:

- the Geneva Protocol on the enforcement of arbitration clauses of 1923;
- the Geneva Convention of 21 April 1961 on international arbitration;
- the Washington Convention of 1965 on the settlement of investment disputes between states and nationals of other states;
- the Energy Charter Treaty; and
- the European Convention on international commercial arbitration.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

There are 86 bilateral investment treaties (BIT) currently in force between France and other countries (among the 115 signed treaties in total, 22 being terminated and seven signed but not in force).

On 28 August 2021, the Agreement for the Termination of Bilateral Investment Treaties Between the Member States, signed on 5 May 2020 by 23 member states of the European Union, including France, entered into force. This followed the decision of the Court of Justice of the European Union dated 6 March 2018 in Case C-284/16 *Slowakische Republic v Achmea BV*, which ruled that arbitration clauses in intra-EU BITs deprive EU courts of their jurisdiction and are therefore inconsistent with EU law. As a result, 12 BITs between France and other EU member states were terminated (namely those with Bulgaria, Croatia, Hungary, Estonia, Latvia, Lithuania, Malta, Poland, the Czech Republic, Romania, Slovakia and Slovenia). The Agreement also includes provisions related to pending arbitrations initiated on the basis of intra-EU BITs, which cannot be used anymore for new litigations.

Domestic arbitration law

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

The French domestic sources of law for both domestic and international arbitration, including rules relating to the arbitration agreement, arbitral proceedings and the recognition and enforcement of awards, are the French Civil Procedure Code (CPC) and the French Civil Code (CC). The relevant provisions can be found respectively, for domestic and international arbitration, under articles 1442 to 1503 and articles 1504 to 1527 CPC. Under article 1506 CPC, and unless agreed otherwise by the parties to the arbitration agreement, several provisions of domestic arbitration also apply to international arbitration. In addition, articles 2059 to 2061 CC set out certain rules regarding the arbitration agreement.

Article 1504 CPC provides that 'An arbitration that triggers the interests of international commerce is international'. Under case law, this definition is to be understood from a purely economic point of view and means that the arbitration will be considered international if it involves a commercial transaction between the economy of more than one country (eg, Paris Court of Appeal, 10 May 2007). The parties cannot decide on the domestic or international nature of the arbitration.

Domestic arbitration and UNCITRAL

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

French arbitration law is not based on the UNCITRAL Model Law, but it is friendlier towards arbitration.

Major differences between them can be found, for instance (1) in the definition of international arbitration as opposed to domestic arbitration, (2) the procedure of recusation, (3) the power of the arbitral tribunal to apply the law which it deems the most appropriate as opposed to the mandatory application of rules of conflict and (4) recognition of foreign arbitral awards.

Mandatory provisions

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

Domestic procedural arbitration law contains the following mandatory rules from which parties may not deviate:

- the parties' equality and due process (article 1510 CPC);
- the parties' right to apply for provisional measures in expedite proceedings before state courts before the arbitral tribunal is constituted (article 1449 section 2 CPC);
- the arbitrators' lack of power to grant attachment of assets or judicial securities (article 1449 CPC);

- the parties' right to refer to a state court 'supporting judge' (article 1460 CPC);
- the parties' right to apply for the production of documents held by a third party before the president of the first instance civil court (article 1469 CPC);
- the possibility, under specific conditions, to initiate a recourse for revision (article 1502 CPC); and
- no opposition proceedings against the award by a third party or petition before the *Cour de Cassation* (ie, the French Civil Supreme Court) (article 1503 CPC).

Substantive law

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

Under article 1511 CPC, the law applicable to the merits of the dispute is, as a general rule, the rules of law freely chosen by parties, or in the absence of such choice, the rules of law considered to be appropriate by the arbitral tribunal. This means that the arbitral tribunal does not have to apply the conflict of law rules of a specific national law.

French case law applies a broad interpretation of the notion of rules of law. It can be the lex mercatoria (*Cour de Cassation*, 22 October 1991, *Compania Valencia de Cementos Portland*). In any case, arbitrators shall consider trade customs.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The International Court of Arbitration of the International Chamber of Commerce

The most prominent institution in France is the International Court of Arbitration of the International Chamber of Commerce (ICC), established in 1923 and located at 33–43 avenue du Président Wilson, 75116 Paris (https://iccwbo.org/dispute-resolution-services/arbitration/). Obviously, the ICC Court of arbitration is an international institution, not a French domestic institution. The ICC Court of arbitration is generally considered as the leading arbitration institution at the international level.

The Centre de Médiation et d'Arbitrage de Paris

The Centre de Médiation et d'Arbitrage de la Chambre de Commerce et d'Industrie de Paris (CMAP) is located at 39 Avenue Franklin D. Roosevelt, 75008 Paris. It has been established in 1995 by the Paris Chamber of Commerce (https://www.cmap.fr/?lang=en). A new version of the CMAP Arbitration Rules has recently been adopted and entered into force on 1 January 2022. It must be noted that the CMAP has adopted Rules of Adjudication, also revised as from 1 January 2022, and that unless otherwise expressly specified, adherence to the CMAP Arbitration Rules implies adherence to these Rules of Adjudication.

Members of the arbitral tribunal are appointed by the CMAP Arbitration Committee, upon proposals from the parties or, for the chairman of the arbitral tribunal if composed of several arbitrators, by the arbitrators proposed by the parties once confirmed by CMAP Arbitration Committee.

Unless otherwise agreed by the parties, the seat of arbitration shall be in Paris. The fees and administrative charges are determined through a schedule based on the value of the dispute, the limits of which may not be exceeded unless otherwise expressly agreed by the parties.

The Association Française d'Arbitrage

The Association Française d'Arbitrage (AFA) is located at 8 Avenue Bertie Albrecht, 75008 Paris (www.afa-arbitrage.com/?lang=en).

Under its arbitral rules (article 6§6), there is no imposed list of arbitrators, but the appointed arbitrators must be current members of the AFA before he or she assumes his or her functions (to be covered by the insurance policy subscribed by the AFA). There is no restriction regarding the seat and language of the arbitration or the law applicable to the merits. The arbitrators fees are calculated on the basis of the amount of the dispute.

The Chambre arbitrale internationale de Paris

The Chambre arbitrale internationale de Paris (CAIP) was created in 1926 and is located at 6 Avenue Pierre 1 de Serbie, 75116 Paris (http://www.arbitrage.org/en/). The CAIP Rules of Arbitration were revised in 2020 and their new version entered into force on 1 January 2021.

While the CAIP offers a list of arbitrators specialised in different areas, the parties are entitled to nominate an arbitrator that is not on the CAIP's list. Unless otherwise agreed between the parties, the arbitral tribunal is composed of three members: (1) each party appointing a co-arbitrator and the chairman being always appointed by the President of the CAIP's Court, when there is only one respondent, and (2) all members of the arbitral tribunal being appointed by the President of the CAIP's Court, when there are more than two parties involved.

Unless otherwise agreed by the parties, the seat of the arbitration shall be Paris. The language of the arbitration proceedings that can be chosen by the parties is limited to French, English and Spanish (article 18.2). There is no restriction regarding the choice of rules of law applicable to the merits.

One particularity of that institution is the possibility for the parties to expressly opt to have a second-degree review of the arbitral award (the conduct of such second-degree proceedings is governed by Appendix II of the CAIP Rules of Arbitration).

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Under article 2060 of the French Civil Code (CC), certain subject matters are not arbitrable in France. This is the case for matters relating to personal status (capacity, marriage, divorce, etc), disputes relating to public bodies or administrations (except for the industrial and commercial activity of such public bodies if expressly authorised by decree) or matters relating to the violation of public order.

Intellectual property disputes are arbitrable except for disputes relating to the issuance and annulment of a patent that relate to the exclusive jurisdiction of national courts (article L.615-17 of the French IP Code).

Disputes involving matters relating to antitrust and competition law are arbitrable on all civil law aspects and consequences. However, arbitral tribunal are not allowed to pronounce injunctions or sanctions that fall within the exclusive power of the relevant public authority.

Intra-company disputes are also arbitrable unless prohibited by the company's by-laws.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Under French law, for international arbitration, the arbitration agreement's validity is not subject to any formal requirement (article 1507 French Civil Procedure Code (CPC)). Therefore, the agreement does not need to be made in writing. French courts only consider the 'common intent of the parties' (*Cour de Cassation*, 20 December 1993, Dalico, 5 January 1999, Zanzi). The arbitration agreement can be inserted in a document distinct from the main contract, for example, in general terms

and conditions. However, in this case and in the absence of reference in the main contract, the validity of the arbitration agreement is subject to (1) the parties' knowledge of the content of such distinct document (which can be established by previous and regular business relationships); and (2) the parties' consent – even by silence – for incorporating this distinct document in the contractual relationships (*Cour de Cassation*, 9 November 1993, No 91-15.194; *Cour de Cassation*, 11 October 1989, No 87-15.094; *Cour de Cassation*, 9 November 2016, No 15-25.554).

For matters relating to domestic arbitration, the arbitration agreement needs to be made in writing and signed by each party. This agreement can be made by signing a document that refers to other documents, which includes the arbitration clause (article 1443 CPC).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

Arbitration agreements are materially separable from the underlying contract. Thus, any modification (annulment, termination, limitation, etc) affecting the latter does not impact the arbitration clause (article 1447 CPC). However, if the cause of annulment is with the arbitration clause itself, it cannot be enforced.

The parties can renounce the arbitration agreement explicitly or implicitly. This can happen in the case of interdependent contracts where the latter contract provides for jurisdiction of state courts, or when one party initiates state court litigation on the merits and the other party does not challenge the jurisdiction of the state court.

In the case of insolvency, the principles of creditors' equality and suspension of individual claims are part of French public international order (*Cour de Cassation*, 7 January 1992, No. 89-18.708). Therefore, state courts hold, to a certain extent, exclusive jurisdiction. The arbitration clause agreed before the insolvency remains valid and binding on the relevant party, but, until the end of the insolvency proceedings, the power of the arbitrators will not encompass the possibility to condemn the insolvent party to pay an amount of money to the other party. It may, however, rule on the case and liquidate the amount of the claim.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Arbitration agreements are materially and legally separable from the main agreement.

Material separability means that inefficiency of the agreement containing the arbitration clause does not affect the validity of that arbitration clause (article 1447 CPC).

Legal separability means that the law applicable to the agreement containing the arbitration clause is not necessarily the law applicable to that clause (*Cour de Cassation*, 5 January 1999, *Zanzi*; 20 December 1993, Dalico).

Third parties – bound by arbitration agreement

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

As a general rule, under French law, a party can only be bound by an arbitration agreement if it has given consent (article 2061 CC).

However, in the case of assignment of contract, the assignee is bound by all its assignor's obligations, including those arising out from an arbitration clause, even without its previous acknowledgement (*Cour de Cassation*, 5 January 1999) and even if the assignment contract is flawed (separability). The assignment of the arbitration clause does not work, however, if the arbitration agreement was *intuitu personae* (ie, provided for in consideration of the identity of the initial parties to the agreement) (*Cour de Cassation*, 28 May 2002, No. 00-12.144, *Cimat*).

In addition, French case law holds that if a third party got involved in the performance of the main agreement while knowing about the existence of the arbitration clause, this third party must be bound by that clause (Paris Court of Appeal, 26 February 2013). The same rule applies in the event of co-dependency between several contracts with one containing an arbitration clause.

In the case of agency, a party is bound by the arbitration clause signed by its agent (*Cour de Cassation*, 11 July 2006, No. 05-18.681).

In the case of insolvency, the liquidator is bound by the arbitration clause if agreed before the insolvency (*Cour de Cassation*, 1 April 2015, No. 14-14.552).

Third parties – participation

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

There are no provisions under French law as to third-party participation in arbitration. The parties' intention is the main criteria to join independent arbitration proceedings.

Groups of companies

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

Yes, this type of extension is accepted in case law (ICC Award, 21 October 1983, *Dow Chemical* followed by subsequent French case law: Paris Court of Appeal, 31 October 1989, *Kis France v Société Générale*).

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

French law does not prohibit multiparty arbitration agreements and does not provide for any special requirement in relation thereto (article 1507 CPC). Multiparty arbitration is governed by the same principles of equality between the parties and of due process (article 1510 CPC).

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

There is no specific provision under French law regarding the power of the arbitral tribunal to join separate arbitral proceedings. Such matters will be subject to the parties' agreement or governed by the rules of the appointed arbitral institution (if any).

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

The only restriction as to the capacity of an arbitrator is set out under article 1450 of the French Civil Procedure Code (CPC): the arbitrator

must be a physical person capable of exercising all his or her rights. Several categories of person (civil servants and, more specifically, professors) can act as an arbitrator under specific conditions.

Judges cannot be arbitrators (Law No. 2001-530 dated 25 June 2001), nor can bailiffs (article 20 of Decree No. 56-222, 29 July 1956, article 20). Retired judges can be arbitrators.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

The legal community holds a predominant part in the community of arbitrators sitting in France. This obviously involves practising lawyers, law professors, in-house counsels and retired judges. Paris being a significant seat for international arbitration, the parties may easily find experts from different nationalities, legal backgrounds and cultures.

Obviously, people from other backgrounds may also often seat as arbitrators and bring their professional knowledge to the arbitral panel.

Default appointment of arbitrators

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

French law provides that, where the parties cannot agree on the appointment of a sole arbitrator, the appointment is to be made by the competent arbitral institution. Failing which, the 'supporting judge' (ie, the president of the first instance civil court) is competent to do so. Similarly, where the parties cannot agree on the appointment of a tribunal with three arbitrators, each party shall appoint one arbitrator, then those co-arbitrators will appoint the president within one month from the appointment of the second arbitrator. Exceeding this delay, the 'supporting judge' appoints the co-arbitrator for the failing party within expedited proceedings (article 1452 CPC).

The ICC Rules provide for a default mechanism for the appointment of arbitrators, respectively where the parties did not agree on the number of arbitrators (article 12.2), where the parties agreed on the appointment of a sole arbitrator (article 12.3), and when the parties agreed on an arbitral tribunal with three arbitrators (article 12.4 et seq.).

The arbitration rules of the Association Française d'Arbitrage (article 6), of the Chambre Arbitrale Internationale de Paris (article 11) and of the Centre de Médiation et d'Arbitrage de la Chambre de Commerce et d'Industrie de Paris (article 17) provide for similar mechanisms.

Challenge and replacement of arbitrators

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

The grounds for challenge are the lack of independence or impartiality of the arbitrator.

French law provides for a duty on the arbitrator to proactively reveal, before accepting his or her mission, all circumstances that are likely to affect his or her independency or impartiality. This duty remains after his or her appointment and until the end of the arbitration proceedings (article 1456 CPC applicable for both domestic and international arbitration).

If one of the arbitrators breaches this duty to reveal the relevant information, the sanction is the annulment of the award.

An arbitrator can be challenged if there is a reasonable doubt as to his or her independence and impartiality before the competent arbitral institution, failing which, before the 'supporting judge' within one month following the disclosure or discovery of the relevant facts (article 1456 CPC). The matter is to be ruled through expedite proceedings and the order of the supporting judge is not appealable (article 1460 CPC).

In the case of impediment, abstention or resignation of an arbitrator, article 1457 CPC provides that the parties will be entitled to refer any dispute either to the competent arbitral institution or, failing which, the 'supporting judge' within one month from the occurrence of the situation. There must be a legitimate cause, otherwise the principle is that the arbitrator must pursue his or her mission until completion.

The arbitration proceedings are suspended until the arbitrator is replaced (article 1473 CPC, applicable to domestic arbitration but the same solution should apply to international arbitration as well).

Practitioners refer to the IBA Guidelines on Conflicts of Interest in International Arbitration among other sources and guidelines.

Relationship between parties and arbitrators

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

The relationship between the parties and each arbitrator is of contractual nature, and its conclusion is not subject to formal requirement. The acceptance of the mission by the arbitrator is sufficient.

The arbitrators' main obligations are to disclose any matters of potential concern relating to their independence and impartiality, to perform their obligations until the end of the proceedings, to render the award within the relevant time constraints, and to apply the principle of equality between the parties and due process. It is implied by article 1456 CPC that all arbitrators shall remain neutral (whether party-appointed or not).

The arbitrators' remuneration and expenses are usually governed by the provisions of the terms of reference or, in institutional arbitration, by the institution's rules. Disputes regarding the arbitrators' remuneration will be referred to the ordinary judge having jurisdiction for contractual disputes

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Under article 1456 CPC, arbitrators, shall disclose any fact and circumstance that may affect their independence or impartiality in the mind of the parties, prior to accepting their mission. This duty is extensive and encompasses, for instance:

- the fact that the arbitrator has business relations with the parties or the parties' counsel (Paris Court of Appeal, 9 September 2020, SGS) or with companies of the same group as one of the parties;
- the fact that the arbitrator is related to one of the parties, one parties' counsel or expert;
- the existence of a common interest between the arbitrator and one of the parties; and
- the fact that an arbitrator has been appointed multiple times by one party or its counsel in previous cases.

Immunity of arbitrators from liability

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

Under article 1465 CPC, the principle of *Kompetenz-Kompetenz* is applicable under French law. Therefore, the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.

Should a legal action be brought before a state court despite an existing arbitration agreement, the judge must decline jurisdiction in

favour of the arbitral tribunal. However, a jurisdictional objection must be raised by one of the parties and a judge cannot decline jurisdiction on its own motion (Paris Court of Appeal, 12 March 2013, *Beten*). The objection has to be raised before the judge renders a decision on the merits, otherwise, the parties are considered to have renounced their arbitration agreement (Paris Court of Appeal, 12 June 2012, *Commisimpex*) irrevocably (*Cour de Cassation*, 20 April 2017, No. 16-11,413).

In the case of jurisdictional challenge, the state court may only retain jurisdiction if the arbitral tribunal is not yet constituted and the arbitration clause is manifestly void or manifestly inapplicable, which does not allow the judge to substantially examine that clause (article 1448 CPC).

The above rules apply to both domestic and international arbitration.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

Under article 1465 of the French Civil Procedure Code (CPC), the principle of *Kompetenz-Kompetenz* is applicable under French law. Therefore, the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.

Should a legal action be brought before a state court despite an existing arbitration agreement, the judge must decline jurisdiction in favour of the arbitral tribunal. However, a jurisdictional objection must be raised by one of the parties and a judge cannot decline jurisdiction on its own motion (Paris Court of Appeal, 12 March 2013, *Beten*). The objection has to be raised before the judge renders a decision on the merits, otherwise, the parties are considered to have renounced their arbitration agreement (Paris Court of Appeal, 12 June 2012, *Commisimpex*) irrevocably (*Cour de Cassation*, 20 April 2017, No. 16-11,413).

In the case of jurisdictional challenge, the state court may only retain jurisdiction if both the arbitral tribunal is not yet constituted and the arbitration clause is manifestly void or manifestly inapplicable, which does not allow the judge to substantially examine that clause (article 1448 CPC).

The above rules apply to both domestic and international arbitration.

Jurisdiction of arbitral tribunal

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

Under articles 1448 and 1465 CPC, the principle of *Kompetenz-Kompetenz* is applicable before French state courts. Once a dispute has already been submitted to an arbitral tribunal, that is all members of the tribunal have accepted their mission (article 1456 CPC), a state court must decline its jurisdiction in favour of the arbitral tribunal.

The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction. French law does not provide for a specific time limit to raise jurisdictional objections before the arbitral tribunal. However, a party who engages itself in the arbitral proceedings and fails to challenge in due time the arbitral tribunal's jurisdiction, without legitimate reason, is deemed to have renounced the raising of the challenge (article 1466 CPC).

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

French law does not provide for a default mechanism to determine the place and language of arbitration. Therefore, in the absence of prior agreement of the parties, this should be determined by the arbitral tribunal, in accordance with the rules of the appointed arbitral institution if applicable.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Under article 1462 of the French Civil Procedure Code (CPC), the dispute is submitted to the arbitral tribunal, either jointly by the parties, or by one of the parties. The arbitral proceedings are usually initiated by the submission of a request for arbitration; however, the CPC does not specify formal requirements in this regard.

The rules of the main French arbitral institutions provide for the following requirements:

- Under article 2, section 1 of the Association Française d'Arbitrage's (AFA's) rules of arbitration, the arbitral proceedings are initiated by a request for arbitration, which must include: 'the parties' names, descriptions and addresses, a brief summary of the facts, the subject matter of the request, the claimant's proposal as to the number of arbitrators (and where there is more than one arbitrator, the claimant's nominated arbitrator), the arbitration agreement, and where relevant, the details of any agreement between the parties concerning the conduct of the arbitration'.
- Under article 4.1 of the Centre de Médiation et d'Arbitrage de la Chambre de Commerce et d'Industrie de Paris's (CMAP's) rules, the request for arbitration must include the parties' and their counsels' name, registered address and email address, a brief presentation of the subject matter of the dispute and of the relief sought, all relevant agreements and, when the parties have agreed for a tribunal composed of three arbitrators, the indication of the arbitrator who the claimant intends to nominate. The request must be submitted by registered letter with acknowledgement of receipt, in as many copies as the number of defendants, plus one copy for the CMAP.
- Under article 5.3 of the Chambre arbitrale internationale de Paris's (CAIP's) rules, the request for arbitration must contain:
  - the names, postal addresses and, to the extent possible, electronic contact details of each of the parties and, where applicable, their respective representatives and lawyers; and
  - a summary statement of the facts in dispute, the measures requested and, as far as possible, a quantified estimate of the claims, as well as the arbitration agreement.

Hearing

28 | Is a hearing required and what rules apply?

French law does not require that a hearing must be held, nor contains provisions regarding the conduct of a hearing. Nor do the AFA's and CMAP's rules of arbitration. As for CAIP, article 23 of its rules sets forth specific requirements regarding the holding and conduct of hearings.

Evidence

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

Under article 1467 CPC, the arbitral tribunal proceeds with the investigatory measures unless the parties agree to instruct one of its members for this purpose. The arbitral tribunal may hear any person as witness or expert, the examination of which is carried out without oath-taking. If a party holds a piece of evidence, the arbitral tribunal may order its production, under penalty if deemed necessary, and determine the conditions for such production.

French practitioners often refer to the Rules on the Taking of Evidence in International Arbitration.

If the arbitration has not yet started, French practitioners would also often seek the appointment of an expert by the state courts (article 1449 CPC). If so, the court-appointed-expert prepares a report on the technical aspects of the case, from an independent and impartial point of view. The parties may then arbitrate based on this report.

Court involvement

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

Domestic courts may provide their assistance or intervene in several instances and, in particular:

- prior to the constitution of the arbitral tribunal, to order investigatory, provisional or conservatory measures (article 1449 CPC);
- for the constitution of the arbitral tribunal, to appoint an arbitrator failing the agreement of the parties, to rule on a challenge raised against an arbitrator (article 1451 et seq CPC); and
- during the arbitral proceedings, to extend the delay to issue the award failing an agreement of the parties (article 1463 CPC), to order the production of evidence (article 1469 CPC).

Confidentiality

31 | Is confidentiality ensured?

Article 1464 CPC provides that the arbitral proceedings are subject to a principle of confidentiality, unless the parties agree otherwise and subject to legal impediments. Confidentiality covers the existence of the proceedings, the documents exchanged between the parties and the award. This provision applies only to domestic arbitration and there is no similar rule for international arbitration.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Before the arbitral tribunal has been constituted, domestic courts may order investigatory measures and, in a situation of urgency, provisional or conservatory measures (article 1449 of the French Civil Procedure Code (CPC)). After the constitution of the arbitral tribunal, domestic courts may only order conservatory attachment and judicial securities, as the arbitral tribunal lacks the power to do so (article 1468 CPC).

Interim measures by an emergency arbitrator

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

French law does not provide for an emergency arbitrator. The rules of the main French arbitral institutions provide for the possibility to appoint an emergency arbitrator prior to the constitution of the arbitral tribunal and include specific rules in this regard.

Interim measures by the arbitral tribunal

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

The arbitral tribunal may order the parties to perform any conservatory or provisional measures that it considers appropriate, in conditions it determines and, if deemed necessary, subject to penalty. It may also modify or complete a conservatory or provisional measure previously ordered (article 1468 CPC).

French law does not set forth specific provisions regarding the arbitral tribunal's possibility to order security for costs.

Sanctioning powers of the arbitral tribunal

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

Whereas there is no specific provision in this regard, the arbitral tribunal may sanction 'guerrilla tactics' through the use of their general powers regarding the conduct of the proceedings and through the allocation of costs. French counsels can be subject to disciplinary sanctions by the Bar Association before which they are registered.

AWARDS

Decisions by the arbitral tribunal

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

Unless specified otherwise under the arbitration agreement, the decision is made by a majority of arbitrators. If a minority of the arbitrators refuses to sign the award, such refusal is mentioned in the award (articles 1480 and 1513 of the French Civil Procedure Code (CPC)). Further, in international arbitration, failing a majority to make a ruling, the president of the arbitral tribunal will rule alone. In such cases where there is no unanimity, the award will have the same effects as if it was signed by all arbitrators or rendered by a majority of the arbitrators.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

There is no specific provision under French law dealing with dissenting opinions, which would not be considered to be part of the award to which they relate.

Form and content requirements

38 | What form and content requirements exist for an award?

The award must be signed by the arbitral tribunal and specify: (1) the personal name or corporate name of the parties as well as the address of their domicile or registered office; (2) if applicable, the name of the parties' counsel or any person who represented or assisted the parties in the arbitration; (3) the name of the arbitrators; (4) the date of the award and (5) the place where the award has been rendered (articles 1480 and 1481 CPC).

In addition, the award must briefly present the respective positions and arguments of the parties and must be reasoned (article 1482 CPC).

The above requirements apply to both domestic and international arbitration (article 1506,4° CPC).

Time limit for award

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

For domestic arbitrations, French law provides for a six-month delay to render the award if the arbitration agreement does not provide for a specific time limit. This delay can be extended by agreement of the parties or by the decision of the supporting judge.

The rules of the main French arbitral institutions (Association Française d'Arbitrage (AFA), Centre de Médiation et d'Arbitrage de Paris (CMAP) and Chambre Internationale d'Arbitrage de Paris (CAIP)) also provide for a six-month delay to render the award as from the date of submission of the dispute to the arbitral tribunal, which can be extended upon request of the parties or of the arbitral tribunal.

Date of award

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

The date of notification of the award is the decisive date from which starts running the delay to challenge the award or to file a request for correction of the award.

Such notification must be delivered by a bailiff, unless the parties have expressly agreed otherwise (articles 1484 and 1519 CPC). Under case law, agreeing to the rules of an arbitral institution allowing another form of notification is not sufficient to prove that the parties have renounced to the notification by bailiff (Paris Court of Appeal, 26 May 2015, No. 15/06910).

Types of awards

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

The following types of awards can be rendered:

- a final award ruling on the whole dispute between the parties;
- a partial award, ruling on a specific aspect of the dispute with the arbitral tribunal remaining seized for the other aspects of the dispute;
- a mixed award, which, on the one hand, rules on part of the dispute and, on the other hand, orders a provisional or investigatory measure related to the remaining part of the dispute;
- an interim award, which aims at preparing the final ruling on the dispute by ordering provisional or investigatory measures;
- a default award, when one of the parties failed to appear in the proceedings; and
- a consent award acknowledging the agreement of the parties on the relevant dispute.

Termination of proceedings

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

In domestic arbitration, the proceedings can be terminated:

- with the expiry of the delay to render the award if such delay has not been extended (article 1477 CPC);
- by decision of the arbitral tribunal when, in case of suspension of the proceedings (eg, death of a party, stay of proceedings, resignation of an arbitrator) the parties failed to take the required steps to resume the arbitration (article 1474 CPC); and
- by decision of the parties, notably if they reached an agreement to settle the dispute.

Although there are no similar legal provisions for international arbitration, it is admitted that the arbitral proceedings may also be terminated by decision of the parties or upon expiry of the delay to render the award – if not extended.

Cost allocation and recovery

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

As French judges, the arbitral tribunal has full discretion regarding the allocation of the costs of the arbitration. It is generally made by following, in a proportionate manner, the result of the parties' respective claim.

There is no specific rule under French law regarding the types of recoverable costs but they generally include the administrative costs of arbitral institutions, the arbitrators' fees and expenses, the costs incurred to organise the hearing, the fees and expenses of experts appointed by the tribunal, and reasonable attorney fees.

Interest

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

Under French law, the delay to perform a payment obligation entails the application of default interests at the legal rate, as from the date of a formal notice claiming payment to the debtor (article 1231-6 CC). For the second semester of 2021, the legal rate for default interests was 0.76 per cent for professionals. When the debtor fails to comply with a judgment after two months following its notification, the legal rate is increased by 5 per cent.

Such legal default interests can be ordered under an arbitral award. The arbitral tribunal can also apply the interests applicable under the parties' contract if the rate is not excessive.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

At the request of one of the parties, the arbitral tribunal may interpret the award or correct clerical mistakes and omissions (articles 1485 2 of the French Civil Procedure Code (CPC)). The time limit for the parties to submit a request for interpretation or correction of the award is three months as from notification of the award (article 1486 CPC). These provisions apply to both domestic and international arbitration.

Challenge of awards

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

The recourse against an award must be filed before the court of appeal which has territorial jurisdiction where the award was rendered, within a one-month delay from the notification of the award (articles 1494 and 1519 CPC).

Domestic awards cannot be subject to an appeal unless agreed by the parties. They can always be subject to a recourse for annulment unless the parties have provided for the possibility of an appeal. International awards can only be subject to a recourse for annulment.

Under articles 1492 and 1520 CPC, a recourse for annulment can only be based on the following grounds:

- the arbitral tribunal wrongly declared itself competent or incompetent;
- the arbitral tribunal has been improperly constituted;
- the arbitral tribunal has ruled without complying with the mission entrusted to it;
- the principle of contradiction has not been respected;
- the recognition or enforcement of the award is contrary to (international) public order; or
- for domestic arbitration only:
    - the award is not reasoned;
    - the award does not indicate the date on which it was made or the name of the arbitrators;
    - the award does not include the required signatures; or
    - the award was not made by a majority vote.

Levels of appeal

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

There is only one level for the appeal (if applicable) and for the recourse for annulment. The decision of the court of appeal can be challenged before the *Cour de Cassation* (French Civil Supreme Court), which only has the power to ensure the proper application of the law, without the possibility to review the merits of the decision.

Proceedings before a court of appeal generally last between 18 and 24 months. Before the *Cour de Cassation*, it takes between 12 and 18 months to obtain a decision.

The procedural costs applied by the court of appeal amount to €225 and must be paid by the party who initiates the recourse. The proceedings before the *Cour de Cassation* are free.

The court has complete discretion on the allocation of costs and on the amount to be awarded as compensation for legal fees and costs. The parties are not required to file the details of their legal fees and costs and generally just mention a lump sum at the end of their written briefs.

Recognition and enforcement

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

The rules governing the recognition and enforcement of arbitral awards are set forth in articles 1487 et seq CPC for domestic awards and in articles 1514 et seq. CPC for foreign awards and international awards rendered in France.

French courts are seen as 'arbitration-friendly' and the decisions denying enforcement of awards are rare.

Regarding domestic awards

The request for recognition and enforcement of a domestic award (exequatur) must be submitted to the first instance civil court (tribunal judiciaire) which has territorial jurisdiction where the award was rendered. The proceedings are ex parte.

The requesting party must submit the original copy of the award and of the arbitration agreement, or copies in a form that ensures their authenticity. The application itself usually consists in a handwritten note on the first page of the award, and the exequatur order consists in a provision stamped on the last page of the award.

Exequatur is not granted if the award is manifestly contrary to public order. The order refusing exequatur must be reasoned and can be challenged before the court of appeal within one month after its notification.

The order granting exequatur cannot be challenged. However, initiating an appeal (if applicable) or a recourse of annulment against the award automatically entails an appeal against the exequatur order.

Regarding foreignawards and international awards rendered in France

For international awards rendered in France, the request for exequatur must be submitted to the first instance civil court which has territorial jurisdiction where the award was rendered. For foreign awards, the Paris first instance civil court has jurisdiction.

Exequatur is granted through ex parte proceedings if two conditions are fulfilled. First, the existence of the award must be established by the requesting party, which is done by filing the original copy of the award and of the arbitration agreement, or copies in a form that ensures their authenticity. If the award is not in French, a translation must be submitted. Second, the enforcement of the award shall not manifestly infringe international public order (based on a prima facie review carried out by the judicial tribunal).

The order refusing exequatur may be appealed before the court of appeal within one month from its notification.

The order granting exequatur of a foreign award can be challenged before the court of appeal within one month as from its notification. The order granting exequatur of an international award rendered in France can only be appealed within a recourse for annulment launched against the award.

The court of appeal can refuse the recognition or enforcement of the award only for the same five limited grounds that apply to a recourse for annulment:

- the arbitral tribunal wrongly declared itself competent or incompetent; or
- the arbitral tribunal has been improperly constituted;
- the arbitral tribunal has ruled without complying with the mission entrusted to it;
- the principle of contradiction has not been respected; or
- the recognition or enforcement of the award is contrary to international public order.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Regarding arbitral awards that have been recognised in France pursuant to an order for exequatur, there is a 10-year time limitation for their enforcement (articles L.111-3,2° and L.111-4 Code of Civil Enforcement Proceedings).

Enforcement of foreign awards

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

Under an established case law, French courts authorise the recognition and enforcement in France of foreign awards that have been set aside by the courts of the place of arbitration, considering that the award rendered abroad is an international award that has not been incorporated into the legal system of the State where it was rendered, so that its existence remains established despite its setting aside (Cass. Civ. 1, 23 March 1994, *Hilmarton*, No 92-15.137; see also Cass. Civ. 1, 29 June 2007, *Putribali*, No 17-19850).

Enforcement of orders by emergency arbitrators

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

There is no provision under French law, nor specific case law, regarding the enforcement of orders by emergency arbitrators.

The main French arbitration institutions, in particular the AFA (Association Française d'Arbitrage) and the CMAP (Centre de Médiation et d'Arbitrage de Paris) provide in their arbitration rules for the possibility to initiate emergency arbitration but do not include specific provisions related to the enforcement of awards rendered by emergency arbitrators.

Cost of enforcement

52 What costs are incurred in enforcing awards?

The costs to enforce an arbitral award mainly include, for the recognition of the award, the costs for translation of the award (if needed) and the attorney fees to submit the application for exequatur; and, for the enforcement itself, the bailiff's costs and attorney fees, the amount of which mostly depend on the nature of the enforcement measures that will be performed, the nature and location of the debtor's assets and the potential difficulties to identify such assets.

OTHER

Influence of legal traditions on arbitrators

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

Under applicable French civil procedural law, a party may seek for the production of documents from its opponent, or from a third party, either (1) before the dispute has been brought to trial, either inter partes through summary proceedings, or ex parte before the presiding judge of the competent court (article 145 of the French Civil Procedure Code (CPC)), or (2) during the proceedings, by requesting the judge to order the production by another party of a specific evidence (articles 132 to 142 CPC). These means for document production are very different from a common law or US-style discovery. They are notably characterised by a significant involvement of the judge to control the process. Further, there is no general obligation of disclosure before French courts.

In addition, there are specific provisions regarding the examination of the parties by the judge (articles 184 to 198 CPC), the testimonies of third parties (article 199 CPC), the submission of written statements with the possibility for the judge to examine their author (articles 200 to 202 CPC), the examination of experts (articles 245 and 283 CPC). However, these provisions related to oral or testimonial evidence are almost never used before civil and commercial courts.

The above civil law specificities may, in a certain extent, influence a French arbitrator, who might be inclined to put more weight on documentary evidence than on oral testimonies. That being said, France being historically a very pro-arbitration jurisdiction, many French arbitrators have a strong and extensive experience of international arbitration and are thus used to deal with oral evidence and witness examination.

Professional or ethical rules

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

Counsel and arbitrators in international arbitration are not subject to specific professional or ethical rules. French counsel must abide by professional and ethical rules enacted by the national bar association, as well as, when applicable, to the Code of Conduct for European Lawyers.

Best practice in France does not contradict the IBA Guidelines on Party Representation in International Arbitration.

Third-party funding

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

Under French law, third-party funding of arbitral claims is not subject to specific regulatory restrictions.

A few organisations in France have released guidelines on third-party funding but they merely constitute soft law. The International Arbitration Commission of the Paris Bar issued in February 2017 a report on third-party funding that included recommendations to lawyers with respect to ethical duties, particularly regarding the need to ensure the absence of conflict of interests, professional secrecy and confidentiality, and the independence of arbitrators and disclosure of the third-party funding.

Regulation of activities

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

Under French law and the relevant professional rules, any communication between an attorney and a client is subject to professional secrecy, as well as any communications between or among attorneys unless it is specifically indicated that the communication is considered as 'official'. The client cannot release the lawyer from his or her professional secrecy obligations.

French lawyers are not entitled to handle funds directly on behalf of their clients, including for payments of monies ordered under a judgement or an arbitral award. They must act through a centralised organisation called the Caisse Autonome de Règlement Pécuniaire des Avocats (CARPA), which is responsible for handling funds flowing between lawyers and clients to ensure control, security and transparency, notably in order to prevent money laundering.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

In the past year, two of the main prominent French arbitral institutions, the Chambre arbitrale internationale de Paris (CAIP) and the Centre de Médiation et d'Arbitrage de la Chambre de Commerce et d'Industrie de Paris (CMAP), have modified their arbitration rules.

On 1 January 2021, the revised CAIP Arbitration Rules came into force. The revision aimed at making the CAIP's Rules clearer and more efficient. Among the main innovations, the written part of the proceedings is now removed and all notifications or communications by the parties, the arbitral tribunal or the Court shall be made by electronic means, except for limited exceptions, particularly awards that are originally notified to the parties (articles 4.1 and 28.4). Oral hearings are, however, still to be held in person. The revised CAIP's Rules also provide for increased confidentiality at all steps of the arbitral proceedings (articles 2, 23.3 and 28.6), an obligation of transparency in the case of third-party funding (article 35), as well as new clauses regarding the intervention of third parties in the arbitration (article 8) and the joinder of arbitral proceedings (article 9). They also offer the possibility to initiate emergency procedures and expedited procedures.

As for the CMAP, on 1 October 2021 its general assembly approved the updated arbitration rules that entered into force on 1 January 2022. The digitalisation of the proceedings is also one of the main modifications: all communications between the parties, the tribunal and the institution can be made electronically, from the request for arbitration to the issuance of the award (articles 10.1 and 28.5). The CMAP's revised rules include specific provisions dealing with complex arbitrations, and particularly regarding third-party intervention (article 13), multipartite and multi-contract proceedings (article 14) and the joinder of proceedings (article 15). They also provide for the obligation to disclose third-party funding (article 11.11). Another noteworthy innovation is that, unless otherwise expressly specified, adherence to the CMAP Arbitration Rules now implies adherence to the Rules of Adjudication, the latter giving the possibility for the parties to obtain, before the constitution of the arbitral tribunal, an interim measure from a third-party decision-maker appointed by the CMAP (article 1.2).

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Germany is a contracting state to the New York Convention. The Convention has been in force in Germany since 28 September 1961. No declarations or notifications have been made. In addition, Germany is party to:

- the Geneva Protocol on Arbitration Clauses (1923);
- the Geneva Convention on the Execution of Foreign Arbitral Awards (1927);
- the European Convention on International Commercial Arbitration (1961);
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention 1961); and
- the Energy Charter Treaty (1994).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Germany has signed more than 130 bilateral investment treaties (BITs). 118 BITs are currently in force. 14 BITs concluded between Germany and other EU member states were terminated following the European Court of Justice's decision in *Slovak Republic v Achmea BV* and the agreement to terminate intra-EU BITs of May 2020.

Domestic arbitration law

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

The 10th book (sections 1025 to 1066) of the German Code of Civil Procedure (ZPO) contains the provisions relating to both arbitral proceedings and the recognition and enforcement of arbitral awards. Where the seat of arbitration is in Germany, irrespective of whether the arbitration is domestic or international, the proceedings will be governed by sections 1025 to 1066 of the ZPO.

Domestic arbitration and UNCITRAL

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

The German arbitration law is based on the UNCITRAL Model Law but deviates in limited aspects. For example, the law:

- allows for additional support by state courts in relation to the appointment of arbitrators (section 1025(3) ZPO);
- has more lenient formal requirements for the arbitration agreement, for example allowing for arbitration agreements to be concluded in a letter of confirmation to which the other party did not reply or object (section 1031(2) ZPO, mandatory);
- allows parties to petition to state courts to determine the admissibility of arbitral proceedings – which the courts interpret to include the validity and the scope of the arbitration agreement – prior to the constitution of the arbitral tribunal; notably, this provision does not require the arbitration to be seated in Germany (section 1032(2) ZPO, mandatory);
- offers a default rule on the allocation of costs (section 1057 ZPO); and
- stipulates that certain defences are no longer available in proceedings for a declaration of enforceability on expiration of the three-month time limit for the initiation of set-aside proceedings (section 1060(2) third sentence ZPO).

Mandatory provisions

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

Party autonomy is one of the key aspects of German arbitration law; however, there are some mandatory provisions. Most importantly:

- section 1025(1) of the ZPO provides for German arbitration law to apply where the seat of arbitration is in Germany;
- section 1030 of the ZPO stipulates the requirements of arbitrability;
- section 1031 of the ZPO provides the form requirements of an arbitration agreement;
- section 1032 of the ZPO allows parties to petition to state courts to determine the admissibility of arbitral proceedings (including validity and the scope of the arbitration agreement) prior to the constitution of the tribunal;
- section 1034(2) of the ZPO concerns the parties' right to be treated equally with regard to the constitution of the arbitral tribunal;
- section 1037(3) of the ZPO provides for a final court decision if the challenge of an arbitrator has been unsuccessful;
- section 1040(3) of the ZPO provides for a final court decision on the jurisdiction of the arbitral tribunal, where the tribunal found that it had jurisdiction;

- section 1042(1) of the ZPO stipulates that the parties must be treated equally and they must be given full opportunity to present their case; and
- section 1059 of the ZPO preserves the right to challenge an award rendered in Germany before state courts.

Substantive law

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

Section 1051(1) of the ZPO provides for the arbitral tribunal to decide the dispute in accordance with the rules of law that the parties have chosen to apply to the substance of the dispute. The parties can thus decide freely on the law applicable to the merits of the case. A choice of law is to be understood to refer directly to the substantive law of the respective state and not to its conflict of laws rules. The parties are also free to agree on a different modus for the arbitral tribunal to determine the applicable substantive law (eg, by agreeing on a set of institutional arbitration rules). In the absence of such a choice, according to subsection 2, the arbitral tribunal shall apply the law of the state with the closest connection to the subject matter of the proceedings. In contrast, article 24.2 of the German Arbitration Institute (DIS) Rules provides that the arbitral tribunal may apply the rules of law that it deems to be appropriate.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent and leading institution on domestic and international arbitration in Germany is the DIS. Since 2008, the DIS also hosts the German Court of Arbitration for Sport. The DIS revised its arbitration rules (the DIS Rules) in 2018. They do not provide for any restrictions as to the selection of arbitrators or the place or language of arbitration. The fee structure for arbitrators is based on the amount in dispute and is calculated using the annexed schedule of costs (article 34 DIS Rules). Additionally, the DIS offers specific supplementary rules for the resolution of corporate disputes.

The institution's main office is situated in Bonn. Additional offices are in Berlin and Munich.

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ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

In general, any claim involving an economic interest can be subject to an arbitration agreement. Where the arbitration agreement concerns claims that do not involve an economic interest (eg, in cases where criminal law and matters of family law are concerned), the arbitration agreement has legal effect only to the extent that the parties are entitled to conclude a settlement on the issue in question (section 1030(1) German Code of Civil Procedure (ZPO)).

Disputes concerning issues of antitrust and competition law are arbitrable in Germany. Intellectual property disputes relating to the validity of IP rights, however, are – although frequently discussed – still considered non-arbitral.

Regarding corporate governance disputes, the German Federal Court of Justice changed its position in 2009. Following the *Arbitrability II* judgment, intra-company disputes are now considered to be arbitrable in Germany, also for partnerships as clarified in the *Arbitrability III* judgment. However, the court tied the validity of the arbitration agreement to additional requirements. In 2021, the German Federal Court of Justice clarified in its *Arbitrability IV* judgment that such additional requirements apply in partnerships only if the articles of association provide that intra-company disputes are not to be resolved among the partners but with the partnership. Otherwise, the actions are to be directed against the partners and no additional requirements must be met.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

For an arbitration agreement to be enforceable under German law, it must fulfil the requirements of section 1031 of the ZPO.

The arbitration agreement must be included in a document that has either been signed by the parties or has been contained in an exchange of letters or other means of communication, such as emails (section 1031(1) ZPO).

German arbitration law also allows for an arbitration agreement to be contained in a document unilaterally provided by either one of the parties or a third party to both parties. Where no objections are raised, the arbitration agreement will form part of the agreement in accordance with common usage (section 1031(2) ZPO). This option is mainly used in connection with commercial letters of confirmation.

Even the incorporation by reference to documents, such as standard terms and conditions, which contain the arbitration agreement is permitted (section 1031(3) ZPO).

If one of the parties is a consumer, the arbitration agreement must be contained in a separate document that must be signed by the parties. This document must not contain any additional information or agreements that do not concern the arbitral proceedings (section 1031(5) ZPO).

Any non-compliance with form requirements is cured if the parties participate in the arbitral proceedings (section 1031(6) ZPO). To this end, objections regarding the form must be raised before the parties enter into arguments on the substance of the dispute (eg, by submitting the answer to the request for arbitration).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

For the purposes of determining its existence or validity, the arbitration agreement is to be treated as an agreement independent of the other provisions of the contract (section 1040(1) ZPO). Therefore, the challenge, rescission or termination of the main contract will not result in the arbitration agreement being invalid. However, the parties can mutually agree to terminate the arbitration agreement itself.

In the case of a German-law-governed insolvency of a party during an arbitration, the power to conduct proceedings passes to the insolvency administrator. However, the insolvency administrator remains bound by an existing arbitration agreement.

Nevertheless, the administrator might be able to invoke the inoperability of the arbitration agreement due to a lack of assets (cf. section 1032(1) ZPO), as would be the case if the insolvent party can no longer pay its share of the advance on costs and the other party is not willing to cover the entire advance on costs.

If one party dies, the arbitration agreement continues to be enforceable. The rights and obligations under the arbitration agreement pass on to the legal successor.

Separability

11 Are there any provisions on the separability of arbitration agreements from the main agreement?

Section 1040(1) of the ZPO stipulates the separability of the arbitration agreement and the underlying contract. For the purposes of determining its existence or validity, the arbitration agreement is to be treated as an agreement independent of the other provisions of the contract. Thus, in the case of a valid arbitration agreement, the arbitral tribunal has jurisdiction to decide the dispute even if the contract itself is invalid.

Third parties – bound by arbitration agreement

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

In general, only the signatories are bound by an arbitration agreement. In some cases, such as assignment, legal succession or insolvency, a third party (eg, the assignee, successor or insolvency administrator) will be equally bound by the arbitration agreement. Further, personally liable shareholders of partnerships can be bound to arbitration agreements entered into by the partnership.

Third parties – participation

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

German arbitration law does not contain any provisions on the participation of third parties. However, third parties can join the proceedings if the parties to the arbitration consent. The joinder of a third party can be based on the accord of the third party itself or on a third-party notice. However, in the latter case, the consent of the third party will likely be difficult to obtain.

For DIS-administered proceedings, article 19 of the DIS Rules provides additional requirements for joinder of third parties.

Groups of companies

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

German courts do not extend an arbitration agreement to non-signatories under the group of companies doctrine. Instead, German courts determine the subjective scope of the arbitration agreement by means of interpretation. However, the German Court of Federal Justice clarified in a decision in 2014 that binding non-signatories to an arbitration agreement under the group of companies doctrine under the applicable foreign law does not automatically amount to a violation of German public policy.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

German arbitration law does not contain any explicit provisions on multiparty arbitration. It is possible, however, to conclude a valid multiparty arbitration agreement under German arbitration law. To ensure equality, the parties must have equal opportunity to influence the composition of the arbitral tribunal. In multiparty disputes, this may require appointment of the arbitrators by a third party. If a party is placed at a disadvantage, this party can request the court to appoint the arbitrators in deviation from the procedure agreed upon in the arbitration agreement (section 1034(2) ZPO). Article 20 of the DIS Rules contains a similar provision.

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

German arbitration law does not specifically address the consolidation of separate arbitral proceedings. However, it is nonetheless possible to consolidate arbitral proceedings under German arbitration law. German legal doctrine generally requires consent of the parties and compatibility of the arbitration agreements. Article 8 of the DIS Rules stipulates that upon the request of one or more parties the DIS may consolidate two or more arbitrations administered by the DIS. A consolidation under the DIS Rules requires all parties to all the arbitrations to consent to the consolidation. Unless the parties have agreed otherwise, the consolidation of arbitrations shall be into the arbitration that was first commenced.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

German law does not impose any special qualification for arbitrators. It is not necessary for an arbitrator to be qualified to practise law. However, the parties may stipulate special qualifications in the arbitration agreement (eg, the qualification to be a judge). Active judges need approval by the respective supervisory authority to act as arbitrators (section 40(1) German Law on Judges), which is often not granted. Additionally, judges can only act as arbitrators if they have been appointed either mutually by both parties or by an independent appointing authority. Judges acting as arbitrators without said approval would expose themselves to disciplinary actions, but can nevertheless issue binding arbitral awards.

Contractually stipulated characteristics such as gender, nationality or cultural background will likely be recognised by German courts.

Background of arbitrators

18 Who regularly sit as arbitrators in your jurisdiction?

Most arbitrators acting in arbitrations seated in Germany are lawyers. Few are (mostly retired) judges or academics. In-house counsel or government officials rarely act as arbitrators. There is a clear tendency to provide for more diversity in appointments of arbitrators by the German Arbitration Institute (DIS). The institution is signatory to the Equal Representation in Arbitration Pledge and publishes statistical data on arbitral appointments in DIS-administered arbitrations. The number of female arbitrators appointed by the institution has reached 53.3 per cent. The total number of female arbitrators appointed in DIS-administered proceedings rose from 17.5 per cent in 2019 to 20.8 per cent in 2020.

Default appointment of arbitrators

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

Section 1035(3) of the German Code of Civil Procedure (ZPO) offers a default mechanism for both proceedings involving a sole arbitrator as

well as a three-member tribunal: if no agreement as to the person of the arbitrator can be reached between the parties, a sole arbitrator shall be appointed by the court upon request of a party. In an arbitration with three arbitrators, each party shall appoint one arbitrator. The party-appointed arbitrators will then appoint the presiding arbitrator. Where a party fails to appoint an arbitrator or the party-appointed arbitrators cannot agree on a presiding arbitrator, this arbitrator shall be appointed by the court upon request of a party. If the arbitration agreement is silent on the number of arbitrators, the number of arbitrators shall be three (section 1034(1) ZPO).

The DIS Rules provide for a similar default mechanism, stipulated by articles 10 to 13. Under the DIS Rules, regardless of who has nominated an arbitrator, all arbitrators are appointed by the DIS-appointing committee.

Challenge and replacement of arbitrators

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

The procedure for challenging arbitrators is primarily derived from the parties' agreement, including referenced institutional rules (section 1037(1) ZPO). As a default rule, a written challenge must be submitted to the arbitral tribunal either within two weeks of the constitution of the tribunal or after the challenging party has become aware of circumstances that might give rise to doubts as to the arbitrator's impartiality or independence (section 1037(2) ZPO). The arbitral tribunal itself decides on the challenge, unless the challenged arbitrator withdraws or the other party agrees to the challenge. If a challenge is rejected, the challenging party can request a final decision of the challenge by state courts (section 1037(3) ZPO).

For DIS-administered arbitrations, article 15 of the DIS Rules provides the procedure for challenging an arbitrator. While the time limits for a challenge are the same as under the German arbitration law, the challenge must be filed with the DIS instead of the arbitral tribunal (article 15.2 DIS Rules). Deviating from the statutory provisions, article 15.4 of the DIS Rules provides that the DIS Arbitration Council decides the challenge of an arbitrator.

There are two possible grounds for the challenge of an arbitrator (according to section 1036(2) ZPO, and articles 15 and 9.1 DIS Rules): first, circumstances that give rise to justifiable doubts as to the impartiality or independence of the arbitrator; and second, if the arbitrator does not possess qualifications on which the parties agreed. Arbitrators are under the ongoing obligation to disclose any circumstance that could cause a reasonable person to have doubts regarding their impartiality or independence as soon as they become aware of them. In practice, German arbitrators often base their disclosures on the IBA Guidelines on Conflicts of Interest.

Other grounds for removal are the resignation of an arbitrator and an agreement by the parties to remove the arbitrator (section 1038(1) ZPO and article 16 DIS Rules). If an arbitrator is unable to, or for other reasons does not, comply with his or her duties as an arbitrator within reasonable time, the parties can move for removal of this arbitrator by the state courts (section 1038(1)(2) ZPO); article 16.2 of the DIS Rules similarly provides for the possibility to have an arbitrator removed by the DIS Arbitration Council.

Relationship between parties and arbitrators

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

German arbitration law does not contain specific provisions on the legal relationship between parties and arbitrators. It is broadly accepted, however, that the appointment as arbitrator creates a contract sui generis. In ad hoc proceedings, this contract is concluded between the arbitrator and all the parties. The arbitrators' fees and expenses usually are provided for in this contract. In administered proceedings, depending on the role of the institution regarding appointment and payment of the arbitrators, the contract can be concluded between the institution and the arbitrators, as is the case in proceedings administered by the DIS. In this case, the arbitrators' remuneration is based on article 34 of the DIS Rules and the annexed schedule of costs.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

An arbitrator is under the ongoing obligation throughout the arbitration to disclose any circumstance that will likely give rise to justifiable doubts regarding their impartiality or independence as soon as they become aware of them (section 1036(1) ZPO, and articles 15 and 9.1 DIS Rules). Among other aspects, business and close social relationships with a party, relationships with co-arbitrators and any prior involvement in the dispute must be disclosed. In practice, arbitrators often refer to the IBA Guidelines of Conflict of Interest.

Immunity of arbitrators from liability

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

In general, arbitrators are liable regarding their conduct during the arbitration for any negligence and intent. Such fault may already lie in the failure to disclose necessary information. However, the liability for negligence can be excluded in the arbitrator's contract. Accordingly, where the arbitration is administered by the DIS, the liability is also limited to cases of intent and gross negligence (article 45.2 DIS Rules).

For acts in connection with the arbitrator's decision-making, however, both under the statutory liability regime and article 45.1 of the DIS Rules, the liability of an arbitrator is limited to cases of intent.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

A German court must reject an action in a matter that is subject to an arbitration agreement upon the objection of one of the parties (section 1032(1) German Code of Civil Procedure (ZPO)). The court will not reject the action, if it finds the arbitration agreement to be null and void, inoperable or incapable of being performed. An objection must be made prior to the beginning of the oral hearing on the substance.

Additionally, an application to declare whether or not an arbitration is admissible can be made to the court even before the constitution

of the tribunal (section 1032(2) ZPO). Courts interpret this provision to include the validity and the scope of the arbitration agreement.

It is not possible, however, to invoke an anti-suit injunction in Germany. In 2019, the Higher Regional Court of Munich even granted injunctive relief preventing a party from pursuing an anti-suit injunction in a different forum.

Jurisdiction of arbitral tribunal

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

The arbitral tribunal has the provisional competence-competence to rule on its own jurisdiction (section 1040(1) ZPO). A challenge to the arbitral tribunal's jurisdiction must be raised at the latest in the respondent's first substantive submission (cf. section 1046(1)(1) ZPO, article 7.4 German Arbitration Institute (DIS) Rules). Where the challenge concerns the scope of the arbitration agreement, it must be raised as soon as the matter is raised in the arbitration proceedings (section 1040(2) ZPO).

If the tribunal upholds its jurisdiction, within one month, either party can request the courts to render a final decision on jurisdiction. Thus, the ultimate competence-competence lies with the state courts (section 1040(3) ZPO). This provision is mandatory. If a request is not made in a timely manner, the parties are precluded from raising the objection at a later stage, including setting aside and enforcement proceedings. However, the situation is different when the responding party does not participate at all in the arbitral proceedings. In this scenario, the arbitral tribunal proceeds with determining its jurisdiction (section 1048(2) ZPO) and – if the tribunal assumes jurisdiction – the respondent is not precluded from invoking lacking jurisdiction to challenge the award (section 1059 ZPO).

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Without agreement of the parties, the seat of arbitration is determined by the arbitral tribunal (section 1043(1) German Code of Civil Procedure (ZPO) and article 22.1 German Arbitration Institute (DIS) Rules); the tribunal can choose a different venue for any procedural acts, including the hearing (article 22.2 DIS Rules).

Without agreement of the parties, the tribunal can determine the language of the arbitration (section 1045(1) ZPO and article 23 DIS Rules).

Where no choice of substantive law has been made, German arbitration law stipulates that the arbitral tribunal shall apply the law of the state with the closest connection to the subject matter of the proceedings (section 1051(2) ZPO). In contrast, article 24.2 of the DIS Rules provides that the arbitral tribunal may apply the rules of law that it deems to be appropriate.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Arbitral proceedings are initiated by filing a request for arbitration (section 1044 ZPO). The dispute commences on the date on which the respondent receives the request. The request must state the names of the parties and the subject matter of the dispute, and must refer to the arbitration agreement.

In proceedings under the DIS Rules, more detailed information must be included in the request. In addition to the above, the request shall contain information on the claimant's counsel, a statement on the specific relief sought, the amount of any quantified claims, a description of the facts, the nomination of an arbitrator and particularities or proposals regarding seat, language and rules of law applicable to the merits (article 5.2 DIS Rules). Additional formal requirements must be adhered to (article 4.2 DIS Rules). Further, under the DIS Rules, the proceedings commence upon receipt of the request for arbitration by the DIS secretariat (article 6 DIS Rules). Provided that the request contains the necessary information and that the claimant has paid the administrative fee, the DIS transmits the request to the respondent (article 5.5 DIS Rules).

Hearing

28 | Is a hearing required and what rules apply?

The parties can determine whether to hold an oral hearing (section 1047(1) ZPO, article 29.1 DIS Rules). Where one of the parties requests an oral hearing on the merits, the arbitral tribunal shall hold such hearing. In all other cases, the decision is at the discretion of the arbitral tribunal. While German courts have not yet decided whether a remote hearing (eg, by videoconference) is considered an oral hearing in the statutory sense and legal doctrine is split on the matter, remote hearings have been generally accepted in practice.

Evidence

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

German arbitration law does not contain specific provisions regarding the taking of evidence in arbitration proceedings. Where there is no agreement between the parties, the arbitral tribunal shall conduct the arbitration in such a manner as it considers appropriate (section 1042(4) ZPO). The tribunal can determine the admissibility of evidence presented by the parties and take and assess evidence sua sponte (article 28.2 DIS Rules).

In practice, witnesses, experts and documents are frequently relied on as evidence. While US-style discovery is foreign in German civil procedure, it is common practice for arbitral tribunals to order a party to produce documents requested by the other party. Especially in international arbitrations, tribunals often seek guidance in the IBA Rules on the Taking of Evidence in International Arbitration; the Prague Rules are less frequently resorted to in practice. Redfern Schedules are frequently used. However, since document production is foreign to the German jurisdiction, arbitrators often apply a high threshold for document production requests and only grant very limited document production, particularly in domestic arbitration proceedings. Annex 3.E to the DIS Rules stipulates that the production of documents is discussed during the case management conference.

Court involvement

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

State courts can support the arbitral proceedings in certain instances, including:

- determining the admissibility of the arbitration proceedings (including validity and scope of the arbitration agreement) before constitution of the arbitral tribunal upon request of a party (section 1032(2) ZPO);

- ordering interim measures upon request of a party (section 1033 ZPO) or ordering enforcement of interim measures ordered by an arbitral tribunal if they are not complied with voluntarily (section 1041(2) ZPO);
- appointing arbitrators in certain circumstances upon request of a party (section 1035(3)-(5) ZPO);
- reviewing the tribunal's negative decision on the challenge of an arbitrator upon request of a party (section 1037(3) ZPO);
- reviewing the tribunal's affirmative decision on its jurisdiction upon request of a party (section 1040(3) ZPO); and
- assisting in the taking of evidence (section 1050 ZPO).

Confidentiality

31 | Is confidentiality ensured?

German arbitration law does not include any provisions concerning confidentiality. The DIS Rules, however, stipulate that the parties and their counsel, the arbitrators, the DIS employees and any other person associated with the DIS must not disclose any information concerning the arbitration (article 44 DIS Rules). This includes the existence of the arbitration, the names of the parties, the nature of the claims, the names of any witnesses or experts, any procedural orders or awards and any evidence that is not publicly available. There are exceptions to this general rule of confidentiality under the DIS Rules – for example, if disclosure is required by applicable law, legal duties and for the purpose of recognition, enforcement or annulment of an award (article 44.2 DIS Rules).

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Section 1033 of the German Code of Civil Procedure (ZPO) and article 25.3 of the German Arbitration Institute (DIS) Rules clarify that a competent court may grant provisional or conservatory measures although the matter is subject to an arbitration agreement. This applies before and during the arbitral proceedings. In other words, a party to an arbitration agreement remains at liberty to seek interim relief from state courts even after it has initiated arbitration proceedings.

Interim measures by an emergency arbitrator

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

Both the ZPO and the DIS Rules are silent on emergency arbitrators. However, article 20(2) of the DIS Sports Arbitration Rules allows for an emergency arbitrator. Prior to the constitution of the tribunal in a sports arbitration, the DIS guarantees for an emergency arbitrator to be available for interim measures at all times.

Interim measures by the arbitral tribunal

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

An arbitral tribunal can order provisional or conservatory measures upon the request of either party, provided there is no contrary agreement between the parties (section 1041(1) ZPO and article 25.1 DIS Rules). To this end, the tribunal can also require either party to provide appropriate security. Among others, available measures are pre-award attachment orders and securities or freezing orders. In exceptional cases, the tribunal can also order security for costs.

Upon a party's request, a court is permitted to grant leave of enforcement of the interim measures ordered by the tribunal (section 1041(2) ZPO). A decision by the Bavarian Highest Regional Court in 2020 clarified that it is not the court's task to perform a full review of the tribunal's decision on preliminary measures. In principle, the court shall thus grant the application.

Sanctioning powers of the arbitral tribunal

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

Neither the ZPO nor the DIS Rules contain specific countermeasures for 'guerrilla tactics' employed by parties or counsel. However, arbitral tribunals are not powerless. Where guerrilla tactics take the form of procedural measures in the arbitration (eg, dilatory applications), the tribunal can and should disallow such measures within its procedural discretion (section 1042(4) ZPO, article 21.3 DIS Rules) and unfettered by any misconceived due process concerns (often referred to as 'due process paranoia'). At the latest when allocating the costs, a tribunal can take into consideration any circumstances it deems appropriate, including dilatory, inappropriate or otherwise disruptive behaviour of parties or their counsel (section 1057 ZPO). Additionally, article 33.3 of the DIS Rules allows the arbitral tribunal to consider the extent to which the parties have conducted the arbitration efficiently when deciding on the costs.

In extreme cases, the arbitrators may report the party or its counsel to the competent disciplinary institution, such as a bar association, or even the public prosecutor's office.

AWARDS

Decisions by the arbitral tribunal

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

In absence of an agreement between the parties, a tribunal consisting of more than one arbitrator will make decisions by majority vote of all members. A unanimous vote is not required. Even if one of the arbitrators refuses to take part in the vote, the remaining arbitrators can decide. Additionally, the presiding arbitrator can decide individual questions of procedure alone, if authorised by the parties or the other members of the tribunal (section 1052 German Code of Civil Procedure (ZPO), articles 14.2 and 14.3 German Arbitration Institute (DIS) Rules).

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Neither the ZPO nor the DIS Rules include provisions on dissenting opinions. Their permissibility is hotly debated in Germany following an obiter dictum by the Higher Regional Court of Frankfurt in 2020 stating that issuing a dissenting opinion likely violates the secrecy of deliberations and could lead to the setting aside of an arbitral award. The decision has received both support and criticism.

Form and content requirements

38 | What form and content requirements exist for an award?

An award must be in writing and signed (section 1054 ZPO and article 39 DIS Rules). The award must state the date and place of arbitration. The signature of the tribunal's majority suffices, provided that the reason for any omitted signature is provided. It must also include the reasons upon which the award is based, unless the parties agreed otherwise. This does not apply to an award on agreed terms.

Time limit for award

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

German arbitration law does not provide any time limits for rendering an award. Article 37 of the DIS Rules, however, stipulates that the DIS must be provided with an award within three months of the last hearing or authorised submission. This time limit is not mandatory. A failure to meet this deadline has no effect on the arbitral tribunal. If it fails to deliver the draft award within that time frame, it remains in office and can submit the award at a later point. Irrespective of the fact that a late submission of the award has no direct consequences, the time limit can be extended pursuant to article 4.9 of the DIS Rules.

However, depending on how long it takes the tribunal to issue a final award, the DIS Arbitration Council can reduce the arbitrators' fees (article 37 DIS Rules).

Date of award

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

The decisive date for a request for the correction and interpretation of the award (section 1058 ZPO and article 40 DIS Rules) or for setting the award aside (section 1059 ZPO) is the date of transmission (ie, the date on which the award is received by the respective party). The date of the award itself is only of importance if the tribunal in an arbitration administered by the DIS intends to correct the award on its own initiative. In this case, the correction shall be made within 60 days of the date on which the award was made (article 40.5 DIS Rules).

Types of awards

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

An arbitral tribunal can issue final, partial, interim or interlocutory awards, as well as awards on agreed terms (ie, consent orders). The German arbitration law does not contain an exhaustive list of remedies that the arbitral tribunal is permitted to grant. Arbitral tribunals have considerable liberty when it comes to types of relief, including declaratory relief or specific performance (subject to the applicable substantive law). But arbitral tribunals must not award punitive damages, which would lead to a violation of German public policy. Such awards could be set aside (section 1059(2) No. 2 lit. b)) or their enforcement could be refused (sections 1060(2)(1) and 1061 ZPO).

Termination of proceedings

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

Arbitral proceedings end with a final award or with a termination order (section 1056(1) ZPO). Pursuant to section 1056(2) of the ZPO and article 42.2 of the DIS Rules, the arbitral tribunal can issue a termination order when:

- the claimant fails to submit its statement of claim without good cause;
- the claimant withdraws its claim, unless the respondent objects;
- the parties agree to terminate the proceedings;
- the parties fail to pursue the arbitration despite requests of the arbitral tribunal; or
- the continuation of the proceedings has become impossible.

Cost allocation and recovery

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

By default, section 1057(1) of the ZPO allows for the arbitral tribunal to allocate the costs of the arbitration between the parties by means of an arbitral award. This includes all legal fees that were necessary to conduct the proceedings, such as administrative fees, arbitrators' fees, costs for the taking of evidence and attorneys' fees. The tribunal will consider the circumstances of the case and particularly the outcome of the proceedings. Thus, tribunals seated in Germany usually apply the principle of 'costs follow the event', which also applies before German state courts. Where the parties have chosen the DIS Rules, article 33 applies, which does not differ significantly from the statutory default provision.

Interest

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

Provided that the applicable substantive law allows a claim for interest, an arbitral tribunal is permitted to award interest on payment claims. The applicable interest rate depends on and varies according to the applicable substantive law. However, interest on a claim for reimbursement of costs may only be awarded to an arbitral party upon application.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Section 1058 of the German Code of Civil Procedure (ZPO) and, similarly, article 40 of the German Arbitration Institute (DIS) Rules provide for correction and interpretation of awards. They allow for the arbitral tribunal to correct clerical, typographical or computation errors and to interpret or clarify sections of the award. Both require a respective application by any party. Following its own initiative, the tribunal may only correct the award. The parties can also request the tribunal to render a supplementary award upon any claims that were made in the arbitration but were not addressed in the award. A request must be made within one month (30 days) of the award being received.

Challenge of awards

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

Awards rendered by a tribunal seated in Germany can be subject to set-aside proceedings before state courts (section 1059(1) ZPO). The list of grounds for setting aside an arbitral award is exhaustive. It is based on the UNCITRAL Model Law and, as the Model Law, distinguishes between

grounds that will be observed ex officio and grounds to be raised by the applicant:

Accordingly, a court may set aside an award if the applicant shows, with sufficient cause, that:

- the arbitration agreement is invalid or that any party to the proceedings was under some incapacity;
- its right to be heard has been violated;
- the tribunal exceeded its jurisdiction; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the German arbitration law or the parties' agreement, and this affected the award.

Alternatively, the court may conclude on its own initiative that:

- the subject matter of the dispute is not arbitrable; or
- recognition or enforcement of the award would lead to a result contrary to public policy.

An application must be made within three months of the applicant receiving the award, unless the parties agreed otherwise.

Levels of appeal

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

Applications to set aside an award must be directed at the competent higher regional court. The higher regional court's decision can be appealed on point of law to the Federal Court of Justice (section 1065(1) ZPO). Both proceedings, the setting aside and the appeal, will take between six months and two years, approximately. The costs of set-aside proceedings are allocated depending on the outcome (costs follow the event).

Recognition and enforcement

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

A domestic award will be enforced after it has been declared enforceable (section 1060(1) ZPO). The declaration of enforceability will only be refused (and the award will be set aside) if one of the grounds for setting aside is present. However, the court will not take into account any grounds if an application for setting aside based on such grounds has been finally rejected by the time the declaration of enforceability is being served. Moreover, grounds for setting aside the award that must be invoked by the applicant will not be considered when declaring an award enforceable if the relevant time limits have expired without the party applying to set aside the award.

For foreign awards, recognition and enforcement follow the New York Convention or other applicable international conventions (section 1061 ZPO). Articles IV and V of the New York Convention set out the relevant requirements for an application for recognition and enforcement as well as the exhaustive grounds for a refusal thereof. If the declaration of enforceability is refused, the court will rule that the arbitral award is not to be recognised in Germany. If an award is set aside abroad after having been declared enforceable, an application for the declaration of enforceability to be repealed may be made.

In general, German courts tend to look favourably upon enforcing domestic and international awards.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

There is no specific point in time by which the successful party must make an application for the award to be declared enforceable. It should be noted, however, that claims resulting from an arbitral award will be time-barred after 30 years.

Enforcement of foreign awards

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

A party can object to the recognition and enforcement of a foreign award if the award has been set aside by a court at the seat of arbitration. It is highly likely that German courts will not enforce such an award.

Enforcement of orders by emergency arbitrators

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

Neither the ZPO nor the DIS Rules provide for an emergency arbitrator. Therefore, there are no provisions on the enforcement of orders by emergency arbitrators. It is sometimes argued that emergency awards should be treated like interim measures, which can be enforced with court assistance (section 1041 ZPO).

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The costs that are incurred when enforcing an award derive from the cost schedules for court fees and lawyers' fees. According to these schedules, the costs depend on the amount in dispute. However, the costs do not increase linearly in relation to the amount in dispute but rise more slowly the higher the amount in dispute. Enforcement of an award of €1 million will result in court fees for the first instance of about €12,000 and statutory lawyers' fees of about €15,000 for each party. The losing party will have to pay both sides' fees under the statutory cost schedules, but not any fees beyond that based on hourly rates agreed between the prevailing party and its lawyer.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

In international arbitration proceedings, German arbitrators can be expected to follow international standards. In purely domestic arbitrations, German arbitrators may be more reluctant to order broad document disclosure, especially compared to arbitrators with a common law background: although arbitral tribunals are not bound by the restrictive approach to document production under German civil procedural law as applied by German courts, German arbitrators may be influenced by the virtual absence of this feature in the German judicial system. However, article 28.2 of the German Arbitration Institute (DIS) Rules allows for the arbitral tribunal to order any party to produce or make available any documents or electronically stored data on its own initiative (sua sponte). Annex 3.E to the DIS Rules ensures that the production of documents is discussed during the case management conference.

Professional or ethical rules

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

German arbitration law does not include specific ethical rules for arbitrators or counsel in arbitration proceedings. However, German counsel and arbitrators who are admitted to the bar are bound by the Federal Lawyers' Act even when acting in an international arbitration.

The IBA Guidelines on Party Representation in International Arbitration provide useful guidance to counsel in arbitration proceedings seated in Germany, in particular in international arbitrations providing for features unfamiliar to the German legal system (eg, written witness statements or cross-examination of witnesses). However, counsel will always need to consider their ethical obligations on a case-by-case basis in each situation.

Third-party funding

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

There are no regulatory restrictions on third-party funding under German law.

Regulation of activities

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

Work permits and visa requirements need to be observed, and legal advice rendered by counsel in Germany to German clients will regularly be subject to VAT. The same is true for services of a German arbitrator in relation to German parties.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The German Arbitration Institute's 2018 Rules are particularly modern. Additionally, the German arbitration law has been undergoing a modernisation process since 2016. However, no large-scale reform is currently planned.

There are currently 23 investment arbitrations pending, which have been initiated by German investors. Of the two recent investment arbitrations in which Germany is the responding state, the heavily discussed investment arbitration between Vattenfall et al and the Federal Republic of Germany (*Vattenfall AB and others v Federal Republic of Germany*, ICSID case No. ARB/12/12) was settled in March 2021.

Following the European Court of Justice's decision in *Slovak Republic v Achmea BV* (confirmed in several related judgments such as *République de Moldavie v Komstroy* and *Republiken Polen v PL Holdings Sàrl*), most EU member states signed an agreement in May 2020 for the termination of their intra-EU bilateral investment treaties (BITs). In January 2021, this agreement was ratified in Germany and, consequently, Germany's 14 intra-EU BITs have been terminated. The European Commission initiated infringement proceedings against member states that failed to terminate their intra-EU BITs. The impact of these developments on investor-state dispute settlement with a German or European nexus still is the subject of debate.

In February 2021, the Higher Regional Court of Frankfurt elevated the *Achmea* judgment to the rank of a 'fundamental decision' applicable to all intra-EU BITs. In the UNCITRAL investment arbitration *Raiffeisen Bank v Croatia* seated in Frankfurt, the court found the arbitration clause of the applicable Austria–Croatia BIT to be incompatible with EU law.

Moreover, once the EU–Singapore and the EU–Vietnam investment protection agreements are ratified, the respective BITs can be expected to be terminated shortly thereafter.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Ghana is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Ghana became a party to the New York Convention on 9 April 1968, which came into force on the same date. No declarations or notifications were made under articles I, X and XI of the New York Convention. Ghana is also a party to the International Convention on the Settlement of Investment Disputes, which came into force on 14 October 1966. In addition, Ghana is a party to the United Nations Commission on International Trade Law (UNCITRAL).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Yes. Ghana has entered into 28 bilateral investment treaties with other countries, most of which contain dispute resolution provisions. The most recent bilateral investment treaty was signed between Ghana and Turkey on 1 March 2016. Ghana also has two treaties with investment provisions: the Ghana–US Investment Development Agreement, which came into force on 26 February 1999; and the Ghana–UK Interim Trade Partnership Agreement, which was signed on 2 March 2021 and is yet to come into force.

Domestic arbitration law

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

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) regulates domestic arbitral proceedings. The ADR Act is divided into five parts. Part 1 is the part that provides for arbitration. The ADR Act does not regulate foreign arbitral proceedings; however, it provides the framework for the recognition and enforcement of foreign arbitral awards. Arbitration proceedings are considered foreign when they are undertaken outside the jurisdiction under a system of law other than the laws of Ghana. The party seeking to enforce a foreign award must apply to the High Court of Ghana to enforce the foreign award. The High Court will enforce the award if the following conditions are satisfied:

- the award was rendered by a competent authority under the laws of the country where the award was made;
- either a reciprocal agreement exists between Ghana and the country in which the award was made or the award was made under the New York Convention or under any other international convention on arbitration ratified by Parliament;
- the party has produced the original award, or a certified copy thereof, and the agreement pursuant to which the award was made or a duly authenticated copy of the award (the authentication must be done in accordance with the law of the country where the award and agreement were made); and
- there is no appeal pending against the award in any court under the law applicable to the arbitration.

Domestic arbitration and UNCITRAL

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

Part 1 of the ADR Act is largely based on the UNCITRAL Model Law on International Commercial Arbitration. However, there are some differences between the ADR Act and the UNCITRAL Model Law. Some of the major differences are as follows:

- in terms of subject matter, the UNCITRAL Model Law essentially relates to commercial disputes between contracting parties at the international level. The ADR Act, however, provides an avenue for the resolution of a wide variety of disputes, including commercial disputes;
- the ADR Act provides for customary arbitration, which is unique to the Ghanaian legal system. Customary arbitration is where parties with a prior agreement to be bound by the decision of the arbitrators submit their disputes to customary arbitrators (who may be chiefs, heads of family or heads of clan) for the purpose of having the dispute decided informally, but on its merits; and
- the court and the Alternative Dispute Resolution Centre (set up by the ADR Act) are key parts in the ADR Act, as opposed to the position of the conciliator in the UNCITRAL Model Law.

Mandatory provisions

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

Generally, parties may agree on the procedure to be adopted for arbitration. They may also adopt the procedural rules of an arbitration institution. In the absence of such an agreement, the arbitral tribunal

may conduct the arbitration in the manner it considers appropriate. In either case, the arbitral tribunal has the obligation to abide by the principle of equal treatment of the parties in the proceedings, and ensure that each party is given an opportunity to present its case.

The following are mandatory provisions on procedure from which parties may not deviate.

- Section 2(3) of the Act requires an arbitration agreement to be in writing.
- Section 3(1) provides that the arbitration agreement that forms part of another agreement shall not be regarded as invalid, non-existent or ineffective because of the invalidity, non-existence or ineffectiveness of that agreement. It is treated as a separate and distinct agreement.
- Under section 29(1), the arbitrator is required to hold an arbitration management conference within 14 days of being appointed, with seven days' prior notice to the parties, unless the parties decide otherwise.
- An arbitrator is bound to give the parties notice of the date of the hearing. If the arbitrator does not give notice to a party, that will be grounds for a party to challenge the arbitral award.
- A party before the hearing shall give the arbitrator and the other party personal details of witnesses that the party intends to call, and the substance of the testimony of each witness.
- The hearing of the arbitration proceedings is required to be in private unless the parties decide otherwise.

Substantive law

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

The ADR Act mandates the arbitrator to decide the dispute in accordance with the law of a country chosen by the parties (excluding the conflict of law rules of that country). The arbitrator is also required to have regard to such other considerations as are agreed by the parties or as may be determined by the arbitrator. Where the issue relates to a contract, the arbitrator is expected to take cognisance of the usages of the trade to which the contract relates. If the parties are unable to reach an agreement on the applicable substantive law, the arbitrator is required to determine the dispute by reference to the conflict of law rules that the arbitrator deems applicable. The Act empowers an arbitrator to grant any relief that the arbitrator considers just and equitable, including specific performance.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

There are two prominent arbitral institutions in Ghana. These are the Ghana Arbitration Centre and the Ghana ADR Hub. Below are their contact details:

The Ghana Arbitration Centre
No. C122A / 3 Farrar Avenue, Asylum Down
PO Box GP 18615, Accra
Ghana
Tel: +233 302 240820 / 240924
Fax: +233 302 223227
gac@ghana.com
www.ghanaarbitration.org

Ghana ADR Hub
H/No. Plot 50, Block A
New Ahensan, Kumasi
Ghana
Tel: +233 267 037800
info@ghanaadrhub.org
www.ghanaadrhub.org

In addition, the ADR Act has made provision for the establishment of an Alternative Dispute Resolution Centre. It is envisaged that the Centre, when established, will have a permanent existence with the object of facilitating the practice of alternative dispute resolution in Ghana. The law provides a great deal of flexibility in terms of the choice of law, place of arbitration, selection of arbitrators and the language of proceedings. In each of these areas, the parties are given the autonomy to make a choice. The arbitral tribunal is vested with the power to decide on any of the matters where the parties are unable to reach a consensus on the issue in question. With respect to the fees for arbitrators, there must first be an agreement between the parties and the arbitrator as to the amount payable. In calculating the amount payable, regard must also be given to the value of the subject matter, the complexity of the case and the agreed hourly fee rate.

The National Labour Commission, as established by the Labour Act 2003 (Act 651), is another important arbitral institution in Ghana. The National Labour Commission's mandate is to facilitate and settle industrial disputes through negotiation, mediation and arbitration. Arbitration conducted by the National Labour Commission may be either voluntary or compulsory. The Labour Act 2003 (Act 651) stipulates that industrial disputes involving strike and lockout, and essential services, shall be compulsorily referred to arbitration where the disputes persist after statutorily defined time limits. Currently, the National Labour Commission is usually the first point of call in the resolution of industrial disputes in Ghana.

The Ghana Investment Promotion Centre Act 2013 (Act 865) and the Minerals and Mining Act 2006 (Act 703) allow for parties (investors and the government) to resort to arbitration as one of the options for dispute resolution. These laws further provide that parties may refer the dispute to arbitration in accordance with UNCITRAL rules or within the framework of a bilateral agreement between Ghana and the investor's country.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Yes. The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) expressly states that matters involving the following are not arbitrable:

- national or public interest;
- the environment;
- the enforcement and interpretation of the Constitution; and
- other matters that by law cannot be settled by an alternative dispute resolution method (including criminal action and abuse of human rights).

The general rule is that only matters that can be subjected to compromise and settlement are to be referred to arbitration. Section 72 of the Courts Act 1993 (Act 459) provides that all civil matters can be settled out of court, including through arbitration. Although the ADR Act does not expressly mention disputes in the areas of intellectual property, antitrust, competition law, securities transactions and intracompany disputes, such disputes may be settled through arbitration.

Requirements

9 What formal and other requirements exist for an arbitration agreement?

The ADR Act provides that an arbitration agreement must be in writing. In order to satisfy the requirement of writing, the law stipulates that the arbitration agreement may be in the form of an exchange of letters, telex, fax, email or other means of communication providing a record of the agreement. An arbitration agreement is valid even where it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other, or when reference is made in a contract to any document containing an arbitration clause.

Enforceability

10 In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement may not be enforceable if waived by the parties or if the parties decide to submit the matter to the jurisdiction of the courts, or if declared null and void by the arbitral tribunal.

However, an arbitration agreement is not rendered unenforceable by reason of the death, merger or dissolution of a party to the agreement. The obligations of a party under an arbitration agreement may be transferred to their successors, personal representatives or liquidator on the death, merger or dissolution of such a party. In addition, a party to an arbitration agreement who is not notified of an arbitral proceeding may apply to the High Court to set aside the arbitration agreement.

Arbitration agreements that form part of a contract are generally deemed to be independent of the other terms of the contract. Thus, the invalidity or unenforceability of the underlying contract does not affect the arbitration agreement or clause.

Separability

11 Are there any provisions on the separability of arbitration agreements from the main agreement?

Yes. The ADR Act specifically provides that an arbitration agreement that forms or is intended to form part of another agreement shall remain valid, effective and enforceable even if that other agreement is invalid, did not come into existence or has become ineffective. The arbitration agreement is regarded as separate and distinct from the other invalid, ineffective or non-existent agreement. Additionally, the arbitration agreement, once concluded, is irrevocable unless the parties express a contrary intention in that agreement.

Third parties – bound by arbitration agreement

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

In principle, arbitration agreements cannot be extended to third parties that are not signatories to the arbitration agreement. The ADR Act does not make any express provision for the imposition of liability arising from an arbitration agreement on account of assignment, agency or insolvency. However, the assignment of the underlying contract may be presumed to include the acceptance of any arbitration agreements contained in or incorporated into the underlying contract. Similarly, a principal may be bound by an arbitration agreement entered into by an agent. Under the ADR Act, the occurrence of death does not discharge a party to an arbitration agreement from liability. The implication is that a successor-in-title will be required to discharge the liabilities arising from the arbitration agreement entered into by the deceased. This may also be presumed for situations of insolvency.

Third parties – participation

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

The ADR Act does not contain any provisions with respect to third-party participation in arbitration. However, third parties may participate where the arbitration agreement in a main contract entered into by the parties extends to ancillary contracts that one of the parties to the main contract executes with a different party, or where the parties agree to the joinder of a third party. Also, under the Contracts Act of Ghana 1960 (Act 25), a third-party beneficiary of the main contract may enforce an arbitration agreement contained in the main contract as if it were a party to the contract.

Groups of companies

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

Under the principle of separate legal personality, companies in the same group will not be bound by an arbitration agreement entered into by a parent company or subsidiary company, or another company in the same group, unless the corporate veil is lifted.

The ADR Act provides that parties that submit a matter for arbitration must have an agreement between them. This implies that the arbitrator, or the tribunal as the case may be, shall not have the mandate to extend any arbitral proceedings to another party that was not a party to the agreement.

The law does not grant any exemption to companies in this regard, and hence the 'group of companies' doctrine may not be applicable in Ghana, unless the corporate veil is lifted.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

There is no express provision relating to multiparty arbitration agreements under the ADR Act. Thus, the requirements for a valid bilateral agreement would, in principle, be the same as those set out for the validity of a multiparty arbitration agreement. Additionally, whenever an issue regarding the composition of the arbitral tribunal arises, the appointing authority shall decide on it based on the principles of equal treatment and due process of law.

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Consolidation of arbitration proceedings is subject to the agreement of the parties. The ADR Act provides, at section 31(6), that the parties may agree to permit the arbitrator to consolidate separate arbitral proceedings, and hold concurrent hearings. Consolidation is usually considered by the courts where:

- the subject matter of the dispute is identical in both proceedings;
- the parties are the same;
- the actions are about the same thing;
- there is the possibility of prejudice or confusion of interest arising in relation to the separate proceedings;
- there are some common questions of law or fact in the actions;

- the right to relief claimed in each action arises out of or in respect of the same transaction or a series of transactions in each action; or
- for some other reason, it is desirable to consolidate.

Where the above factors exist and the parties agree, there is no reason why arbitral proceedings should not be consolidated.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

The general principle is that an arbitrator is required to have the relevant experience and competence. However, parties are given the power to appoint any persons to act as arbitrators, regardless of their experience or nationality. Even though arbitral institutions are mandated to keep a list of qualified mediators and arbitrators, there is nothing in the law that suggests that parties to an arbitration dispute cannot appoint arbitrators outside that list.

In order to guarantee a fair award, the factors outlined below, among others, are to be taken into account in the appointment of an arbitrator:

- the relationship of the arbitrator to a party or counsel of a party to the arbitration;
- the nationality of the parties; and
- the personal, proprietary, fiduciary or financial interest of the arbitrator.

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) provides in relevant parts that, in appointing an arbitrator, the parties, the person or the appointing institution shall have regard to the 'nationalities of the parties and other relevant considerations'. Once the parties agree on the arbitrators, the law recognises those arbitrators irrespective of a requirement for nationality, religion or gender.

Parties are at liberty to challenge the appointment of any arbitrator whose appointment does not satisfy the foregoing requirements. The law does not impose any express restrictions on the appointment of judges (active or retired) as arbitrators. The ADR Act provides that parties to an arbitration can request a list of arbitrators from any of the arbitral institutions in Ghana.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Generally, the ADR Act only requires that an arbitrator must be independent and impartial. There is, therefore, no legal requirement for any specific professionals to sit as arbitrators. The trend in commercial disputes is for lawyers, judges and law professors to sit as arbitrators. In labour disputes, the trend is for the National Labour Commission to appoint industry experts (who may not necessarily have a legal background) to sit as arbitrators.

Default appointment of arbitrators

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

The ADR Act permits parties to agree on the procedure for appointing an arbitrator. If the parties are unable to agree on the appointment procedure, the default rules for the appointment of arbitrators are triggered. With respect to a sole arbitrator, the default rule is that the appointment shall be made by the appointing authority upon a request by one party if both parties cannot agree on an arbitrator within 14 days of one party receiving a request for arbitration from the other. Where the parties fail to agree on the number of arbitrators, the default number of arbitrators is three, with two being party-appointed arbitrators. Where the arbitral tribunal is made up of three arbitrators and the two party-appointed arbitrators are unable to agree on a third arbitrator, either party can request that the appointment of the third arbitrator be made by an appointing authority.

Challenge and replacement of arbitrators

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

The ADR Act provides that a person appointed as an arbitrator shall make a full disclosure of material facts involving any proprietary or financial interest that may give reasonable cause to doubt his or her independence and impartiality.

The appointment of an arbitrator may be challenged if it emerges that the arbitrator does not possess the qualifications agreed upon by the parties or circumstances exist that give rise to justifiable doubt as to the arbitrator's independence or impartiality. According to the ADR Act, a party may not challenge an arbitrator he or she has appointed, or whose appointment he or she participated in, except for reasons that the party becomes aware of after the appointment.

With respect to the procedure for challenging the appointment of an arbitrator, the law gives parties the right to make that determination. Where the parties are unable to agree on a procedure, the party mounting the challenge is required to submit a written statement to the arbitral tribunal or the arbitrator, within 15 days of becoming aware of the composition of the tribunal or the grounds justifying the challenge of a sole arbitrator. The party challenging the appointment of the arbitrator can also apply to the High Court for the revocation of the arbitrator's authority on notice to the other party. The High Court may remove an arbitrator where there is sufficient reason to doubt the impartiality of the arbitrator. If the arbitrator is physically or mentally incapable, or there is justifiable doubt as to the arbitrator's capability to conduct proceedings, he or she may also be removed by the High Court. Additionally, if the arbitrator has refused or failed to conduct the arbitral proceedings properly, or to use reasonable dispatch in conducting the proceedings or making an award, and substantial injustice has or will be caused to the applicant, the High Court may remove that arbitrator. The arbitrator's authority will also be revoked on his or her death. If the arbitrator's authority is revoked, the law permits the parties to decide on how the vacancy will be filled.

If the parties fail to agree on the replacement arbitrator, an appointing authority shall, on application by a party, appoint another arbitrator in accordance with the law. Where an arbitrator has been successfully challenged, or that arbitrator's mandate is terminated owing to an agreement between the parties, or a situation has made it impossible for the arbitrator to act, or the arbitrator has resigned, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

There is nothing in the law that prohibits an arbitral tribunal or arbitrator from seeking guidance from the IBA or any other body, should it deem this necessary.

Relationship between parties and arbitrators

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

Arbitrators, whether appointed by the parties or by the appointing institution, or otherwise, are required to be independent, and to act fairly and impartially. Arbitrators are not agents or representatives of the parties in the dispute. Thus, to guarantee a fair award, the law imposes a strict obligation on an arbitrator to disclose all material facts that will impinge on the delivery of his or her award.

The parties are also required to bear the expenses and remuneration of the arbitrator or the tribunal. Where the High Court removes an arbitrator on an application by a party, it may make any orders that it considers appropriate for payment of fees and expenses of the arbitrator, or the payment by the arbitrator of any fees or expenses already paid to the arbitration. The ADR Act empowers an arbitrator to withhold the delivery of an award to the parties until there is full payment of the fees and expenses of the arbitrator.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The ADR Act imposes a duty on the appointed arbitrator to disclose in writing to the parties any circumstances likely to give reasonable cause to doubt that person's independence or impartiality as an arbitrator. This disclosure is required to be done at the point of the appointment and throughout the arbitral proceedings. Failure to do so is a ground for challenge of the arbitrator's appointment.

Immunity of arbitrators from liability

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

The ADR Act provides immunity to arbitrators in the performance of their functions and explicitly regulates their liability. However, an arbitrator will be liable for the consequences of deliberate wrongdoing arising from the performance of his or her duties. Section 23(1) of the ADR Act states that 'an arbitrator is not liable for any act or omission in the discharge of the arbitrator's functions as an arbitrator unless the arbitrator is shown to have acted in bad faith'.

Section 23(1) also applies to an employee or an agent of the arbitrator.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

If a party institutes court proceedings in spite of an arbitration agreement, the other party may make an application to the court to stay its proceedings and refer the parties to arbitration. Where such an application is made, the court is mandated by the Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) to refer the parties to arbitration where the court finds that there is an arbitration agreement in respect of the dispute. The ADR Act mandates that the party making the application for stay of proceedings must do so upon entering (conditional) appearance in the action. This is because, if the defendant takes a step in the litigation, it would be presumed as a waiver of the arbitration agreement. Thus, it is essential that the application for stay of proceedings is made to the court after entry of (conditional) appearance.

Jurisdiction of arbitral tribunal

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

Once constituted, the arbitral tribunal is competent to rule on its own jurisdiction. A party making a jurisdictional challenge before the arbitral tribunal must raise the motion before taking the first step in the proceedings to contest the case on its merits. Parties are not precluded from raising an objection to the jurisdiction of the arbitral tribunal or arbitrator because they have appointed or participated in the appointment of an arbitrator. A motion that the arbitral tribunal is exceeding the scope of its authority is required to be raised as soon as the matter alleged to be beyond the scope of its authority arises during the arbitral proceedings. The arbitral tribunal may address the issue of jurisdiction in a preliminary award before ruling on the merits of the case. A party dissatisfied with the tribunal's ruling on its jurisdiction may apply to the appointing authority or the High Court within seven days of the ruling for the determination of the arbitrator's jurisdiction. The decision of the High Court may be appealed but with leave of the Court. The initiation of a jurisdictional challenge does not suspend the ongoing arbitral proceedings unless the parties agree to stay the proceedings. The arbitrator may entertain an objection made later than the prescribed time if the arbitrator considers that there is sufficient justification to do so.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) provides that where the parties are unable to agree on the place of arbitration, it shall be determined by the arbitrator or the arbitral tribunal, taking into consideration the circumstances of the case and the convenience of the parties. The law also confers power on the arbitral tribunal to determine the language to be used for the arbitral proceedings if the parties are unable to agree on this issue. The arbitrator may direct that any documentary evidence should be accompanied by a translation into a language agreed on by the parties. The substantive law of the dispute is determined by the parties' agreement on the law applicable to their dispute, or in accordance with such other considerations as agreed by the parties or determined by the arbitrator. The choice of law in this instance refers to the substantive laws of the country, not conflict of law rules. Where the parties have not chosen or agreed on any law, the ADR Act (section 48) empowers the arbitrator to apply the law determined by conflict of law rules that the arbitrator considers applicable.

Where the dispute is one of contract, the arbitrator is empowered under the ADR Act to apply the terms of the contract, taking into consideration the usages of trade to which the contract relates.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

An arbitration proceeding is initiated where a party to a dispute in respect of which there is an arbitration agreement refers the dispute

to an arbitrator or an arbitral institution for arbitration. The party initiating the arbitral proceedings is required to notify the other party of the commencement of the proceeding. If a party to an agreement is not notified of an arbitration proceeding arising under that agreement, it may apply to the High Court to set aside any arbitral award.

Hearing

28 | Is a hearing required and what rules apply?

Subject to the agreement of the parties, the arbitrator may dispense with the requirement for a hearing. In lieu of a hearing, the arbitrator may request the parties to make their respective cases through the submission of documents and other materials. However, if the parties desire to be heard, there are a number of procedures that must be satisfied. The parties are required to give the arbitrator the particulars of any witnesses who will be called. The ADR Act further requires that the hearing shall be held in private, unless the parties agree to the contrary. At the commencement of the hearing, the parties are required to provide opening statements that will set down the issues to be determined. Similar rules of procedure apply where the parties elect to use the Expedited Arbitration Proceedings Rules of the Alternative Dispute Resolution Centre, when set up. In that regard, the Centre will play a facilitative role with respect to the proceedings. The Centre will be required to serve notice of the hearing date on the parties. Depending on the nature of the issue in contention, the hearing may be concluded in a day.

Evidence

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

The taking of evidence is generally governed by the statutory rules relating to the admissibility of evidence. The ADR Act imposes an obligation on the arbitrator to ensure that evidence is taken in the presence of parties, unless a party has expressly waived that right or has refused to attend without good cause. A party is entitled to present its evidence by affidavit after the arbitrator has considered any objections by the opposing party. The opposing party is also entitled to cross-examine the deponent after the presentation of the affidavit evidence. The parties may agree, or the arbitrator may direct the parties, to submit additional documents and materials to him or her after the oral hearing to enable the issue or issues to be settled conclusively. The law confers enormous powers on the arbitrator to regulate the procedure dealing with the calling of witnesses. The parties are obliged to provide only material evidence.

Witnesses are required to provide relevant evidence that is necessary to the determination of the issues in dispute. Subject to the rules of natural justice, the arbitrator has the prerogative of determining whether evidence given is relevant and material to the issues in contention. The ADR Act makes provision for the appointment of experts to assist in the conduct of the proceedings. The law does not give pre-eminence to either tribunal-appointed experts or party-appointed experts. It provides that the arbitrator may appoint an independent expert to report to the arbitrator or tribunal in writing on any specified issue. In such a case, the parties are required to cooperate with the expert by providing him or her with the required information and evidence. On the submission of the report of the tribunal-appointed expert, the parties are entitled to cross-examine the expert at the hearing or call their own experts to comment on the report of the tribunal-appointed expert. As part of the process of obtaining evidence, the arbitral tribunal may request that documents submitted by parties should be inspected. The arbitral tribunal is required to provide notice to the parties indicating the time and date for the inspection. On completion of the inspection, the arbitral tribunal is required to furnish the parties with copies of its report for their comments.

The rules of evidence in Ghana are quite exhaustive for the purposes of conducting arbitral proceedings. That notwithstanding, an arbitral tribunal or arbitrator may seek guidance from the IBA or any other body when it becomes necessary.

Court involvement

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

The ADR Act does not contain any express provisions on the instances where the arbitral tribunal can request assistance from the court. The court is, however, empowered to refer any matter brought before it to arbitration where it is satisfied that the action or part thereof can be resolved through arbitration. The court may intervene where any issues arise with regard to the appointment procedure of the arbitrator. Where the appointment procedure of the arbitrator is called into question, a party may apply to the High Court for the purposes of setting aside the appointment.

In addition, a party may apply to the High Court for the revocation of the arbitrator's authority where it is established that the arbitrator has violated the requirements of neutrality or impartiality in the discharge of his or her responsibilities. The ADR Act further provides that a party to a proceeding that is dissatisfied with an arbitrator's ruling on jurisdiction in an arbitration proceeding may apply to the High Court for the determination of the arbitrator's jurisdiction. The Court's intervention will also be triggered when a party to an agreement that has not been notified of an arbitration proceeding applies to the Court to set aside the proceedings. The Court may also intervene where a party applies to set aside an arbitral award. A party is entitled to challenge the validity of an award where the court is satisfied, inter alia, that a party to an agreement was under some form of disability, the law applicable to the arbitration agreement was not valid, or the party was not given notice of the appointment of the arbitrator or was unable to present its case. An arbitral award is also liable to be set aside where the Court discovers that the subject matter of the arbitration was not capable of settlement by arbitration.

With respect to evidence, the law confers considerable power on the arbitrator to regulate the process. For instance, the arbitrator determines the materiality and relevance of evidence submitted by the parties. The Court cannot intervene directly with regard to the taking of evidence. Its power to support arbitral proceedings on issues of evidence is subject to the consent of the parties.

Confidentiality

31 | Is confidentiality ensured?

The ADR Act enjoins the arbitrator or the arbitral tribunal to maintain confidentiality at all stages of the proceedings. The arbitrator is required to keep any information relating to the dispute in strict confidence. For instance, the arbitrator is required to conduct the oral hearing in private and is mandated to keep information regarding any material submitted in confidence, unless the parties request otherwise. In addition, a party who seeks to enforce an award is only required to apply to the High Court for an order. Confidentiality can still be maintained at this stage, since the Court will not go into the substantive issues that gave rise to the arbitration proceedings or the award.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) permits parties to request the High Court to order an interim measure before or during arbitral proceedings.

The High Court may make an interim order for the taking and preservation of evidence or assets, or on issues affecting property rights that are the subject of the proceedings, make an interim injunction or address issues regarding the appointment of a receiver.

Under section 40 of the ADR Act, the High Court may also determine any questions of law that arise in the course of the proceedings if the Court is satisfied that the question substantially affects the rights of the other party. The High Court is also entitled to make an order that any question of law arising from an arbitration proceeding be referred to it for determination. The exercise of this power is, however, subject to the agreement of the parties. In addition, the ADR Act provides that, unless the parties otherwise agree, an application to the High Court shall not serve as a stay of the arbitral proceedings.

Interim measures by an emergency arbitrator

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

No, the ADR Act does not contain any provisions for an emergency arbitrator. However, the ADR Act provides that, where there is a sudden vacancy in the arbitral tribunal, the parties may agree on whether and how the vacancy should be filled.

However, with regard to the National Labour Commission, where a vacancy occurs in the number of arbitrators, the remaining arbitrators may, with the consent of the parties, act despite the vacancy; failing that, the party whose number of arbitrators is affected by the vacancy shall appoint another arbitrator to fill the vacancy immediately; failing this, the Commission shall appoint another arbitrator to fill the vacancy.

Interim measures by the arbitral tribunal

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

The arbitrator may, at the request of a party, grant any interim relief the arbitrator considers necessary for the protection or preservation of property. An interim relief may be in the form of an interim award, and the arbitrator may require the payment of costs for such relief. The applicant is required under the law to bear liability for the cost of granting the interim relief.

Sanctioning powers of the arbitral tribunal

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

The ADR Act and the rules of the Ghana Arbitration Centre do not specifically provide for the arbitration tribunal's competence to sanction parties or counsel who use 'guerrilla tactics'. But, such competence may fall within the broad powers of the arbitrator in section 31(2) of the ADR Act, which places an obligation on the arbitral tribunal, subject to the other requirements of the ADR Act, to conduct the arbitration to avoid unnecessary delay and expenses. This section also allows the arbitral tribunal to adopt measures that will expedite resolution of the dispute. The ADR Act further prescribes that the arbitral tribunal has the power to decide on matters of procedure and evidence subject to the rights of the parties. Thus, the arbitral tribunal, for example, has the power to determine the manner in which witnesses are examined.

Under the rules of the Ghana Arbitration Centre, once the arbitral tribunal has adopted the rules for settling the dispute, the arbitral tribunal may proceed if a party attempts to delay the proceedings. However, this party must be notified of the proceedings that took place in its absence. Also, under the rules, the Ghana Arbitration Centre levies charges on a party who causes an adjournment of any scheduled hearing.

AWARDS

Decisions by the arbitral tribunal

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

The arbitrator is required to encourage the parties to resolve their differences during the proceedings. The law does not impose any requirement that the decision of the arbitrators be unanimous if the parties are unable to reach an agreement.

In rendering an award, it is sufficient if the decision of the arbitral tribunal is made by a majority. The validity of the award is not impugned by a dissenting opinion expressed by an arbitrator.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

In all cases in which a dissenting opinion is expressed by a member of an arbitral tribunal, it will not count towards the final decision of the tribunal. Where a unanimous decision cannot be reached, the decisive opinion is that expressed by the majority.

Form and content requirements

38 | What form and content requirements exist for an award?

The parties have the liberty to determine the form and content of the arbitral award. In the absence of such an agreement, the following requirements must be satisfied:

- the award must be in writing;
- the award must be signed by the arbitrator or the tribunal, as the case may be;
- the date and place where the award was made must be indicated; and
- the reasons for the award must be indicated, unless the parties otherwise agree not to.

In the case of awards granted by a tribunal, the signatures of the majority shall be sufficient, provided that the reason for the omission of the signatures of some of the arbitrators is stated.

Time limit for award

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

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) has not set out any specific time frame for the delivery of the award. However, the parties to an arbitration proceeding expect to resolve their differences as quickly as possible; thus, the arbitration proceeding is expected to be conducted expeditiously and the award handled within a reasonable time. What amounts to a reasonable time is a question of fact to be determined on a case-by-case basis. Even though the ADR Act does not specify the time limit for the delivery of the award, it expressly prohibits the arbitrator from extending the time limit agreed by the parties for the delivery of the award. Under the rules of the Ghana Arbitration Centre, the arbitrator shall not deliver the award later than 30 days from the date of closing the hearings, or if oral hearings are waived, from the date of transmitting the final statements and proofs to the arbitrator. The parties may, however, amend the time limit of the award.

Date of award

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

The date of the delivery of the award and the date of its receipt by the parties are significant for a number of reasons. The date of the delivery of the award is relevant for purposes of adding to or correcting any clerical, typographical, technical or computational error in the award. This may be effected either at the request of a party to the proceedings or at the instance of the arbitrator within a period of 28 days of the delivery of the award. The date of the receipt of the award by the parties is relevant for the purposes of challenging its validity. A party that wishes to set aside an award is required to submit its application to the High Court within a period of three months from the date the party received or is notified of the award.

Types of awards

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

The law provides for three main types of awards: interim relief, settlement before conclusion of arbitration and the final arbitral award.

With regard to interim relief, an arbitrator is permitted, at the request of a party, to grant any interlocutory relief that he or she considers necessary for the preservation or protection of property.

In addition, a relief in the form of an award may be granted by an arbitrator where, in the course of a proceeding, the parties settle their dispute before the arbitral award is given. An arbitrator may also deliver a final award on the conclusion of an arbitration proceeding. The ADR Act also provides that an arbitrator may grant any relief the arbitrator considers just and equitable (including specific performance) provided that the arbitrator acts within the scope of the arbitration agreement.

Termination of proceedings

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

The arbitral proceedings may be terminated if:

- the claimant withdraws the claim, unless the respondent objects, and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;
- the parties agree on the termination of the proceedings;
- the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible; or
- the parties have settled their dispute before the delivery of the final award. In such circumstances, the law permits the arbitrator to terminate the proceedings and, with the consent of the parties, record the settlement in the form of an arbitral award on agreed terms.

Cost allocation and recovery

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

The assessment of the costs and expenses arising from an arbitration proceeding is done by the arbitrator. Parties are liable to equally bear all the administrative costs arising from the proceedings, unless they agree to the contrary. The parties are also required to pay for the services of their attorneys and any other statutory fees.

The law also provides that a party may, within 28 days of the date of the determination of the amount of fees, apply to the appointing authority or the court, upon notice to the other party and the arbitrators, for an order adjusting the amount. Any excess payment made as a result of the adjustment may be ordered to be repaid.

Interest

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

The ADR Act makes provision for the recovery of interest on principal claims in appropriate circumstances. The mode of payment and the rate of interest on any sum are determined by the arbitrator. In the case of disputes relating to contracts, the arbitrator can grant the appropriate pre-award or post-award relief at simple or compound interest under the terms of the contract and the applicable law.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) grants the arbitrator the power to correct any clerical, typographical, technical or computational error in the award, and to make an additional award in respect of a claim presented to the arbitrator but omitted from the award. Such corrections can be effected at the instance of the arbitrator or at the request of a party, within 28 days of delivering an award or such longer period as the parties may agree on, upon giving 14 days' notice to the parties. The law is silent with respect to the power of the tribunal to interpret the award.

Challenge of awards

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

The validity of an award can be challenged on a number of grounds. Among several others, the existence of any of the factors outlined below can provide a basis for challenging the award:

- a party to the arbitration was under some form of disability or incapacity;
- the law applicable to the arbitration agreement is not valid;

- the applicant was not given notice of the appointment of the arbitrator or of the proceedings, or was unable to present the applicant's case;
- the award deals with a dispute not within the scope of the arbitration agreement or outside the agreement, except that the court shall not set aside any part of the award that falls within the agreement;
- there has been a failure to conform to the agreed procedure by the parties;
- the arbitrator has an interest in the subject matter of arbitration that the arbitrator failed to disclose;
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Ghana; or
- the award is in conflict with public policy.

A party that alleges that any of the above-stated factors have impugned the credibility of the award is required to apply to the High Court to set aside the award.

Levels of appeal

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

The ADR Act does not permit the parties to appeal on the merits of the decision of an arbitrator or arbitral tribunal. However, an aggrieved party may apply to the High Court to set aside the arbitral award.

A party that wishes to set aside an arbitral award for any irregularity is required to apply to the High Court. If the party is dissatisfied with the ruling of the Court, an appeal lies, as of right, to the Court of Appeal, with further appeal to the Supreme Court (the last appellate court). The ADR Act is silent on the costs to be incurred and the time frame. The parties will be required to bear their own costs unless the court decides otherwise. Regarding the time frame, it is difficult to determine beforehand how long it will take for a challenge to be decided at each level. It will depend largely on the number of cases to be decided by the court at each period.

Recognition and enforcement

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

An award will generally be recognised when it satisfies the requirements of due process and natural justice. An award shall be enforced in the same manner as a judgment or order of the High Court.

In order for a foreign award to be enforceable, it must satisfy the following requirements:

- it was rendered by a competent authority under the laws of the country where the award was made;
- a reciprocal agreement exists between Ghana and the country in which the award was made;
- the award was made under the international convention specified in the First Schedule to the ADR Act;
- the party has produced the original award or a certified copy thereof, and the agreement pursuant to which the award was made or a duly authenticated copy; and
- there is no appeal pending against the award in any court under the law applicable to the arbitration.

An award may not be enforced where it is shown that the arbitrator lacked jurisdiction to make the award.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Yes, an action to enforce an arbitral award may not be brought after 12 years from the date of the delivery of the award. The Limitation Act 1972 (NRCD 54) provides that an arbitration award under an arbitration agreement under seal shall not be enforced after 12 years. This limitation applies to arbitration agreements under the ADR Act because the Act specifically provides that an arbitration agreement is only enforceable where it is in writing, and arbitration agreements are separable from the main or substantive underlying agreement.

Enforcement of foreign awards

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

The ADR Act clearly provides that a foreign arbitral award that has been annulled (and by implication set aside) in the country in which it was given cannot be enforced in Ghana, and the courts are likely to uphold this provision.

Enforcement of orders by emergency arbitrators

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

The ADR Act and the rules of the Ghana Arbitration Centre do not provide for emergency arbitrators or the enforcement of orders made by emergency arbitrators. We are not aware of any Ghanaian case law in which the courts enforced orders by emergency arbitrators. However, a court of competent jurisdiction, under its inherent powers, may enforce an order made by an emergency arbitrator where the court considers it fair and just to do so.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The ADR Act does not have express provisions dealing with the costs of enforcing awards. However, it can be reasonably expected that the person who seeks to enforce either a domestic or foreign award shall bear the full costs associated with the enforcement.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

The legal system of Ghana follows the common law tradition. The various rules pertaining to this system in the area of evidence and procedure will provide the guiding framework for the conduct of arbitration in Ghana. An arbitrator will therefore be required to follow and observe the general rules of common law and equity in the discharge of his or her responsibilities.

As a general rule, parties are required to appear in person or be represented by counsel during the arbitral proceedings. This does not preclude the possibility of submitting a written statement in lieu of appearance before the arbitrator or the tribunal.

In effect, the law provides a great deal of discretion to the parties to decide the mode of submitting evidence for the consideration of the arbitrator or the tribunal.

Professional or ethical rules

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

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) does not specify any specific professional or ethical rules to be followed by counsel in international arbitration. However, generally, lawyers have an ethical duty to the court, the client and the legal profession. Under the Legal Profession (Professional Conduct and Etiquette) Rules 2020 (LI 2423), a lawyer has a duty to behave with the utmost honesty and with frankness when dealing with clients and the courts.

The ADR Act provides in relevant part that a party may be represented by counsel or any other person chosen by the party. Also, where a party intends to be represented at the arbitration proceedings, the person is required to give at least seven days' notice to the other party before the commencement of the arbitration.

Although the ADR Act does not specifically state how a party's representative can be changed during the proceedings, largely best practice is that it is not advisable for the parties to change their representatives once the proceedings have begun.

Third-party funding

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

No, the ADR Act does not have any express provisions restricting third-party funding of arbitral claims. The concept of third-party funding of arbitral claims is not a common practice in Ghana, and most parties that opt to arbitrate their claims provide the funding from their own resources.

However, considering that there is no express statutory restriction of the practice, it is unlikely that third-party funding of arbitral claims will be disallowed. However, the full details of any such arrangement must be disclosed to the arbitrator and the other party in order for any conflict of interest checks to be carried out by all the parties to the arbitration.

Regulation of activities

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

The ADR Act does not place any limitation on the participation of foreigners in an arbitration proceeding. The parties to the arbitration are at liberty to appoint a person without experience or qualifications relevant to the subject of the dispute as an arbitrator.

However, a foreign practitioner must be conversant with the common law system used in Ghana and the impact it has on arbitration practice generally.

A foreign practitioner will also be required to obtain a resident and work permit to engage in any form of employment. The practitioner is further required to pay the appropriate taxes on the income obtained from rendering professional services.

Apart from these general observations, a practitioner will not face any other legal and administrative challenges in the discharge of his or her responsibilities.

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UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Ghana's arbitration law is not currently subject to reform and there is no pending or ongoing action to revise the rules of the arbitration institutions in the country.

The main recent decisions in the field of international investment arbitration to which Ghana was a party are:

- *GPGC Limited v The Government of Ghana the Republic of Ghana* – PCA case No. 2019-05 (26 January 2021);
- *Sibton Switch Ghana Limited v Bank of Ghana* – LCIA (28 July 2021); and
- *Africa Integras Limited v University of Ghana* – LCIA (2 August 2018).

Hong Kong

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RPC

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Hong Kong is a signatory by virtue of the People's Republic of China's accession to the New York Convention on 22 January 1987 (although the Convention was first applied to Hong Kong on 21 April 1977 through a declaration by the United Kingdom).

Since the 1997 resumption of Chinese sovereignty, however, the New York Convention no longer applied to the enforcement of Hong Kong awards in mainland China and vice versa. This is because mainland China did not consider Hong Kong awards to be awards made in the territory of another New York Convention state. The reciprocal enforcement of arbitral awards between Hong Kong and mainland China is therefore now governed by an 'Arrangement' and a 'Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the mainland and the Hong Kong Special Administrative Region', which came into force in 1999 and 2021 respectively.

In common with many other signatories to the Convention, Hong Kong (via China's accession) has adopted both the reciprocity reservation and the commercial reservation. The reciprocity reservation provides that Hong Kong will recognise and enforce only those arbitral awards made in other states that are also signatories to the Convention. The commercial reservation limits recognition and enforcement to arbitral awards made in commercial cases.

The Hong Kong Department of Justice website provides a list of all the treaties that are in force and are applicable to Hong Kong. Most of the treaties listed applied to Hong Kong before 1 July 1997 and continue to apply, while others were applied to Hong Kong with effect from 1 July 1997 (because China was already a signatory) or have been applied since that date.

In addition to the New York Convention, Hong Kong is party to a number of other treaties and conventions relevant to arbitration, including (among others):

- the Hague Convention for the Pacific Settlement of International Disputes 1899;
- the Hague Convention for the Pacific Settlement of International Disputes 1907;
- the Statute of the Hague Conference on Private International Law 1951 (as amended 2007);
- the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965; and
- the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Yes, Hong Kong has 20 bilateral investment treaties in force with the following countries: Austria, the Belgium-Luxembourg Economic Union, Canada, Chile, Denmark, Finland, France, Germany, Italy, Japan, Korea, Kuwait, Mexico, Netherlands, New Zealand, Sweden, Switzerland, Thailand, the United Arab Emirates and the United Kingdom.

Domestic arbitration law

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

The primary domestic source of law is the Arbitration Ordinance (Cap. 609) (AO), which came into force on 1 June 2011 (with some additional amendments taking effect from 19 May 2021). For arbitrations commenced on or after 1 June 2011, the AO applies to domestic and international arbitrations without distinction. In addition, the common law is an important source of law in Hong Kong, including with respect to the enforcement and setting aside of awards.

Domestic arbitration and UNCITRAL

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

The AO is largely based on the UNCITRAL Model Law. It incorporates most of its provisions, including the amendments adopted in 2006.

Before the current AO came into effect in June 2011, Hong Kong had two separate regimes – one for domestic arbitrations and another for international arbitrations. Although the separate domestic regime has essentially been abolished, there remains a procedure allowing parties to opt into certain provisions of the former domestic regime. Those provisions, as set out in Schedule 2 to the AO, cover:

- appointment of sole arbitrators;
- consolidation of arbitrations;
- determination of preliminary questions of law by the court;
- challenging arbitral awards on the grounds of serious irregularity; and
- appeals against arbitral awards on a question of law.

Additional differences between the AO and the UNCITRAL Model Law relate to the power of an arbitrator to act as a mediator after the arbitral proceedings have commenced, if all parties consent in writing (also

known as med-arb) (section 33 of the AO) and that arbitration-related court proceedings be confidential (section 17 of the AO).

Mandatory provisions

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

The AO contains relatively few provisions that cannot be excluded by the parties. Section 3(2) of the AO states that it is based on the following principles:

> *(a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and*
>
> *(b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance.*

Certain mandatory provisions do apply, however, including that the parties must be treated equally and the tribunal must be independent and act fairly and impartially towards the parties, giving each party a reasonable opportunity to present its case and deal with its opponent's case and use procedures that are appropriate to the particular case to avoid unnecessary delay and expenses (section 46 of the AO).

Substantive law

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

Most arbitration agreements contain a clause expressly stating the law governing the substantive contract. Where no such clause exists, the tribunal will apply conflict of laws rules in order to determine the substantive law of the dispute. This is likely to be the law with which the contract has its closest and most real connection.

Even where the parties have expressly chosen the law governing the substantive contract, and perhaps also the procedural rules for arbitration, it is not uncommon for them to have failed to stipulate which other relevant systems of law apply, such as the law governing the arbitration proceedings and the law governing the agreement to arbitrate – thereby leaving them uncertain and open to dispute. This can lead to complications and require recourse to the courts (which will apply conflict of laws rules to resolve the issue). In an effort to prevent such difficulties from arising, the Hong Kong International Arbitration Centre (HKIAC) has included in its model arbitration agreement an express choice of law clause covering these points, as currently there is no international consensus on determining the law of an arbitration agreement.

The UK Supreme Court held in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 that, where the law applicable to the arbitration agreement was not specified and the parties have expressly chosen the law governing the substantive contract, this will usually also apply to the arbitration agreement. Where there is no express or implied choice of law in the substantive contract, the system of law with which the arbitration agreement has its closest and most real connection will usually be the law of the seat. The Hong Kong Court of First Instance considered *Enka* and found that it is a matter of looking at the relevant arbitration clause and considering what the parties' intentions were as to the governing law of the arbitration agreement (see *Capital Wealth Holdings Ltd* [2020] HKCFI 3025 (19 October 2020)).

In another recent decision – *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (27 October 2021) – the UK Supreme Court followed its earlier decision in *Enka* and held that the validity of the arbitration agreement will be determined by reference to the law chosen by the parties to govern it, and in the absence of such a choice, the law of the country where the award is made (ie, the seat). The UK Supreme Court also held that these principles in *Enka* applied both before the issue of an award and at the enforcement stage.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The HKIAC, 38th Floor, Two Exchange Square, 8 Connaught Place, Central, Hong Kong is one of the world's leading dispute resolution organisations, specialising in arbitration, mediation, adjudication and domain name dispute resolution. The HKIAC also offers state-of-the-art hearing facilities.

The HKIAC's 2018 Administered Arbitration Rules (the 2018 HKIAC Rules), which came into force on 1 November 2018, is a modern and comprehensive set of rules. The HKIAC is the first institution expressly to provide parties with a choice between paying arbitrators based on hourly rates or a sum calculated by reference to the amount in dispute. Although the HKIAC maintains both a Panel and a List of Arbitrators, there are no restrictions on selection of the arbitrators (although arbitrators still have to be confirmed by the HKIAC) or the seat of arbitration.

The HKIAC considers itself to be a 'light touch' institution. It has power under the 2018 HKIAC Rules to facilitate the efficient and effective running of an arbitration where necessary. If not, the HKIAC will not intervene. The HKIAC does not scrutinise awards. It leaves it to the tribunal to render a valid award.

The International Court of Arbitration of the International Chamber of Commerce's (ICC) Secretariat in Hong Kong (ICC-HK), Room 102, 1/F, West Wing, Justice Place, 11 Ice House Street, Central, Hong Kong (http://www.icchkcbc.org/index.html) administers ICC arbitration cases in the Asia-Pacific region.

The 2021 ICC Rules of Arbitration, which came into force on 1 January 2021, are used all around the world to resolve disputes.

One noteworthy aspect of ICC arbitration is that the ICC monitors the entire arbitral process, from the initial request for arbitration to scrutiny of the draft final award. The arbitrators' fees are managed by the ICC and fixed on an ad valorem basis. The ICC will take into consideration whether the procedure is expedited or not, the diligence of the arbitrators, time spent, rapidity of the proceedings and complexity of the dispute. Based on the amount in dispute, the ICC's scale provides a minimum and a maximum per arbitrator. There are no restrictions on the selection of arbitrators (subject to confirmation by the ICC Court) or the seat of arbitration.

The China International Economic and Trade Arbitration Commission's (CIETAC) Hong Kong Arbitration Centre (CIETAC-HK), Room 503, 5/F, West Wing, Justice Place, 11 Ice House Street, Central, Hong Kong is CIETAC's first sub-commission outside mainland China.

The 2015 CIETAC Arbitration Rules, which came into force on 1 January 2015, require the parties to nominate arbitrators from CIETAC's Panel of Arbitrators, unless otherwise agreed (article 26). However, for cases administered by CIETAC-HK, the parties may nominate arbitrators from outside CIETAC's Panel of Arbitrators (article 76). The arbitrators' fees are managed by CIETAC and fixed on the basis of the relevant scale.

In June 2020, the Hong Kong Department of Justice and eBRAM launched a COVID-19 Online Dispute Resolution Scheme to provide a speedy and cost-effective means to resolve small value disputes (up to HK$500,000) involving parties, especially SMEs, which have been adversely affected by the pandemic.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

The following categories of dispute may not be referred to arbitration:

- family law matters, including those relating to divorce and child custody;
- criminal law matters;
- actions in rem against vessels; and
- matters reserved for determination by the state, including taxation and immigration.

Section 70 of the Arbitration Ordinance (Cap. 609) (AO) also provides that the tribunal cannot make orders as to specific performance of any contract relating to land or any interest in land.

There are also a wide range of possible disputes that may not be suitable for arbitration, even if arbitration is not expressly excluded.

If a dispute involves a claim or other dispute that falls with the jurisdiction of the Labour Tribunal, the court has the discretion to determine whether the matter should be referred to arbitration pursuant to the criteria set out in section 20(2) of the AO.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The AO defines an 'arbitration agreement' as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not.

An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement (section 19(1) of the AO).

Section 19(2) of the AO provides that an arbitration agreement (consistent with the UNCITRAL Model Law and the New York Convention) must be in writing. However, the term 'in writing' has a broad definition, and includes an arbitration agreement whose content is recorded in any form – even if the arbitration agreement itself has been concluded orally, by conduct or by other means.

The definition expressly includes:

- electronic communications;
- an agreement in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other; and
- a reference in a contract to any document containing an arbitration clause, provided that the reference is such as to make that clause part of the contract.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

Even if the underlying contract is null and void, it does not mean the arbitration clause is invalid as well (section 34 of the AO).

Even if a party to the arbitration agreement dies, it may be enforced by or against that party's personal representatives.

An award made by a tribunal under an arbitration agreement is final and binding on the parties and any person claiming through or under any of the parties unless otherwise agreed by the parties (section 73 of the AO).

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Yes. The arbitral tribunal may rule on its own jurisdiction and on any objections with respect to the existence or validity of the arbitration agreement (section 34 of the AO). An arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void does not mean the arbitration clause is invalid as well.

Third parties – bound by arbitration agreement

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

A party that has not signed an arbitration agreement or otherwise agreed to become a party to the arbitration proceedings cannot be bound by an arbitration agreement or award.

However, a third party that has not agreed to be bound by an arbitration agreement may enjoy a right to enforce a contract term through arbitration under the Contracts (Rights of Third Parties) Ordinance (Cap. 623) if:

- the contract term is enforceable by the third party;
- the term provides that the dispute between the third party and the promisor is to be submitted to arbitration; and
- the term constitutes an arbitration agreement.

The English courts have also held that an unnamed principal who is a non-signatory to the contract may rely on an arbitration agreement entered into by its agent.

Third parties – participation

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

Under article 27 of the 2018 Hong Kong International Arbitration Centre (HKIAC) Rules, the arbitral tribunal or, where the arbitral tribunal is not yet constituted, the HKIAC, has the power to allow an additional party to be joined to the arbitration provided that prima facie it is bound by the arbitration agreement, or all parties, including the additional party, expressly agree.

Groups of companies

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

No, the 'group of companies' doctrine is not recognised in Hong Kong. However, a third party that has not directly agreed to be bound by an arbitration agreement may enjoy a right to enforce a contract term through arbitration under the Contracts (Rights of Third Parties) Ordinance (Cap. 623).

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The AO does not restrict the number of parties to an agreement to arbitrate. In addition, multiparty arbitrations by way of joinder or

consolidation are expressly provided for in articles 27 and 28 of the 2018 HKIAC Rules.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

An arbitral tribunal has no power to consolidate arbitration proceedings.

However, the HKIAC has the power to do so under certain circumstances. Under article 28 of the 2018 HKIAC Rules, the HKIAC has the power, at the request of a party and after consulting with the parties and any confirmed arbitrators, to consolidate two or more arbitrations pending under the 2018 HKIAC Rules where:

- the parties agree to consolidate;
- all of the claims in the arbitrations are made under the same arbitration agreement; or
- the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions and the arbitration agreements are compatible.

In addition, section 2 of Schedule 2 to the AO (opt-in provision) provides that the Hong Kong courts have the power to consolidate two or more domestic arbitrations where the court finds that:

- a common question of law or fact arises in both or all of them;
- the rights to relief claimed in those arbitral proceedings are in respect of or arise out of the same transaction or series of transactions; or
- it is desirable to do so for any other reason.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

The parties are free to agree on a procedure for appointing the arbitrators, and can essentially adopt whatever criteria they wish in selecting arbitrators. The parties may, for example, stipulate that an arbitrator must possess certain characteristics (eg, being a professional or an expert in a particular field).

An arbitrator may not be prohibited from being appointed by reason of his or her nationality, unless the parties agree otherwise (section 24 of the Arbitration Ordinance (Cap. 609) (AO)). Under the 2018 Hong Kong International Arbitration Centre (HKIAC) Rules, as a general rule, where the parties to an arbitration are of different nationalities, the sole or presiding arbitrator shall not have the same nationality as any party unless specifically agreed otherwise by all parties (article 11.2).

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Lawyers, retired judges, law professors, in-house counsel, government officials and non-lawyer professionals, including architects, engineers and surveyors. In February 2018, the HKIAC launched a public welfare initiative, Women in Arbitration, committed to the promotion and success of female practitioners in international arbitration.

Default appointment of arbitrators

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

If the parties fail to agree, the number of arbitrators must be either one or three as decided by the HKIAC (section 23(3) of the AO). However, if the parties have opted into section 1 of Schedule 2 to the AO, there will be a sole arbitrator.

The parties are free to agree on the procedure for appointing the arbitrator(s) (section 24(1) of the AO). If the parties do not do so, the default provisions under section 24 of the AO will apply, namely:

- In an arbitration with three arbitrators, each party will appoint one arbitrator and those two arbitrators will appoint the third arbitrator (section 24(1)).
- In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, one will be appointed, at the party's request, by the HKIAC (section 24(1)).
- In an arbitration with an even number of arbitrators, each party is to appoint the same number of arbitrators (section 24(2)).
- In an arbitration with an uneven number of arbitrators greater than three, each party is to appoint the same number of arbitrators and the HKIAC will appoint the remaining arbitrator(s) (section 24(3)).
- Where a party fails to appoint an arbitrator in accordance with an agreed or default procedure, the HKIAC can make the necessary appointment (sections 24(1) to (4)).

Challenge and replacement of arbitrators

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

The appointment of an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications stipulated by the parties (section 25(1) of the AO). A party may challenge an arbitrator appointed by it, or in whose appointment it participated, only for reasons of which it becomes aware after the appointment has been made (section 25(2)).

Under section 26(1) of the AO, the parties are free to agree on the procedure for challenging the appointment of an arbitrator. If the parties have not agreed on a procedure, the default provisions under section 26 of the AO will apply, namely:

- A party that intends to challenge an arbitrator must, within 15 days becoming aware of the constitution of the arbitral tribunal or of any of the circumstances set out in section 25(2) of the AO, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his or her office or the other party agrees to the challenge, the arbitral tribunal will decide on the challenge (section 26(1)).
- If the challenge under the above procedure is not successful, the challenging party can request the court or another authority (such as the HKIAC) to decide on the challenge. The challenging party must do so within 30 days after having received the notice of the decision rejecting the challenge. The court or other authority's decision may not be appealed. While such a request is pending, the tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award (section 26(1)).

Where an arbitrator becomes unable to perform his or her functions or for other reasons fails to act without undue delay, his or her mandate will

also terminate if he or she either withdraws from office or is removed by the parties' agreement or by decision of the court or other authority (section 27 of the AO). The mandate of an arbitrator terminates on his or her death as his or her authority is personal (section 29 of the AO). In such circumstances, a substitute arbitrator will be appointed according to the rules that were applicable to the original appointment (section 28 of the AO).

There is a tendency in Hong Kong arbitrations to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration.

Relationship between parties and arbitrators

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

Section 46(2) of the AO provides that the parties must be treated equally. This principle requires arbitrators (party-appointed or otherwise) to:

- be independent;
- act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
- use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate (section 46(3) of the AO).

The parties to proceedings before an arbitral tribunal are jointly and severally liable to pay the reasonable fees and expenses of the tribunal (section 78 of the AO).

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Under article 11.1 of the 2018 HKIAC Rules, an arbitral tribunal shall be and remain at all times impartial and independent of the parties. An arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once confirmed or appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances (article 11.4).

Immunity of arbitrators from liability

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

An arbitrator is liable in law for an act done or omitted to be done by him or her (or his or her employee or agent) in relation to the exercise or performance of his or her functions only if it is proved that the act was done or omitted to be done dishonestly (section 104 of the AO).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

Where a claim is brought before the Hong Kong courts in a matter that is the subject of an arbitration agreement, a party to the claim can request that the parties be referred to arbitration (section 20 of the Arbitration Ordinance (Cap. 609) (AO)). The court will grant the request and stay the court proceedings, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The request must be made not later than when submitting his or her first statement on the substance of the dispute. While the issue is pending before the court, any existing arbitral proceedings may nevertheless be commenced or continued and an award may still be made.

Jurisdiction of arbitral tribunal

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

The principle of competence-competence is recognised in section 34 of the AO.

An arbitral tribunal is competent to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement (section 34(1) of the AO).

A plea that the arbitral tribunal does not have jurisdiction must be raised no later than submission of the statement of defence. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority arises during the arbitral proceedings. In either case, the arbitral tribunal may admit a later plea if it considers the delay justified (section 34(1) of the AO).

Where the tribunal rules that it has jurisdiction, any party may request, within 30 days of having received the notice of the ruling, the court to decide the matter, which decision shall not be appealed (section 34(1) of the AO). In effect, this amounts to a right to appeal the tribunal's initial decision.

However, if the arbitral tribunal rules that it has no jurisdiction to decide a dispute, such decision is not subject to appeal (section 34(4) of the AO) and the court must, if it has jurisdiction, decide that dispute (section 34(5) of the AO).

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

There is no default mechanism for the place or language of the arbitration under the Arbitration Ordinance (Cap. 609) (AO).

The parties are free to agree on the place (or seat) of arbitration, failing which the place of arbitration will be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties (section 48 of the AO). The tribunal may decide, unless otherwise agreed by the parties, on the physical location at which meetings or hearings may take place.

Article 14.1 of the 2018 Hong Kong International Arbitration Centre (HKIAC) Rules provides that the parties may agree on the seat of arbitration. Where there is no agreement as to the seat, the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate.

The parties are free to agree on the language(s) of the arbitral proceedings, failing which the tribunal will make a determination (section 50 of the AO). This agreement or determination, unless

otherwise specified, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. The arbitral tribunal may also order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Under article 15.1 of the 2018 HKIAC Rules, where the parties have not previously agreed on such language, any party shall communicate in English or Chinese prior to any determination by the arbitral tribunal.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Unless otherwise agreed by the parties, the arbitration proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent (section 49(1) of the AO). Such request has to be made by way of a written communication (section 49(2) of the AO).

Under article 4 of the 2018 HKIAC Rules, the party initiating arbitration shall communicate a Notice of Arbitration to the HKIAC and the other party. An arbitration shall be deemed to commence on the date on which a copy of the Notice of Arbitration is received by the HKIAC.

Hearing

28 | Is a hearing required and what rules apply?

Section 47 of the AO provides that parties are free to agree on the procedural rules to be applied, failing which the arbitral tribunal may conduct the arbitration in the manner that it considers appropriate (subject to other provisions of the AO).

Article 22 of the 2018 HKIAC Rules provides that the arbitral tribunal shall decide whether to hold hearings for presenting evidence or for oral arguments, or whether the arbitration shall be conducted solely on the basis of documents and other materials. The arbitral tribunal shall hold such hearings at an appropriate stage of the arbitration, if so requested by a party or if it considers fit. In the event of a hearing, the arbitral tribunal shall give the parties adequate advance notice of the relevant date, time and place. Hearings are held in private unless the parties agree otherwise.

Evidence

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

Unless otherwise agreed by the parties, an arbitral tribunal may decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law relevant to those arbitral proceedings (section 56(7) of the AO). The tribunal may make an order directing the discovery of documents, the delivery of interrogatories, that evidence be given by affidavit, the inspection of property, etc (section 56(1) of the AO). Under section 56(8) of the AO, unless otherwise agreed by the parties, the arbitral tribunal may also:

- administer oaths to, or take the affirmations of, witnesses and parties;
- examine witnesses and parties on oath or affirmation; or
- direct the attendance before it of witnesses in order to give evidence or produce documents or other evidence.

When conducting arbitral proceedings, the arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it must give the weight that it considers appropriate to the evidence adduced in the proceedings (section 47(3) of the AO). The tribunal may refer to the IBA Rules on the Taking of Evidence in International Arbitration for guidance.

Under article 22 of the 2018 HKIAC Rules, while each party shall have the burden of proving the facts relied on to support its claim or defence, the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that it determines to be relevant to the case and material to its outcome. It also has the power to admit or exclude any documents, exhibits or other evidence.

Court involvement

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

The arbitral tribunal, or a party with the arbitral tribunal's approval, may request from a competent Hong Kong court assistance in taking evidence (section 55(1) of the AO). The court may execute the request within its competence and according to its rules on taking evidence. The court may also order a person to attend arbitral proceedings to give evidence or produce documents or other evidence (section 55(2) of the AO).

Consistent with Hong Kong's pro-arbitration stance, the courts cannot interfere with arbitration proceedings, except in certain circumstances in order to assist the arbitral process, which include:

- staying court proceedings in a matter that is the subject of an arbitration agreement (section 20 of the AO);
- determining a challenge to the appointment of an arbitrator (section 26 of the AO);
- granting interim measures, including injunctions (section 45 of the AO);
- assisting in the taking of evidence (section 55(1) of the AO);
- ordering a person to attend proceedings before an arbitral tribunal in order to give evidence or produce documents or other evidence (section 55(2) of the AO);
- extending time to commence arbitration proceedings (section 58 of the AO);
- dismissing a claim for unreasonable delay and debarring a party from commencing further arbitral proceedings (section 59 of the AO);
- making an order, directing the inspection, photographing, preservation, custody, detention or sale of any relevant property by the arbitral tribunal, a party to the arbitral proceedings or an expert; and directing samples be taken from, observations made of or experiments conducted on any relevant property (section 60 of the AO);
- setting aside an arbitral award (section 81 of the AO);
- enforcing an arbitral award, including foreign arbitral awards in accordance with the New York Convention (sections 84, 87, 92 and 98A of the AO); and
- refusing to enforce a domestic or foreign arbitral award under certain conditions (sections 86, 89, 95 and 98D of the AO).

Confidentiality

31 | Is confidentiality ensured?

Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to the arbitral proceedings or an award made in those proceedings (section 18(1) of the AO). However, under section 18(2) of the AO, a party may publish, disclose or communicate the above information to:

- protect or pursue a legal right or interest of the party or to enforce or challenge the award in legal proceedings before a court or other judicial authority in or outside Hong Kong;
- a government body, regulatory body, court or tribunal if the party is obliged to do so by law; or
- a professional or any other adviser of any of the parties.

The HKIAC imposes an obligation of confidentiality under article 45 of the 2018 HKIAC Rules upon the parties, arbitral tribunal, emergency arbitrator, expert, witness, tribunal secretary and the HKIAC itself. However, it does not prevent the disclosure or communication of information by a party to a person for the purposes of having or seeking third-party funding of arbitration (article 45.3(e)).

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

On the application of any party, the court may, in relation to any arbitration proceedings which have been or are to be commenced in or outside Hong Kong, grant interim measures (section 45(2) of the Arbitration Ordinance (Cap. 609) (AO)), including injunctions, freezing orders and security for costs. Such decision, order or direction of the court cannot be appealed (section 45(10) of the AO).

The court may grant interim measures irrespective of whether the tribunal may exercise similar powers under section 35 of the AO (section 45(3) of the AO), although it may decline to do so if the interim measure sought is currently the subject of arbitral proceedings and the court considers it more appropriate for the arbitral tribunal to deal with it (section 45(4) of the AO).

Interim measures by an emergency arbitrator

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

The AO provides for an emergency arbitrator, meaning one appointed under the arbitration rules agreed to or adopted by the parties to deal with the parties' applications for emergency relief before an arbitral tribunal is constituted (section 22A of the AO). Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator is 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 (section 22B of the AO).

The court may not grant leave to enforce any emergency relief granted outside Hong Kong unless the party seeking to enforce it can demonstrate that it consists only of one or more temporary measures (including an injunction) by which the emergency arbitrator orders a party to do one or more of the following:

- maintain or restore the status quo pending the determination of the dispute concerned;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award made by an arbitral tribunal may be satisfied;
- preserve evidence that may be relevant and material to resolving the dispute;
- give security in connection with anything to be done under the above points; or
- give security for the costs of the arbitration.

Article 23 and Schedule 4 of the 2018 Hong Kong International Arbitration Centre Rules provide for emergency arbitrator procedures. The emergency arbitrator may conduct such proceedings in such a manner as he or she considers appropriate. He or she also has the power to rule on objections that he or she has no jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration clause or of the separate arbitration agreement.

Interim measures by the arbitral tribunal

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

Under section 35 of the AO, the tribunal has the power, at the request of a party, to order interim measures, including ordering a party to:

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

In circumstances where the claimant will be unable to pay the respondent's costs if the claim is unsuccessful, the tribunal has the power to require a claimant to give security for the costs of the arbitration (section 56(1) of the AO).

Sanctioning powers of the arbitral tribunal

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

Under section 59 of the AO, a party who has a claim under the arbitration agreement must, after the commencement of the arbitral proceedings, pursue the claim without unreasonable delay, unless otherwise expressed in the agreement. If the arbitral tribunal is satisfied that the party has unreasonably delayed in pursuing the claim in the arbitral proceedings, the arbitral tribunal, on its own initiative or on any party's application, may make an award dismissing a party's claim and may make an order prohibiting the party from commencing further arbitral proceedings in respect of the claim. Delay is unreasonable if it gives rise, or is likely to give rise, to a substantial risk that the issues in the claim will not be resolved fairly or it has caused, or is likely to cause, serious prejudice to any other party. The court can also exercise this power, if an arbitral tribunal capable of exercising that power is not in existence.

Section 35(1) of the AO allows the arbitral tribunal to grant interim measures, whether in the form of an award or in another form, ordering a party to take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself.

AWARDS

Decisions by the arbitral tribunal

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

Unless otherwise agreed by the parties, in arbitration proceedings with more than one arbitrator, any decision of the tribunal must be made by a majority of the tribunal's members (section 65 of the Arbitration

Ordinance (Cap. 609) (AO)). Where there is a dissenting opinion, the signature of the dissenting arbitrator need not be included on the final award. This will not affect the award's validity, provided that the reason for the omitted signature is stated (section 67 of the AO).

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

The AO does not prohibit dissenting opinions. Arbitrators are not obliged to give a dissenting opinion; however, the reason for the arbitrator's failure to sign an arbitral award must be stated (section 67 of the AO).

Form and content requirements

38 | What form and content requirements exist for an award?

The award must be made in writing and signed by the majority of the arbitrators (section 67 of the AO). It must state its date and place as well as the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. Unless otherwise agreed by the parties, an award made by a tribunal under an arbitration agreement is final and binding on the parties and any person claiming through or under any of the parties (section 73 of the AO).

Time limit for award

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

Under the AO, the tribunal is not subject to a time limit for delivery of award. It has the power to make an award at any time (section 72(1) of the AO). If the arbitration agreement imposes a time limit to render an award, the court, on the application of any party, may extend that time limit, regardless of whether it has expired (section 72(2) of the AO). This court order is not subject to appeal (section 72(3) of the AO).

Under article 31.2 of the 2018 Hong Kong International Arbitration Centre (HKIAC) Rules, once the proceedings are declared closed, the arbitral tribunal shall inform the HKIAC and the parties of the anticipated date by which an award will be communicated to the parties. The date of rendering the award shall be no later than three months from the date when the arbitral tribunal declares the entire proceedings or the relevant phase of the proceedings closed, as applicable. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by the HKIAC.

If the HKIAC's expedited procedure is adopted, an award shall be communicated to the parties within six months from the date when the HKIAC transmits the case file to the arbitral tribunal and the HKIAC may extend this time limit in exceptional circumstances (article 42 of the 2018 HKIAC Rules).

Date of award

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

The date of the receipt of the award is decisive for an application for setting aside an award under section 81 of the AO. The date of the award is decisive as regards the correction and interpretation of the award on the tribunal's own initiative (section 69 of the AO), whereas if it is upon a party's request, the date of the receipt of the award is decisive. In relation to a request to the court to review a positive ruling on the tribunal's jurisdiction, the date of receipt of the notice is decisive (section 34 of the AO).

Types of awards

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

The tribunal may render final awards, partial awards and interim awards, and may also make consent orders (section 71 of the AO). Unless otherwise agreed by the parties, the tribunal may award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings in court (section 70(1) of the AO). This also includes the power to order specific performance of any contract, except one relating to land or any interest in land (section 70(2) of the AO).

Termination of proceedings

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

The arbitral tribunal may terminate the proceedings upon default of any party, such as unreasonable delay, and may make an award dismissing a party's claim and may make an order prohibiting the party from commencing further arbitral proceedings in respect of the claim (section 59(2) of the AO). The court can also exercise this power if an arbitral tribunal is not in existence (section 59(5) of the AO).

If the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the tribunal, record the settlement in the form of an arbitral award on agreed terms (section 66 of the AO).

Under article 37.2(a) of the 2018 HKIAC Rules, if the parties settle the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitration or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

The arbitral tribunal shall also issue an order for the termination of the arbitration if continuing the arbitration becomes unnecessary or impossible, unless a party raises a justifiable objection, having been given a reasonable opportunity to comment upon the proposed course of action (article 37.2(b) of the 2018 HKIAC Rules).

Cost allocation and recovery

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

The tribunal may include in an award directions with respect to the costs of the arbitration proceedings, including the fees and expenses of the tribunal (section 74(1) of the AO). The tribunal may, having regard to all relevant circumstances (including the fact, if appropriate, that a written offer of settlement of the dispute concerned has been made), specify to whom, by whom and in what manner the costs are to be paid (section 74(2) of the AO). In practice, the tribunal will adopt the common law approach to the recovery of costs (namely, costs follow the event – the losing party will generally be required to pay the winning party's costs).

The tribunal may order that costs are to be paid forthwith or at the time that it may otherwise specify (section 74(4) of the AO). A provision in an arbitration agreement to the effect that any party must pay its own costs arising under the agreement is void (section 74(8) of the AO).

The tribunal is not obliged to follow the scales and practices adopted by the court on taxation when assessing the amount of costs, other than the fees and expenses of the tribunal (section 74(6) of the AO). Nevertheless, the tribunal must allow only costs that are reasonable having regard to all the circumstances and (unless otherwise agreed by the parties) may allow costs incurred in the preparation of the proceedings before the commencement of the arbitration (section 74(7) of the AO).

The parties can, if they wish, agree that the costs of the arbitration proceedings are to be taxed by the court (section 75(1) of the AO). On taxation by the court, the tribunal must make an additional award of costs reflecting the result of such taxation (section 75(2) of the AO). However, a decision of the court on taxation is not subject to appeal (section 75(3) of the AO).

Unless otherwise agreed by the parties, the tribunal may also direct that the recoverable costs of arbitral proceedings before it are limited to a specified amount (section 57 of the AO).

Under article 34 of the 2018 HKIAC Rules, the arbitral tribunal shall determine the costs of the arbitration in one or more orders or awards, and such costs can include:

- the fees of the arbitral tribunal, as determined in accordance with article 10 of the 2018 HKIAC Rules;
- the reasonable travel and other expenses incurred by the arbitral tribunal;
- the reasonable costs of expert advice and of other assistance required by the arbitral tribunal, including fees and expenses of any tribunal secretary;
- the reasonable costs for legal representation and other assistance, including fees and expenses of any witnesses and experts, if such costs were claimed during the arbitration;
- the registration fee and administrative fees payable to the HKIAC in accordance with Schedule 1 to the 2018 HKIAC Rules; and
- any expenses payable to the HKIAC.

With respect to the costs of legal representation and other assistance, the arbitral tribunal, taking into account the circumstances of the case, may direct that the recoverable costs of the arbitration, or any part of the arbitration, shall be limited to a specified amount (article 34.2 of the 2018 HKIAC Rules).

Interest

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

Unless otherwise agreed by the parties, an arbitral tribunal may award simple or compound interest from the dates, at the rates, and with the rests that it considers appropriate (section 79(1) of the AO). Interest is payable on money awarded by the tribunal from the date of the award, except when the award otherwise provides (section 80(1) of the AO). Interest is payable on costs from the date of the costs award, unless otherwise provided by the tribunal (section 80(2) of the AO).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Section 69 of the Arbitration Ordinance (Cap. 609) (AO) provides that within 30 days of receipt of the award, unless another period of time has been agreed on by the parties, a party with notice to the other party may request the tribunal to:

- correct any computational, clerical or typographical errors or any errors of similar nature in the award; or
- give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award. The arbitral tribunal may also correct any computational, clerical or typographical errors or any errors of similar nature in the award on its own initiative within 30 days of the date of the award.

Further, unless otherwise agreed by the parties, a party may request within 30 days of receipt of the award the arbitral tribunal to make an additional award as to claims presented in the arbitration proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days. If necessary, the arbitral tribunal may extend the period of time within which it shall make a correction, interpretation or an additional award.

Finally, the arbitral tribunal may review an award of costs within 30 days of the date of the award if, when making the award, the tribunal was not aware of any information relating to costs (including any offer for settlement) which it should have taken into account.

Challenge of awards

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

The only means of recourse against a Hong Kong arbitral award is by applying to the Court of First Instance of the High Court for an order setting aside the award under one of the limited grounds set out in section 81 of the AO. Under section 81 of the AO, an award may be challenged and set aside where the party making the challenge can prove that:

- a party to the arbitration was under some incapacity;
- the arbitration agreement is invalid under the law to which the parties subjected it or, failing any indication thereon, under Hong Kong 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 or her case;
- the award deals with a dispute not contemplated by 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 parties' agreement, unless such agreement conflicted with a mandatory provision of the AO.

An award may also be set aside where the court finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; or
- the award is in conflict with Hong Kong's public policy.

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it 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 (section 81(4) of the AO).

An application for setting aside must be made within three months from the date on which the party making that application has received the award (section 81(3) of the AO).

Levels of appeal

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

Subject to obtaining permission to do so, appeals can be made to the Court of Appeal and the Court of Final Appeal. The appeal procedure can take six months to one year at each level, depending on the court's diary. The filing costs are nominal, however, the costs incurred in relation to

lawyers' and counsel's fees can be significant, depending on the case. The courts have a discretion as to costs, but costs will normally follow the event and be taxed on a party and party basis.

Recognition and enforcement

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

The Hong Kong courts are generally supportive of arbitration. Arbitral awards, whether made in or outside Hong Kong, are enforceable in the same manner as a judgment of the court (section 84 of the AO). The procedure is to first obtain 'leave', ie, permission. If leave is granted, the court may enter judgment in terms of the award. Once judgment has been obtained, a party may pursue the same enforcement measures as for any court judgment, including execution against goods belonging to the judgment debtor, a garnishee order or a charging order.

Under section 86 of the AO, the circumstances in which enforcement of an award may be refused include:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was not valid under the law to which the parties subjected it or (if there was no indication of the law to which the arbitration agreement was subjected) under the law of the country where the award was made;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
- the award deals with a difference 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;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or (if there was no agreement) 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 competent authority of the country in which, or under the law of which, it was made;
- the award is in respect of a matter that is not capable of settlement by arbitration under the law of Hong Kong;
- it would be contrary to public policy to enforce the award; or
- for any other reason the court considers it just to do so.

The grounds for refusing to enforce an award in Hong Kong under section 86 of the AO largely mirror those set out in the New York Convention. However, section 86(2) of the AO also gives the court discretion to refuse to enforce an award for any other reason the court considers it just to do so.

Under sections 89, 95 and 98D of the AO, the courts may refuse to enforce Convention awards, Mainland awards and Macau awards for similar reasons to those set out in article 34 of the UNCITRAL Model Law (enshrined in section 81 of the AO) for the setting aside of an award.

The party seeking to enforce an arbitral award, whether made in or outside Hong Kong, which is not a Convention award, a Mainland award or a Macau award must produce the original or a certified copy of the award, the original or a certified copy of the arbitration agreement and (if relevant) any necessary translations (section 85 of the AO).

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Section 14(1) provides that the Limitation Ordinance (Cap. 347) and other limitation enactments apply to arbitrations as they apply to actions in the court. Under section 4(1) of the Limitation Ordinance (Cap. 347), actions founded on simple contract or tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. This applies equally to the enforcement of arbitral awards, with time running from the date on which the defendant fails to honour the implied promise in the underlying contract to perform the award (not the date of the arbitration agreement or the date of the award).

Enforcement of foreign awards

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

Even where a ground is made out within the terms of section 89 of the AO, including the ground under section 89(2)(f)(ii) of the AO that the award has been set aside by a competent authority of the country in which it was made, the Hong Kong court as the court of enforcement has a residual discretion to permit enforcement, although such discretion has to be exercised on recognised legal principles (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111). The enforcing court applies its own law in deciding whether or not to enforce the award (*Dana Shipping and Trading SA v Sino Channel Asia Ltd* [2016] HKCU 1776, applying *Yukos Capital Sarl v OJSC Oil Co Rosneft* [2014] 2 CLC 162).

Enforcement of orders by emergency arbitrators

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

Yes, any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is 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 (section 22B(1) of the AO). Such decision of the court to grant or refuse to grant leave is not subject to appeal (section 22B(4) of the AO). If leave is granted, the court may enter judgment in terms of the emergency relief (section 22B(3) of the AO).

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Leave of the court is required to enforce an arbitral award in Hong Kong (section 84 of the AO). The filing costs are nominal, however, the costs incurred in relation to lawyers' and counsel's fees can be significant, depending on the case. There may be costs involved in relation to the evidence to be produced for enforcement of awards, such as authentication or certification of the award and agreement as well as translations (sections 85, 88, 94 and 98C of the AO).

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Features of the Hong Kong judicial system that might exert an influence on an arbitrator from Hong Kong include:

- the rule of law, in which justice is administered by unbiased judges that are independent of the executive;
- reference to sources of law including the Hong Kong Basic Law, common law, rules of equity, statute and international treaties;
- judges from other leading common law jurisdictions are invited to sit on the Hong Kong Court of Final Appeal;

- adversarial common law approach (for example, discovery is an example of the difference in approach adopted by common law versus civil law practitioners) (section 56(1)(b) of the Arbitration Ordinance (Cap. 609) (AO)); and
- in the interpretation of the AO, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith (section 9 of the AO).

Professional or ethical rules

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

The Hong Kong International Arbitration Centre has published a Code of Ethical Conduct. Other professional bodies have their own ethical codes, including the Hong Kong Institute of Arbitrators' Code of Professional and Ethical Conduct.

Hong Kong solicitors must comply with the Hong Kong Solicitors' Guide to Professional Conduct issued by the Law Society of Hong Kong and Hong Kong barristers must comply with the Hong Kong Bar Association's Code of Conduct.

Best practice in Hong Kong reflects the IBA Guidelines on Party Representation in International Arbitration.

Third-party funding

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

Since 1 February 2019, the third-party funding of arbitration is not prohibited by the common law doctrines of maintenance and champerty (sections 98E, 98K and 98L of the AO).

For purposes of the provisions in the AO concerned with third party funding 'arbitration' is given an extended meaning: it not only includes actual arbitrations to which the AO applies, but also court proceedings, proceedings before an emergency arbitrator and mediation proceedings (section 98F of the AO).

If a 'funding agreement' is made, the funded party must give written notice of this fact, and the name of the funder, to the other side, and to the arbitration body, upon the commencement of the 'arbitration' (for a funding agreement made on or before such commencement). For a funding agreement made after the commencement of the arbitration, the notice must be given within 15 days of the funding agreement is made (section 98U of the AO).

For the purposes of this requirement, a 'funding agreement' is a written agreement for funding made on or after 1 February 2019, the meaning of 'arbitration' includes proceedings commenced in court for the purposes of enforcing a foreign arbitral award, and for the avoidance of doubt, the requirement is applicable to arbitrations where the seat of arbitration is outside Hong Kong, but only to the funding of services provided in Hong Kong (sections 98F, 98H and 98N of the AO).

A Code of Practice for Third Party Funding of Arbitration was issued on 7 December 2018 setting out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third-party funding of arbitration in Hong Kong.

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Regulation of activities

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

Visas may be required for parties, counsel, arbitrators, witnesses, experts and other interested persons to enter or work in Hong Kong. Due to the covid-19 pandemic, there may also be restrictions on such persons entering Hong Kong, as well as mandatory on-arrival testing and quarantine. There is no VAT in Hong Kong.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

As at 14 September 2021, the Hong Kong International Arbitration Centre had processed 50 applications to 23 different mainland Chinese courts under the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the Interim Measures Arrangement) seeking to preserve evidence, assets or conduct in mainland China. In respect of those applications, the mainland Chinese courts issued orders to preserve assets worth 10.9 billion yuan. According to the available information, the median time taken by the mainland Chinese courts to issue a decision is eight days. Applicants under the Interim Measures Arrangement have included parties from mainland China, the British Virgin Islands, the Cayman Islands, Hong Kong, Japan, Samoa, the Seychelles, Singapore, Switzerland and

Taiwan. Respondents have included companies from the British Virgin Islands, the Cayman Islands, France, Hong Kong, mainland China, the Netherlands, St Kitts and Nevis, and Singapore.

The Hong Kong–Mexico bilateral investment treaty (BIT), which was signed on 23 January 2020, came into force on 16 June 2021. The BIT intends to create and maintain favourable conditions for investments and aims to intensify the economic cooperation for their mutual benefit.

On 19 May 2021, Part 2 of the Arbitration (Amendment) Ordinance 2021 came into effect to fully implement the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the mainland and the Hong Kong Special Administrative Region (the Supplemental Arrangement), which was signed between the Hong Kong government and the Supreme People's Court of the People's Republic of China on 27 November 2020.

The purpose of signing the Supplemental Arrangement is to amend the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the mainland and the Hong Kong Special Administrative Region (the Arrangement), which came into effect on 1 February 2000, and bring it fully in line with the current practice of international arbitration.

The Supplemental Arrangement amends the Arrangement in the following aspects:

- express inclusion of the term 'recognition' when referring to enforcement of arbitral awards in the Arrangement for greater certainty;
- an express provision to clarify that a party may apply for preservation measures before or after the court's acceptance of an application to enforce an arbitral award for greater certainty;
- aligning the definition of the scope of arbitral awards with the prevalent international approach of 'seat of arbitration' under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and
- removal of the previous restriction of the Arrangement to allow parties to make simultaneous applications to both the courts of the mainland and Hong Kong for enforcement of an arbitral award.

The relevant amendments are implemented through the Arbitration (Amendment) Ordinance 2021. Therefore, since 19 May 2021, all mainland awards, as long as they are made in accordance with the Arbitration Law of the People's Republic of China, are enforceable in Hong Kong under the Supplemental Arrangement, and section 93 of the Arbitration Ordinance (Cap. 609) has been repealed to allow simultaneous enforcement of arbitral awards in Hong Kong and the mainland.

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Hungary

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Hungary is a contracting state to the New York Convention, which has been in force in Hungary since 3 June 1962. Hungary applies the Convention only to recognition and enforcement of awards made in the territory of another contracting state and only to disputes that qualify as commercial relationships, whether contractual or not, under the national law.

Hungary is also a party to the following multilateral conventions:

- the European Convention on International Commercial Arbitration of 1961;
- the International Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965;
- the Convention on Conciliation and Arbitration within the Organization for Security and Co-operation in Europe of 1992; and
- the Energy Charter Treaty of 1994.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Hungary has signed close to 60 bilateral investment treaties.

Domestic arbitration law

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

The primary source of law relating to arbitral proceedings is Act LX of 2017 on Arbitration (the Arbitration Act). The Hungarian text of the Arbitration Act can be found at www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK17085.pdf.

The Arbitration Act should be applied for all domestic and international arbitration proceedings before an ad hoc arbitration or arbitral tribunal seated in Hungary. Recognition and enforcement of foreign judgments and arbitral awards are also regulated by Act XXVIII of 2017 on International Private Law (the Conflicts Code), and the rules of the New York Convention. The law on enforcement of arbitration awards is the same as enforcement for final and binding court judgments.

Domestic arbitration and UNCITRAL

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

The Arbitration Act is based on the UNCITRAL Model Law, with some minor differences.

For example:

- a case may only be subject to arbitration if the parties may dispose freely over the subject matter of the proceedings;
- the number of the chosen arbitrators can only be odd;
- the presiding arbitrator has a privileged role as he or she is entitled to decide on the merit of the case in lack of majority opinion; and
- arbitral proceedings are confidential unless the parties agree otherwise.

Mandatory provisions

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

There are very few mandatory provisions under the law. They are mostly related to the minimum standards of due process and equal treatment of the parties, the right to request interim measures and procedural assistance from regular courts, and rules on denial of recognition and enforcement of the awards.

Substantive law

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

Pursuant to section 41 of the Arbitration Act, in the case of international arbitration proceedings the arbitral tribunal should decide the dispute in accordance with the substantive law that has been chosen by the parties for the dispute. If no such substantive law has been chosen by the parties, the applicable law shall be determined by the arbitral tribunal. According to the Hungarian Chamber of Commerce and Industry Rules, failing stipulation by the parties, the arbitral tribunal shall apply the law that it considers to be applicable according to international treaties, or in the lack of such a treaty, according to the rules of Hungarian private international law (the conflicts rules). The Conflicts Code renders the application of Regulation (EC) 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations. When such a regulation does not apply, the conflicts rules of section 51 of the Conflicts Code are applicable to contracts. These rules call for the law that has the closest connection with the case, taking into consideration its most characteristic elements.

Generally, an arbitral tribunal shall adopt its decision in accordance with the terms of the contract as well as by taking into account the trade practices applicable to the transaction. An arbitration panel may render its decision on the basis of equity (ex aequo at bono) or as an amiable compositeur only if it has been expressly authorised to do so by the parties.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
Szabadság tér 7
1054 Budapest
Hungary
Tel: +36 1 474 5100
Fax: +36 1 474 5105
mkik@mkik.hu
www.mkik.hu

This standing arbitral tribunal may be selected for any domestic or foreign arbitration proceedings. The list of arbitrators is only indicative: the parties may elect persons not on the list as arbitrators.

The Arbitration Court of the Hungarian Chamber of Agriculture
Fehérvári út 89-95
1119 Budapest
Hungary
Tel: +36 80 900 3651
www.nak.hu

Title issues and land use rights related to agricultural land, if arbitrated, can be arbitrated only at the Arbitration Court of the Hungarian Chamber of Agriculture.

The Sport Permanent Arbitration Court
Csörsz u. 49-51 IV
1124 Budapest
Hungary
www.olimpia.hu/sport-allando-valasztottbirosag

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

There are some disputes that are not arbitrable, as listed in Chapters XXXI to XLI of the Civil Procedure Act (Act CXXX of 2016). These disputes mostly involve family law and civil status matters, such as matrimonial proceedings, other actions for the establishment of paternity and origin, termination of parental custody, or placement under guardianship or conservatorship, divorce proceedings, etc. Furthermore, administrative actions, challenging administrative decisions, actions for media remedy, liquidation proceedings, actions relating to employment and payment order procedures are not arbitrable. Furthermore, consumer disputes are not arbitrable.

In competition law matters, decisions of the antitrust authority on prohibition of unfair competition and prohibition of abuse of dominant position are not arbitrable. Private enforcement and related damage claims deriving from such acts are arbitrable. Theoretically, disputes between the parties relating to IP rights and infringement thereof may be conferred to arbitration if the parties have free disposal over the subject matter of the proceeding. Intracompany disputes are arbitrable.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Requirements for an enforceable arbitration agreement are as follows:

- the arbitration agreement must be in written form. Exchange of letters and telegrams through telex, telefax or any other electronic means of exchanging messages, including exchange of emails between the parties that is capable of producing a permanent record of the messages, are considered as written form;
- an arbitration agreement can be concluded either as part of another contract or as a separate agreement;
- if one of the parties states in his or her statement of claim that an arbitration agreement was in fact concluded between him or her, and the other party does not deny it in his or her defence, it should be considered that an arbitration agreement has been validly concluded between them;
- reference to a document containing an arbitration clause in a contract concluded in writing qualifies as an arbitration agreement, provided that a specific acceptance of the arbitration clause is made; and
- failure to raise an objection against the jurisdiction of the arbitral tribunal cures any problem deriving from lack of formalities.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

Typically, the avoidance of a contract should not affect the enforceability of the arbitration clause. Avoidance of the agreement itself does not deprive the arbitral tribunal from deciding on its jurisdiction. Within this, the tribunal can decide about the validity of the arbitration agreement as well. Rescission or other unilateral termination rights would not make the arbitration clause unenforceable. In the event of mutual termination by the parties, their termination agreement would be decisive to evaluate whether the termination also affects the arbitration clause of the terminated agreement.

Legal incapacity makes the arbitration agreement unenforceable if such a capacity problem existed at the time of entering into the arbitration agreement. Losing legal capacity later would not affect the validity of the arbitral agreement.

Typically, the death of a party would not make the arbitration clause unenforceable, as the legal successor of the contractual position of the deceased party would be bound by the arbitration commitment as well.

Following the commencement of liquidation proceedings, any claim against the company under liquidation can be initiated exclusively at the liquidation court. However, liquidation proceedings do not affect the jurisdiction of the arbitral tribunal or other courts where a proceeding is already in progress.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

According to the Arbitration Act, the section of a contract referring the dispute of the parties to arbitration (the arbitration clause) must be treated separately from the rest of the contract, as if it were a separate agreement of the parties. In the event that the arbitral tribunal concludes that the main contract is null and void or non-existent, it does not result in the invalidity of the arbitration clause. The Hungarian Chamber of Commerce and Industry (HCCI) Rules contain similar provisions.

Third parties – bound by arbitration agreement

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

Third parties may be bound by the arbitration agreement of others in the event of assignment of the entire contract and legal succession between companies, or succession of a contractual position because of the death of a person.

In the case of insolvency, the bankruptcy trustee is bound by the contracts previously concluded by the company if the arbitration proceedings have already been pending, or if the bankruptcy trustee initiates a claim as a claimant under a contract that has an arbitration clause.

Third parties – participation

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

The jurisdiction of the arbitration court cannot be extended to third parties, unless the third party accepts the jurisdiction of the arbitration court. Generally, third parties may participate in arbitration proceedings only if the dispute or claim in question can only be decided together with the subject matter of the arbitration contract and the third party accepts the jurisdiction of the arbitration court in writing. In addition to this, either party may initiate the joinder of a third party to the arbitration tribunal who has an interest in the outcome of the arbitration. Upon receipt of the notification from the arbitration tribunal on the possibility of a joinder, this third party may join the proceedings to support the position of one of the parties. The decision of the arbitration tribunal on allowing the joinder of a third party is not subject to judicial review.

Groups of companies

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

The group of companies doctrine is not recognised in Hungary; consequently the jurisdiction of the arbitration cannot be extended to non-signatory parent and subsidiary companies.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements are not excluded by the Arbitration Act or the relevant rules of the different standing arbitral tribunals. It is advisable that the parties settle in their arbitration clause the rules of election of the arbitrators if there are more than two parties. According to the HCCI Rules, if there are several claimants or defendants, the group of claimants and the group of defendants, respectively, may jointly designate one arbitrator each.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Under the HCCI Rules, the arbitral tribunal may consolidate separate proceedings commenced at the same tribunal, provided that all parties request or consent at the tribunal to do so. In this case, the cases commenced later must be consolidated with the proceedings first commenced, unless the parties request otherwise.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

The following persons may not act as arbitrators:

- persons under 24 years of age;
- persons barred from public affairs by a final court judgment;
- persons placed under guardianship or conservatorship by a final court decision;
- persons sentenced to imprisonment by a final court verdict, until exonerated from the detrimental consequences of having a criminal record;
- persons barred from acting in a profession that requires a law degree; and
- persons under probation ordered by a final court judgment, during the term of the probation.

Generally, the parties may freely select arbitrators: they do not need to choose from the list of arbitrators, as this only serves the purpose of recommendation and providing information. Parties are free to agree in advance to any qualification or special feature of the arbitrators, including their nationality, profession or special expertise. There is no statutory limitation against agreement on gender or religion and unless the parties agree otherwise, the citizenship or lack of citizenship of a person may not serve as a reason for exclusion from an arbitrator position.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Most arbitrators are lawyers, university professors, attorneys and retired judges. Most arbitrators happen to be men and the authors are unaware of any attempts to change this tendency.

Default appointment of arbitrators

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

The general rule is contained in the Arbitration Act. According to this, in connection with arbitral tribunals containing three members, each party has the right to appoint one arbitrator, and the two arbitrators thus appointed shall designate the third arbitrator. When either party fails to appoint its own arbitrator within 30 days of the date of receipt of the other party's request to do so, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the arbitrator shall be appointed, upon the request of any of the parties (unless the parties have authorised a third independent person or authority for this function, or if such an independent authority fails to act in due time) by the court of law with jurisdiction under the Arbitration Act.

In the case of Hungarian Chamber of Commerce and Industry (HCCI) arbitration, the missing arbitrator is appointed by the presidential board of the Arbitration Court.

Challenge and replacement of arbitrators

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

The appointment of an arbitrator may be terminated only upon his or her resignation, by a successful challenge procedure or by the mutual agreement of the parties in those cases where the Arbitration Act makes it possible.

A challenge may be exercised for the disqualification of an arbitrator only under those circumstances that are likely to give rise to justifiable doubts as to his or her lack of prejudice, independence or impartiality, or if he or she does not have the qualification agreed upon by the parties. The parties may agree on the procedure for challenging an arbitrator. In the absence of such an agreement, the party that intends to challenge an arbitrator must send a statement in writing to the arbitral tribunal containing the reason for the challenge within 15 days of being informed about the composition of the arbitral tribunal, or learning information about the circumstances that have given reason for the challenge. If the challenged arbitrator refuses to resign or the other party does not agree to the challenge, then the arbitral tribunal will decide on the challenge. If the arbitral tribunal rejects the challenge, the challenging party may, within 30 days, request the court of law to adjudge the challenge (in case of HCCI arbitration, the presidential board of the HCCI's decision, if it rejects such request, can be challenged at the court of law). The challenge proceedings at the court of law do not prevent the arbitral tribunal from continuing with its proceedings and from passing a decision, and do not stop the challenged arbitrator from participating in the proceedings and in the decision-making process.

If an arbitrator fails to comply with the statutory conditions to be an arbitrator owing to a reason arising after the acceptance of the appointment, or if the arbitrator de facto becomes unable to perform his or her functions or he or she fails to act in due time for any reason, he or she may resign his or her office or the parties may agree on the termination of his or her appointment. In the absence of this agreement, either party may request that the court, or in case of HCCI arbitration the presidential board, terminate the mandate of the arbitrator. The decision of the presidential board of the HCCI may be challenged in a court of law. No further remedy is available against the court decision.

Relationship between parties and arbitrators

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

The law does not specifically identify the type of legal relationship between an arbitrator and the party that nominated the arbitrator. Nevertheless, it derives from the Arbitration Act and the rules of other arbitration courts that arbitrators are independent and impartial, and are not considered, and cannot act, as representatives of the parties. An arbitrator cannot accept any instructions from the party nominating him or her (or from any third person) in his or her official capacity.

The amount of the fees is determined by the rules of each arbitration court.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

In accordance with the Arbitration Act, the selected or appointed arbitrator is obliged to disclose any circumstances that would raise reasonable doubt about the lack of bias or his or her impartiality. The arbitrator has the same obligation throughout the entire procedure. The HCCI rules contain the same regulations.

Immunity of arbitrators from liability

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

There are no special statutory regulations on this issue. The HCCI Rules stipulate that the arbitrators, the HCCI Arbitration Court and its employees shall not be liable to any person, for any act or omission in connection with the arbitration, except if they caused damage intentionally or with gross negligence.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

Where an action is filed in connection with a matter that is subject to an arbitration agreement, the court terminates the court proceedings upon the request of either party, unless it declares that the arbitration agreement does not exist, is null and void, is inoperative or is inadmissible. The respondent must submit its dismissal request, at the latest, upon filing its counterclaim on the merits of the case. The submission of the request for dismissal and the counterclaim on the merits does not impede the opening or the continuation of the arbitration proceedings, and shall not impede the arbitral tribunal from the adoption of its award or decision while the issue is pending at the court.

If the court rejects the jurisdictional challenge and issues a decision on its jurisdiction or incorporates such a decision into its judgment on the merits, the respondent may challenge such a decision in the same manner and at each level of appeal, and an extraordinary judicial review process is available for challenging court decisions under Hungarian law.

Jurisdiction of arbitral tribunal

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

Primarily, the arbitral tribunal makes its own decision concerning its jurisdiction, including any objection in respect of the existence or validity of the arbitration agreement. Any objection with respect of the jurisdiction of the arbitral tribunal must be made at the time of submission of the statement of defence. A plea claiming that the arbitral tribunal exceeded its jurisdiction must be lodged without delay when the alleged excess of the jurisdiction was made. The arbitral tribunal may admit a later plea as well, if it finds the delay justified.

The arbitral tribunal may rule on the jurisdictional objection either when the objection was made, or in its decision on the merits of the case. If the arbitral tribunal rules that it has jurisdiction, either party

may request, within 30 days from the date of receiving such a ruling, the court of law to adjudge the jurisdiction of the arbitral tribunal. The arbitral tribunal may continue the proceedings and may adopt its award or other decision while the court proceeding regarding the jurisdiction issue is pending. The final and binding decision of the regular courts will ultimately settle the jurisdictional dispute.

As a last resort, either party, or any person who is affected by the award, may file for action at a regular court of law to have the arbitral award set aside if the arbitration agreement was not valid under the law to which the parties subjected the arbitration agreement, or lacking such an indication, under Hungarian law; or the subject matter of the dispute is not capable of settlement by arbitration, or the arbitral tribunal exceeded the scope of the arbitration agreement.

Generally, parties are precluded from raising jurisdictional objections at a later stage of the proceedings unless they have done so within the time frames specified above.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Failing agreement of the parties, the place of arbitration should be determined by the arbitral tribunal in due consideration of the circumstances of the case. In the case of a standing arbitral tribunal, the place of arbitration should be the place registered in the charter documents as its seat. According to the Hungarian Chamber of Commerce and Industry (HCCI) Rules, the place of the hearings is in Budapest. In addition, the arbitral tribunal may, unless otherwise agreed by the parties, convene at any place for consultation among its members, for hearing the parties, witnesses or experts, as well as for the inspection of physical evidence and documents.

Failing agreement of the parties, the Hungarian language should be used in the domestic proceedings, although in international proceedings the arbitral tribunal will define the applicable language and may order the translation of any evidence to the language of the proceedings.

The arbitral tribunal shall apply the law selected by the parties. The choice of law clause, unless agreed upon differently by the parties, shall be interpreted as referring to the substantive law of the country selected, disregarding the conflicts laws of the country. In the absence of a choice of law by the parties, the tribunal will determine the applicable substantive law in accordance with the conflict laws considered to be applicable by the tribunal. The decision must be made in accordance with the terms of the contract of the parties, also taking into account the applicable trade practices.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Unless otherwise agreed by the parties, in the case of an ad hoc arbitration the claimant can initiate arbitral proceedings by sending a notice of arbitration to the respondent. The proceedings of the tribunal shall open on the day on which the other party receives the notice of arbitration. In the case of a standing arbitral tribunal, proceedings can be initiated by sending a statement of claim to the arbitral tribunal.

In accordance with the HCCI Rules, all documents shall be submitted in a number of copies sufficient to provide one copy for each arbitrator, for each party and the secretariat. As far as possible, the documents shall also be submitted in electronic format. In the case of HCCI arbitration the statement of claim must indicate:

- the exact names and addresses of the parties;
- the data establishing the jurisdiction of the HCCI Arbitration Court;
- the petition of the claimant;
- the legal grounds of the claim, the facts and reference to evidence supporting them;
- the amount in dispute;
- the name of the arbitrator appointed or a request for the appointment of an arbitrator by the HCCI Arbitration Court;
- a statement regarding the applicable substantial law and the language of the proceedings;
- a list of the documents attached to the statement of claim; and
- the proper signature of the claimant, or the signature of his or her counsel with certified authorisation.

The parties must send all documents submitted to the HCCI Arbitration Court simultaneously to the other parties as well, proving the delivery (eg, with notice of receipt). The claimant must transfer the registration fee and submit the bank certificate thereof to the secretariat of the HCCI Arbitration Court. After submitting the statement of claim, the claimant shall also transfer the advance payment as communicated by the secretariat to the bank account of the HCCI Arbitration Court. The effectuation of the aforementioned payments is a precondition to the initiation of the proceedings.

Hearing

28 | Is a hearing required and what rules apply?

Subject to the rules of the Arbitration Act, the parties may freely agree upon the rules of procedure, or they may stipulate the use of the rules of procedure of a standing arbitral tribunal. Lacking such an agreement, the arbitral tribunal may determine the rules of procedure at its own discretion within the framework of the Arbitration Act.

Unless otherwise agreed by the parties, the arbitral tribunal may freely decide whether it will hold a hearing and give the parties the opportunity to submit their petitions. A hearing must be held at the request of either party, regardless of any previous agreement of the parties to the contrary. In the case of a hearing, the arbitral tribunal hears the witnesses and experts present. The parties shall be given sufficient advance notice of any hearing and of any action of the arbitral tribunal undertaken for the purpose of inspection of physical evidence or documents.

All statements submitted to the arbitral tribunal by one party shall be communicated to the other party. Furthermore, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Minutes shall be prepared of the arbitration proceedings, and one copy thereof shall be served upon each of the parties.

Unless otherwise agreed by the parties, arbitration proceedings are not public.

Evidence

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

The Arbitration Act stipulates that the parties may submit, together with their statements and pleadings, all other documents that they consider relevant for the case, or may refer to any document or other evidence that they plan to submit. The arbitral tribunal may order that any written evidence be translated into the language of the proceeding.

The arbitral tribunal shall hear the witnesses and experts who are voluntarily present; however, it may not impose a fine or apply any means of coercion. At the request of the arbitral tribunal, the local court

shall provide legal assistance in the form of conducting the procedure for presenting evidence, or by application of coercive measures.

Unless otherwise agreed by the parties, the arbitral tribunal may appoint experts if any special expertise is required for the establishment or judgment of any relevant fact or other circumstance that the arbitral tribunal is lacking. The arbitral tribunal may also appoint one or more experts to provide an opinion on issues specified by the tribunal, and may order either party to provide information to the expert or access to any relevant documents or objects to the expert for inspection.

According to the HCCI Rules, each party must prove the circumstances on which he or she bases a claim or a defence. The arbitral tribunal may also instruct a party to submit further evidence, order the presentation of an expert's opinion, obtain evidence from third persons and order the hearing of witnesses. The parties shall submit the original written evidence or a copy thereof so that each party is provided with one copy and the HCCI Arbitration Court with four copies. If the party fails to submit the required evidence, the arbitral tribunal may make its decision on the basis of the available information and evidence.

The manner of taking evidence is determined by the arbitral tribunal, and the arbitrators evaluate the evidence according to their inner conviction.

Court involvement

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

The general rule is that in arbitration proceedings the court may intervene or proceed only if it is specifically allowed by the Arbitration Act. The Arbitration Act stipulates that it is not incompatible with the arbitration proceedings if either party requests a court for provisional measures and the court grants such measures even before or during the proceedings. Moreover, the court may order protective measures in a case pending before an arbitral tribunal. If the presentment of evidence before the tribunal is likely to entail considerable difficulties or unreasonable extra costs, upon the request of the arbitral tribunal the local court shall provide legal assistance in the form of conducting the procedure for the presentment of evidence, or will apply coercive measures, if necessary, in the procedure if conducted by the arbitration court.

The arbitral tribunal shall approach the local court on whose territory the presentment of evidence may be conducted most efficiently.

Following the issuance of the arbitral award, the court may suspend the enforcement of the award or may overturn (set aside) the award upon the request of a party under certain circumstances.

Confidentiality

31 | Is confidentiality ensured?

According to the Arbitration Act, the hearings are not public and the arbitrators are fully committed to confidentiality with regard to all information they have received when discharging their responsibilities, including after the termination of the proceedings.

According to the HCCI Rules, the confidential nature of the proceedings shall be respected by every person who is involved, in whatever capacity. Information on the proceedings to third persons can only be given upon agreement of the parties and the conciliator or mediator. The HCCI hearings are not public; only the presiding arbitrator, the members of the arbitral tribunal, the parties, the recorder, the interpreter, the experts, the witnesses and the president of the HCCI Arbitration Court may be present at the hearings, or any other persons whose presence has been consented to by the arbitral tribunal and all parties. Further, the HCCI Arbitration Court may not give any information on pending proceedings and on its decisions, or the contents thereof. The decision of the tribunal may be published in legal journals or special publications only with the permission of the president of the Arbitration Court and only in such a way that the interests of the parties will not suffer any harm. Even then, the names of the parties, their countries of residence, and the nature and counter-value of the subject matter may only be included in a publication with the express consent of the parties. By stipulation of the HCCI Arbitration Court, the parties undertake that they shall also comply with these rules and shall ensure that others do so.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Either party may submit a request before or during the arbitration proceedings to an ordinary court requesting the imposition of interim or provisional measures, and the court may grant such measures. The court may order protective measures in a case pending before an arbitral tribunal, if the party requesting such a measure can produce an authentic instrument or a private document with full probative force in proof of the inception, quantity and expiry of his or her claim. The party filing for such intervention must inform the arbitral tribunal on his or her request as well as on the decision of the court.

Coercive force may not be applied by the arbitral tribunal, only by the ordinary court.

Interim measures by an emergency arbitrator

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

No emergency arbitrators are used in Hungarian arbitration proceedings. However, the Hungarian Chamber of Commerce and Industry Rules make possible an expedited arbitration proceeding.

Interim measures by the arbitral tribunal

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

The general rule is that the arbitral tribunal may, upon request, order either party to implement provisional measures – or provisional measures to the extent that the tribunal deems necessary – and may require either party to provide appropriate security in connection with such a measure. If the party does not obey voluntarily with such a measure, only regular courts can order enforcement of the measure. This would take considerable time and would present the possibility of different appeals available to the obligor within the regular court system.

Sanctioning powers of the arbitral tribunal

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

Neither the Arbitration Act nor the individual arbitration rules of the different arbitration institutions authorise arbitrators to order sanctions against the parties or their counsels.

AWARDS

Decisions by the arbitral tribunal

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

Unless otherwise agreed by the parties, decisions on the merit of the case shall be passed by a majority of votes of the arbitrators. In the absence of a majority decision, the presiding arbitrator shall have the decisive vote. Procedural questions shall be decided by the presiding arbitrator if so authorised by the parties or by all other arbitrators.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

If the dissenting arbitrator does not sign the award, this fact must be indicated in the award. Although the Arbitration Act does not address the question of whether the dissenting arbitrator may include his or her opinion into writing, there is no restriction on this possibility, taking into account the secrecy rules. The Hungarian Chamber of Commerce and Industry (HCCI) Rules specifically allow the dissenting arbitrator to issue its dissenting opinion in writing.

Form and content requirements

38 | What form and content requirements exist for an award?

The arbitral award and the ruling for the termination of the proceedings must be made in writing and contain (unless it is an award incorporating the settlement agreement of the parties) the reasons for the decision. It also must include the date of the award, the place of the arbitration and the costs of the proceedings, including the fee of the arbitrators and the manner of satisfaction. It must be signed by the arbitrators and the standing arbitration. In the case of a multi-member tribunal, the signatures of the majority of the arbitrators is sufficient, provided that the reason for any omitted signature is stated.

Time limit for award

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

The Arbitration Act does not contain any general rule on the time frame of the proceedings. Under the HCCI Rules, the proceedings must be completed within six months from the setting up of the tribunal 'whenever it is possible'; except under the expedited proceedings, in which case the proceedings must be completed within three months. The award must be incorporated in writing within 45 days or within 15 days respectively.

Date of award

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

The time limits for filing a request with the arbitral tribunal for a correction, the issuance of a supplementary award or provision of interpretation, as well as the time limit for filing a court claim for the setting aside of the award, commence on the date of delivery of the award.

Types of awards

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

The Arbitration Act does not contain provisions on the different types of awards. The arbitration tribunal issues an award on the merit of the case, or it may terminate the proceedings with a resolution. The tribunal, at the request of the parties, incorporates the settlement agreement of the parties in the form of an award, provided that it finds the settlement in compliance with the law.

Termination of proceedings

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

The arbitral tribunal terminates the proceedings, if:

- the claimant fails to present its statement of claim;
- the court establishes its lack of jurisdiction;
- the claimant withdraws its claim, unless the respondent objects thereto and the tribunal finds that the respondent has a legitimate interest in the final settlement of the dispute;
- the parties fail to pay the procedural fee;
- the parties agree to the termination of the proceedings; or
- the tribunal finds that the continuation of the proceedings has, for any other reason, become unnecessary or impossible.

Cost allocation and recovery

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

Typically, arbitration decisions follow the local rules of costs allocation, according to which the losing party must cover or reimburse all costs and expenses of the winning party.

Interest

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

Interest may be awarded in accordance with the relevant rules of law applicable to the merit of the case.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

The arbitral tribunal may correct any errors of names (including misspellings), any errors in numbers or calculations or any other typing errors on its own initiative or on the request of either party if found justified. The deadline for requesting such correction is 30 days, unless the parties agree in a different time frame. Unless agreed otherwise by the parties, either party may request the arbitral tribunal, within 30 days of the receipt of the award, to provide an interpretation of a specific part or point of the award or the supplementing of the award with respect of issues that have been presented during the proceeding but the tribunal failed to address. The arbitral tribunal may issue such an interpretation or supplement if it finds the request justified. The interpretation shall comprise a part of the disposition of the award. The tribunal has 30 days from receipt of such requests to respond, which can be extended by an additional 30 days.

Challenge of awards

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

Arbitration awards cannot be appealed at courts.

The party or any person who is affected by the award, may file, within 60 days from delivery of the award, a request with the court of law for setting aside the award if:

- the party concluding the arbitration contract lacked legal capacity or competence;
- the arbitration agreement is invalid under the law to which the parties have subjected it, or in the absence of such an indication, under Hungarian law;
- the party was not given proper notice about the proceedings or was unable to present his or her case because of other reasons;
- the award was made in a legal dispute that was not covered by the arbitration agreement;
- the composition of the tribunal or the procedure did not comply with the agreement of the parties (unless such an agreement was in violation of the Arbitration Act), or in the absence of such an agreement, was in violation of the Arbitration Act;
- the subject matter of the dispute is not capable of settlement by arbitration under Hungarian law; or
- the award is contrary to Hungarian public policy.

Levels of appeal

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

The judgment of the court issued on the challenge may be appealed at a higher court. The decision on the challenge may take about one year on each level. Under Hungarian law, costs of the proceedings, including reasonable attorneys fees, are typically borne by the losing party.

Recognition and enforcement

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

An arbitration award has the same effect as that of a binding court decision. The court refuses to enforce the arbitration award if the subject matter of the dispute is not subject to arbitration under Hungarian law or the award is contrary to Hungarian public policy.

In respect of foreign arbitration awards, Hungary is a party to the 1958 New York Convention, and Council Regulation (EC) 44/2001 – which has been implemented in Hungary – and Regulation 805/2004 of the European Parliament.

Recognition of foreign awards does not require a separate procedure. The party that wishes to enforce an arbitral award must supply the original or a certified copy thereof with the court of law. If the award is not in the Hungarian language, the party must furnish a certified Hungarian translation as well.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Enforcement of arbitral awards is regulated by the general statute of limitation rules of the substantive law of the case. Commencement of arbitration proceedings terminates the term of the statute of limitation (ie, it starts again). During the proceedings, the statute of limitation rests.

Enforcement of foreign awards

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

With regard to recognition and enforcement of foreign awards, the courts are bound by the rules discussed above. The authors are unaware of published decisions that relate specifically to this particular topic.

Enforcement of orders by emergency arbitrators

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

There are no specific rules regarding the enforcement of the decisions of emergency arbitrators. Consequently, if the decision and the arbitral proceedings meet the requirements set by the New York Convention, the decision may be subject to enforcement proceedings.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

A procedural fee of 1 per cent of the claimed amount (with a minimum 5,000 forint and maximum 350,000 forint), 50 per cent of the service fee of the executor (in the amount of 0.5 to 3 per cent progressively defined) and 50 per cent of that latter fee for the expenses of the court executor must be advanced by the claimant. There might be additional procedural expenses (eg, registration of the execution right in the land registry). If the execution is successful, the court executor is entitled to a certain percentage of the collected amount (3 to 8 per cent progressively defined). The attorneys' fees in international cases are typically agreed upon in the retainer contract.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Discovery, as it is known in common law jurisdictions, is not part of the legal system in Hungary. This means that the party that has the burden of proof or seeks to provide evidence otherwise has a more difficult task to access and provide evidence that is in the possession of the other party. The court, in the course of the proceedings, at the request of the party, may oblige the other party to provide certain documents. Written testimonies are not used if testimony is necessary; typically the witness must appear at the court to testify. Party officers may be heard on behalf of the party. Their testimony will be treated as a presentation of the party and not as a testimony of an independent witness.

Professional or ethical rules

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

There are no special ethical rules in Hungary applicable to international arbitration. Some concepts of the IBA Guidelines prevail in practice.

Third-party funding

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

No regulatory restrictions exist regarding third-party funding of arbitral claims.

Regulation of activities

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

Legal regulations of all kinds are subject to frequent modifications that may affect arbitration proceedings as well.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The new Hungarian Arbitration Act was published in 2017. We do not expect any major modifications to it or to the Arbitration Rules of the Chamber of Commerce in the near future.

Hungary is currently involved in one pending investment arbitration case at the International Centre for Settlement of Investment Disputes.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Yes, India is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the Convention). It signed the Convention on 10 June 1958 and ratified it on 13 July 1960. The Convention has been in force since 11 October 1960.

India has taken reservations under article I of the Convention. These reservations clarify that, in India, the Convention applies only to recognition and enforcement of awards made in the territory of another contracting state under the Convention and only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under Indian law.

India is also a contracting party to the Geneva Convention of 1927. However, this Convention ceased to apply to those awards to which the New York Convention applies.

Until 1996, three enactments governed the law of enforcement of arbitral awards in India. The Arbitration Act 1940 for the enforcement of domestic awards, the Arbitration (Protocol and Convention) Act 1937 to give effect to the Geneva Convention awards and the Foreign Awards (Recognition and Enforcement) Act 1961 to give effect to the New York Convention awards.

The enactment of the Arbitration and Conciliation Act 1996 (the Arbitration Act) in August 1996 repealed all of the above statutes. The Arbitration Act contains two parts. Part I deals with domestic arbitrations (ie, any arbitration conducted in India and the enforcement of awards thereunder), and Part II deals with the enforcement of foreign awards to which the New York Convention and the Geneva Convention applies.

The 246th Law Commission Report (LCR) released in 2014 proposed amendments to various provisions of the Arbitration Act, of which only certain select recommendations were included in the Arbitration and Conciliation (Amendment) Act 2015 (the 2015 Amendment Act). The report is available at www.lawcommissionofindia.nic.in/reports/report246.pdf.

Notable changes were introduced to the Arbitration Act through the 2015 Amendment Act, which received the assent of the President of India on 31 December 2015 and came into force with effect from 23 October 2015. The 2015 Amendment Act was notified in the Official Gazette of India on 1 January 2016.

The report of the High-Level Committee to Review the Institutionalisation of arbitration mechanism in India, constituted on 29 December 2016 and chaired by Justice B N Srikrishna (Retd), recommended further amendments to the 2015 Amendment Act primarily for the purpose of promoting institutional arbitration in India. The report is available at http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf. Some of these recommendations were incorporated by way of the Arbitration and Conciliation (Amendment) Act 2019 (the 2019 Amendment Act). The 2019 Amendment Act received the assent of the President of India on 9 August 2019 and came into force with effect from 9 August 2019, on which date it was notified in the Official Gazette of India.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Yes. Prior to 2017, India was a signatory to 70 bilateral investment treaties (BITs). With the introduction of the Model Bilateral Investment Treaty Text (Model BIT Text) on 28 December 2015, the decision was made to terminate all BITs and renegotiate terms in consonance with the Model BIT Text. In March 2017, the government of India terminated the majority of subsisting BITs and endeavoured to issue joint interpretative statements (JIS) in respect of those BITs that were not yet up for termination (ie, the original duration of which had not yet expired). The Department of Economic Affairs, Ministry of Finance leads all negotiations of stand-alone BITs. Thus far, after the adoption of the Model BIT Text, India has entered into a BIT with Belarus that is yet to come into force. Noteworthy developments are a BIT with Brazil, signed on 25 January 2020, and a BIT concluded with Cambodia, but which is yet to be signed. Additionally, JIS have been issued in respect of the earlier BITs with Bangladesh and Colombia.

India is also a signatory to several multilateral treaties on investments including the SAFTA (2004), BIMSTEC Framework Agreement (2004), ASEAN–India Framework Agreement (2004), India–MERCOSUR Framework Agreement (2003), EC–India Cooperation Agreement (1993), GCC–India Framework Agreement (2004) and ASEAN–India Investment Agreement (2014), among several other CECA, CEPA, FTA, EPA and Framework Agreements. India is a signatory to a total of 14 multilateral agreements.

Domestic arbitration law

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

The primary domestic source of law relating to domestic and foreign arbitral proceedings and recognition and enforcement of awards is the Arbitration Act, which was amended on 11 March 2021 with effect from 4 November 2020. The Arbitration Act lays down guidelines for domestic arbitrations, international commercial arbitrations, conciliation and enforcement of domestic and foreign awards. Part I of the

Arbitration Act provides general provisions, applicable to all domestic arbitral proceedings in India. Section 36 of the Arbitration Act stipulates enforcement of domestic arbitral awards under the Code of Civil Procedure 1908 in the same manner as if it were a court decree. Further, the proviso to section 36 inserted by the 2015 Amendment Act mandates that the court adjudicating an application for a stay in proceedings to set aside a domestic award, where the arbitral award is for payment of money, shall have due regard to the corresponding provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure 1908. Part II provides guidelines for the enforcement of certain foreign awards. Chapter I of Part II covers awards under the New York Convention, whereas Chapter II of Part II covers awards under the Geneva Convention.

Sections 44 and 53 of the Arbitration Act define a 'foreign award' as an arbitral award on differences arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India. The award should be in pursuance of an agreement in writing for arbitration, and an award made in a country that has been identified as being a reciprocating territory.

The term 'commercial' has not been defined in the Arbitration Act; however, the courts have propounded a wide interpretation of the term. In *Union of India and Ors v Lief Hoegh Co (Norway)*, a 1984 case, the concept of a commercial relationship was taken to mean those arising out of, or incidental or ancillary to, business dealings. However, the general trend in case law has been to interpret the word 'commercial' widely. Guidance can also be taken from the UNCITRAL Model Law (the Model Law), which considers 'consulting' and 'commercial representation or agency' to also fall under this category.

The provisions of sections 9, 27, 37(1)(a) and 37(3) of the Arbitration Act shall, per the 2015 Amendment Act, also apply to an international commercial arbitration, even if the place of arbitration is outside India, unless parties contract to the contrary. An arbitral award made or to be made in such a place would be enforceable and recognised under the provisions of Part II of the Arbitration Act. Section 9 pertains to interim measures sought from a court. Section 27 refers to court assistance in taking evidence, section 37(1)(a) contemplates the right to appeal against the refusal of a court to refer parties to a suit to arbitration where there exists a valid arbitration agreement between such parties, and section 37(3) states that no second appeal shall lie from an order passed in appeal under section 37 except to the Supreme Court of India.

Domestic arbitration and UNCITRAL

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

The Indian arbitration law is largely based on the UNCITRAL Model Law. The 'Statement and Objects' enshrined in the Arbitration Act reveals that the domestic arbitration law is based on the Model Law with 'appropriate modifications' to serve the needs of the domestic legal framework.

The Arbitration Act is divided into four parts. Parts I and II contain extensive provisions relating to arbitration agreements, the composition of an arbitral tribunal, the jurisdiction of arbitral tribunals, the conduct of arbitration proceedings, interim measures by the court, recourse against arbitral awards and enforcement of arbitral awards. Part III deals with conciliation proceedings, the procedure for appointment of a conciliator and conduct of conciliation proceedings. The role of a conciliator is sufficiently elucidated in this Part. Part IV provides 'Supplemental Provisions' to remove any procedural difficulty or ambiguity.

Part I is largely based on the original 1985 version of the Model Law. Part II mostly deals with enforcement of foreign awards governed by the New York and Geneva Conventions.

The key differences between the Arbitration Act and the Model Law are outlined below:

- the Arbitration Act states that the number of arbitrators shall not be an even number, but the Model Law has no such restriction;
- if the parties fail to determine the number of arbitrators, the arbitral tribunal, according to the Arbitration Act, shall consist of a sole arbitrator, in contrast with three arbitrators mandated under the Model Law;
- the power of appointment of an arbitrator under the Arbitration Act is vested in the Supreme Court or, as the case may be, the High Court or any person or institution designated by such court;
- article 8 of the Model Law enables a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 of the Arbitration Act uses the expansive expression 'judicial authority' rather than 'court', and the words 'unless it finds that the agreement is null and void, inoperative and incapable of being performed' do not find a place in section 8. However, the section does use the words 'unless it finds that prima facie no valid arbitration agreement exists', which is narrower than the provision contained in the Model Law;
- if any person is found guilty of any contempt of the arbitral tribunal, then according to the Arbitration Act, he or she shall be subject to penalties or punishments similar to those incurred for like offences in suits tried before a court, a provision that is absent in the Model Law;
- unlike the Model Law, interim measures also include measures for securing the amounts in dispute in the arbitration;
- a court under the Arbitration Act has the power to grant interim measures even after the making of the arbitral award, but before it is enforced. Under the Model Law, a court can grant interim measures only before or during the pendency of arbitral proceedings; and
- any controversy concerning the failure or impossibility of an arbitrator to act and the termination of the mandate of the arbitrator by the court is subject to appeal, as against the Model Law that specifically provides that such decision of the court shall not be subject to an appeal.

The Arbitration Act also provides for the following additional provisions that do not form part of the Model Law:

- award of interest (section 31);
- costs of arbitration (section 31);
- the award will be enforced as a decree of the court if it is not challenged within the period provided under section 34, or the challenge made has been rejected by the court (sections 35 and 36);
- appeals (section 37) against:
    - refusal to refer parties to arbitration under section 8;
    - grant or refusal of an interim measure by the court or the arbitral tribunal;
    - acceptance or refusal of a challenge to set aside an award; and
    - acceptance of a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal has exceeded its scope of authority;
- the deposit of an amount or a supplementary deposit as an advance for the costs of arbitration (section 38);
- arbitral tribunals shall have a lien on the arbitral award for any unpaid costs of arbitration and recourse to the courts by a party in respect thereof (section 39);
- arbitration agreements are not discharged on the death of a party (section 40); and
- provisions in case of insolvency (section 41).

The 2015 Amendment Act has brought about the following changes that are not present in the Model Law:

- arbitration proceedings shall be commenced within a period of 90 days from date of an interim order granted by the court (amendment to section 9);
- the court shall not grant interim relief under section 9 once the tribunal has been constituted unless circumstances exist to justify court intervention (amendment to section 9);
- the tribunal has power to grant interim reliefs that are similar to the reliefs provided for under section 9 (amendment to section 17);
- the tribunal must decide and make an award within a period of 12 months from the date the arbitral tribunal enters upon the reference, which is extendable by a maximum period of six months with the consent of both parties. If the award is not made within such a period, the mandate of the arbitrators stands terminated (section 29A);
- a fast-track procedure has been introduced for resolution of disputes within six months where proceedings are carried on, based on written pleadings, documents and submissions filed by the parties without any oral hearing (section 29B);
- applications for the appointment of arbitrators by the courts shall be endeavoured to be disposed of within 60 days commencing from the date of service of notice on the opposite party (section 11(13));
- the text of the IBA Guidelines on the Conflict of Interest in International Arbitration (the IBA Guidelines) has been incorporated (section 12 read with the Fifth and Seventh Schedules);
- the court has the power to grant interim relief in arbitrations seated outside India (section 9); and
- costs will follow an arbitral award (section 31A).

The 2019 Amendment Act has brought about the following significant changes that are not present in the Model Law:

- the power of appointment of an arbitrator on application by a party has now been wholly delegated to arbitral institutions designated by the Supreme Court in the case of international commercial arbitrations and the High Court in the case of all other arbitrations (amendment to section 11);
- the statements of claim and defence in a domestic arbitration shall be completed within a period of six months from the date on which the arbitral tribunal has received written notice of its appointment (amendment to section 23);
- the arbitral tribunal shall make its award in a domestic arbitration within a period of 12 months from the date of completion of pleadings under section 23; this time limit is no longer applicable to international commercial arbitrations (amendment to section 29A);
- a party challenging a domestic arbitral award must do so on the basis of the record of the arbitral tribunal and may not furnish additional proof to that end (amendment to section 34);
- the arbitrator, the arbitral institution and the parties to an arbitration shall maintain confidentiality of proceedings except where such disclosure is necessary for the purpose of implementation and execution of an award (insertion of section 42A);
- an arbitrator shall not be susceptible to suits or other legal proceedings in respect of acts done or intended to be done by him or her in good faith (insertion of section 42B);
- the insertion of Part I-A of the Arbitration Act brings with it the establishment and incorporation of the Arbitration Council of India (insertion of Part I-A);
- accreditation of arbitrators by professional institutes recognised by the Arbitration Council of India shall be governed by the qualifications, experience and norms enumerated in the Eighth Schedule of the Arbitration Act (insertion of Eighth Schedule). The Arbitration and Conciliation (Amendment) Ordinance 2020 (Arbitration Ordinance of 2020) proposes to omit the Eight Schedule altogether.

The 2021 Amendment Act has brought about notable changes to sections 36 and 43 of the Act:

- The proviso to section 36 now empowers the court to grant a stay of the award in cases where it appears prima facie that fraud and corruption has been made out, or arbitral agreement is vitiated by fraud or corruption.
- Section 43J now states that qualifications, experience and norms for accreditation of arbitrators shall be as specified in the 'Regulations'. The 'Regulation', however, is not named.

Mandatory provisions

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

The parties are free to make agreements in certain matters, such as determining the number of arbitrators, the procedure for appointing an arbitrator, the seat and venue of arbitration, procedure to be followed by the tribunal in conducting the proceedings under section 19(2), and determining the law that governs the arbitration proceedings.

However, in the case of arbitrations seated in India, certain provisions on procedure contained in Part I of the Arbitration Act are binding on the parties, necessitating mandatory compliance.

The following is an indicative list of such provisions:

- the arbitration agreement must be in writing (section 7);
- the power of a court to refer parties to arbitration (section 8);
- the court's power to grant interim measures (section 9) (per the 2015 Amendment Act, this power is now extended to international commercial arbitrations even if not seated in India, unless the parties agree to the contrary);
- the procedure and period for appointment of an arbitrator by the arbitral institution designated by the court, failing an agreement between the parties (section 11);
- the grounds for challenging the appointment of an arbitrator and procedure for challenging an arbitrator by the parties (sections 12 and 13);
- the procedure in the event of failure or impossibility of an arbitrator to act (sections 14 and 15);
- the procedure upon a plea taken by a party that the arbitral tribunal does not have jurisdiction to entertain the dispute and the rights of the parties thereof (section 16);
- the equal treatment of parties (section 18);
- the submission of statements of claim and defence (section 23), though the form and manner of submission is left to the discretion of parties;
- an arbitration seated in India (other than an international commercial arbitration), shall be conducted in accordance with the Arbitration Act (section 28);
- the form and contents of an arbitral award (section 31);
- the termination of arbitral proceedings upon final arbitral award, withdrawal of claim by a claimant, or the mutual agreement of parties or for any other reason (section 32);
- setting aside of an arbitral award and grounds thereof (section 34);
- enforcement of an arbitral award (sections 35 and 36);
- appeals against certain orders of the court or arbitral tribunal (section 37) (certain provisions of section 37 shall also apply to international commercial arbitrations seated outside India unless the parties agree to the contrary under the 2015 Amendment Act);
- provisions for deposits and liens on arbitral awards (sections 38 and 39);

- provisions in respect of death of a party and insolvency (sections 40 and 41); and
- provisions relating to jurisdiction and limitation (sections 42 and 43).

The 2015 Amendment Act has inserted the following mandatory provisions:

- for a mandatory period for deciding and making an award by the tribunal (section 29A); and
- with respect to the cost regime (section 31A).

The 2019 Amendment Act has also inserted a mandatory period of six months for the completion of pleadings, commencing from the date of the arbitral tribunal receiving notice of its appointment (section 23).

Substantive law

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

For domestic arbitrations (ie, arbitrations, other than international commercial arbitration, with a seat in India), the applicable law is the substantive law of India in force at the time (ie, the Arbitration Act). For international commercial arbitrations, the arbitral tribunal shall decide the disputes in accordance with the rules of law designated by the parties as applicable to the dispute. This is a mandatory provision contained in section 28(1)(b)(i) of the Arbitration Act and cannot be contracted out of by the parties. If the parties fail to designate the law, the arbitral tribunal shall apply rules of law it considers to be appropriate in the circumstances of the case. This provision is contained in section 28(1)(b)(iii) of the Arbitration Act and cannot be contracted out of by the parties. In such circumstances, the law applied is generally the law with which the contract is most closely connected (connecting factor). Factors such as the nationality of the parties, the place of performance of the contract, the place the contract was entered into and the place of payment under the contract can be examined to ascertain the intention of the parties and are the frequently used indicators of the connecting factor.

The designation of the law of any country by the party is construed to mean the substantive law of the country in question, unless there is an express designation by the parties to the contrary. The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

The 2015 Amendment Act also provides that in any event and in all cases, the arbitral tribunal shall take into account the terms of the contract and trade usages applicable to the transaction – a relaxation of the earlier provision that mandated that the terms of the contract must be strictly adhered to while deciding and making an award (section 28(3)).

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitral institutions in India are:

The Indian Council of Arbitration (ICA)
Room 112, Federation House
Tansen Marg New Delhi 110001
India
Tel: +91 11 2371 9103 / 2331 9760 / 2373 8760 70
Fax: +91 11 2332 0714 / 2372 1504
ica@touchtelindia.net
www.icaindia.co.in

The International Centre for Alternative Dispute Resolution (ICADR)
Plot No. 6
Vasant Kunj Institutional Area, Phase-II
New Delhi 110070
India
Tel: +91 11 2613 9704 / 2613 9706 / 6593 1884 / 6593 1886
Fax: +91 11 2613 9707
icadr@nic.in
www.icadr.nic.in

The Delhi Arbitration Centre
Delhi High Court Campus
Shershah Road
New Delhi 110 003
India
Tel: +91 11 2338 6492
Fax: +91 11 2338 6493
delhiarbitrationcentre@gmail.com
www.dacdelhi.org

The Arbitration Centre – Karnataka
Arbitration Centre – Karnataka (Domestic and International)
'Khanija Bhavana', No. 49, 3rd Floor, East Wing
Racecourse Road
Bangalore 560 001
Karnataka
India
Tel: +91 80 2295 4571 / 2295 4572 / 2295 4573
Fax: +91 80 2295 4572
arbkarblr@gmail.com
www.arbitrationcentreblr.org

Nani Palkhivala Arbitration Centre
New No. 22, Karpagambal Nagar
Mylapore, Chennai – 600 004
India
Tel: +91 44 6513 0808 / 6565 1329 / 6565 1330
Fax: +91 44 24986697
www.nparbitration.in

FICCI Arbitration and Conciliation Tribunal (FACT)
Federation House
Tansen Marg
New Delhi 110 001
India
Tel: +91 11 2331 9849 / 2373 8760 70
Fax: +91 11 2332 0714 / 2372 1504
arbitration@ficci.com
www.ficci-arbitration.com

Indian Institute of Arbitration & Mediation
G-254, Panampilly Nagar,
Cochin 682 036
Kerala
India
Tel: +91 484 4017731 / 6570101
info@arbitrationindia.com
cochin@arbitrationindia.com
www.arbitrationindia.org

The Mumbai Centre for International Arbitration (MCIA)
20th Floor, Express Towers,
Ramnath Goenka Marg Nariman Point,

Mumbai
Maharashtra 400021
India
Tel: +91 22 6105 8888
contact@mcia.org.in
www.mcia.org.in

Of these, the ICA is the most recognised and widely used institution and is governed by Rules of Arbitration and Conciliation (as amended on and with effect from 8 May 2012) for domestic arbitration. The ICA now also provides for Rules of International Commercial Arbitration (with effect on and from 1 January 2014). ICA also offers video conference tools to conduct online hearings, a step towards taking arbitration online. The ICA's Rules of Domestic Commercial Arbitration and Conciliation were also recently amended and came into effect on 1 January 2021.

The MCIA, which was formally launched in Mumbai, India, on 8 October 2016, is a first-of-its-kind arbitral institution in India, established in a joint initiative between the government of Maharashtra and the domestic and international business and legal communities. The MCIA aims to be India's premier forum for commercial dispute resolution, and provides its own rules for the conduct of arbitration. The MCIA Rules came into effect on 15 June 2016.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Yes, there are certain disputes that are not arbitrable in India, although the Arbitration Act does not expressly exclude any dispute as non-arbitrable. However, courts can set aside the award if the substance of the dispute is such that settlement by arbitration is not possible under the laws in force, or if the award conflicts with the public policy of India.

In general, disputes that can be decided by a civil court that involve rights in personam can be referred to arbitration.

However, the following subject matters are barred from being referred to arbitration:

- matrimonial cases;
- testamentary cases;
- guardianship of a minor or disabled person;
- insolvency;
- criminal proceedings;
- winding up or dissolution of a company;
- matters arising out of a trust deed or the Indian Trusts Act;
- matters relating to competition law; and
- matters relating to eviction or tenancy governed by special statutes; enforcement of mortgage; matters under the securitisation laws; and in general matters for which the jurisdiction lies with the Debt Recovery Tribunal.

In *Shri Vimal Kishor & Ors v Mr Jayesh Dinesh Shah & Ors*, decided on 17 August 2016, the Supreme Court held that cases arising out of a trust deed cannot be the subject matter of arbitration.

In *Booz Allen and Hamilton Inc v SBI Home Finance Ltd & Ors* (AIR 2011 SC 2507), the Supreme Court ruled that a suit for enforcement of a mortgage by sale of the mortgaged asset was non-arbitrable, as it involved a right in rem.

In *Eros International Media Ltd v Telemax Links India Pvt Ltd* (decided on 12 April 2016), the Bombay High Court held that copyright disputes were held to be arbitrable.

In *N Radhakrishnan v Maestro Engineers and Ors* (2010) 1 SCC 72, the Supreme Court held that when the seat of arbitration is in India, issues involving criminality, serious fraud and financial malpractices can only be resolved by a court.

In *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd* (AIR 2014 SC 968), the Supreme Court held that:

> *In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties.*

However, the decision in N Radhakrishnan was not held to be per incuriam. This decision has also been distinguished in *Swiss Timing v Organising Committee, Commonwealth Games* (2014) 6 SCC 677 and *A Ayyasamy v A Paramasivam* (2016) 10 SCC 386, which held that even domestic disputes involving allegations of fraud arising out of contracts bearing an arbitration clause shall be referred to arbitration.

In its recent decision in *Avitel Post Studioz Ltd v HSBC PI Holdings* dated 19 August 2020 (arising out of Civil Appeal No. 5145 of 2016), the Supreme Court set out the tests to determine 'serious allegations of fraud' that cannot be arbitrated. Adopting the reasoning enumerated in the *Swiss Timing* decision, the Court held that the earlier decisions ought to have considering a combined interpretation of sections 5, 8 and 16 of the Arbitration Act that sets out an approach whereby, 'when a judicial authority is shown an arbitration clause in an agreement, it is mandatory for the authority to refer parties to arbitration bearing in mind the fact that the arbitration clause is an agreement independent of the other terms of the contract and that, therefore, a decision by the arbitral tribunal that the contract is null and void does not entail ipso jure the invalidity of the arbitration clause'. As for the tests to make such determination, the Court placed reliance on the *Ayyasamy* decision which stipulated the following two tests:

- 'does allegation permeate the entire contract and above all, the agreement of arbitration, rendering it void'; or
- 'whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain'.

The Supreme Court held that in view of the above decisions, 'serious allegations of fraud' would arise only if either of the two tests above are satisfied, and not otherwise.

In *Vidya Drolia and Ors v Durga Trading Corporation* (2020) SCC OnLine SC 1018, the Supreme Court recalibrated the issue of arbitrability of certain subject matters when being called upon to determine the arbitrability of a landlord–tenant dispute. The Court clarified that only 'when a specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations' would the dispute not be arbitrable.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The Arbitration Act provides that all arbitration agreements must be in writing. Section 7 of the Arbitration Act states that an arbitration agreement:

> *1. May be in the form of an arbitration clause in a contract or in the form of a separate agreement;*
> *2. Is in writing if it is contained in:*
> *(a) document signed by the parties;*

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

3. Can also be a reference in a contract to a document containing an arbitration clause if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 7(4)(b) of the 2015 Amendment Act permits the creation of arbitration agreements through electronic communication. Such agreements shall also be regarded to fulfil the requirements of section 7.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is unenforceable in the following circumstances:

- if the party to the arbitration was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force;
- the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force;
- if the agreement is void or otherwise not valid on account of incapacity or disqualification of one of the parties to the contract; or
- in a contract wherein one of the contracting parties is an insolvent and a dispute arises, the arbitration agreement cannot be enforced unless the receiver seeks permission from the judicial authority for an order directing that the matter in question shall be submitted to arbitration.

In recent years, courts have ensured that poorly drafted (or even 'pathological') arbitration clauses will be given effect to in the best possible way and parties will be referred to arbitration. In *Pricol Ltd v Johnson Controls Enterprises Ltd & Ors* (2015) 4 SCC 177, the Supreme Court referred parties to arbitration even though the clause provided for reference to arbitration under the arbitration rules of the Singapore Chamber of Commerce (a non-existent institution), by construing it to mean a reference to the Singapore International Arbitration Centre.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Yes, the doctrine of separability of arbitration agreements from main agreements finds expression in the Arbitration Act under section 16(1)(b) which states that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Interpreting this provision and applying the doctrine, the Supreme Court, in National Agricultural Co-op Marketing Federation India Ltd v Gains Trading Ltd (2007) 5 SCC 692, held:

> *An arbitration clause is a collateral term in the contract which relates to resolution [of] disputes and not performance. Even if performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.*

In *N N Global Mercantile Pvt Ltd v Indo Unique Flame Ltd & Others* (2021) SCC OnLine SC 13, the Supreme Court answered in the negative while deciding if an arbitration agreement becomes non-existent in law, invalid or unenforceable, if the underlying contract was not stamped as per the relevant Stamp Act. The question of whether a non-stamped document renders an arbitration clause therein ineffective has been referred to a constitutional bench of five judges to be authoritatively settled.

Third parties – bound by arbitration agreement

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

The Arbitration Act does not provide for third parties or non-signatories to be bound by an arbitration agreement. An arbitration agreement remains valid even if the underlying contract has been assigned to a third party.

Section 37 of the Indian Contract Act 1872 provides that a contract may be performed by a person's legal heirs on his or her death, unless a contrary intention is evident from the contract. The same principle would apply to arbitration agreements. In the case of insolvency, as stated above, the receiver may adopt the contract to be enforceable by or against him or her.

The 2015 Amendment Act has provided for third parties to subject themselves to an arbitration agreement (domestic arbitrations seated in India) by amending section 8 to allow parties, or those claiming through or under such party, to apply to the court to refer the dispute to arbitration. This amended wording is identical to the wording contained in section 45 (international commercial arbitration), which provides for a party, or any person claiming through or under him or her, to apply to the court to refer a dispute to arbitration.

Non-signatories to an arbitration agreement have also been referred to arbitration under a section 45 application in *Chloro Controls (I) P Ltd v Severn Trent Water Purification Inc and Ors* (2013) 1 SCC 641, wherein the Supreme Court observed that any person claiming through or under a party to the arbitration agreement could also initiate arbitration.

The 2015 Amendment Act now permit such references in accordance with the language in section 45 and the decision of the Supreme Court in *Chloro Controls*. More recently, in its decision in *Mahanagar Telephone Nigam Ltd v Canara Bank & Ors* AIR 2019 SC 4449, the Supreme Court invoked the group of companies doctrine in allowing the impleading of non-signatories.

In the case of *Rickitt Benckinser (India) Private Limited v Raynders Label Printing India Private Limited and Another* (2019) 7 SCC 62, the Supreme Court, while deciding a section 11 application for the appointment of arbitrators, discussed the non-binding nature of an arbitration agreement on non-signatory. The Court particularly held that the intention of a non-signatory to consent to the agreement was essential and the burden of proof rested on the party making an assertion of the non-signatory being bound by the agreement. Since this burden was not discharged in this case, the Court said that the non-signatory therein could not be subjected to the proposed arbitration proceedings.

Third parties – participation

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

The Arbitration Act does not provide for joinder or third-party participation in arbitration. In *Sukanya Holdings*, the Supreme Court held that parties who were not signatories to the agreement cannot be added to the proceedings by the Court.

Similarly, in *Indowind Energy Limited v Wescare (India) Ltd & Anr* (2010) 5 SCC 306, the Supreme Court held that a company that was not

party to an arbitration agreement could not be joined as a party to the proceedings solely by virtue of its conduct.

In *Charan Properties Limited v Kasturi and Sons Limited and Ors* (2018) 16 SCC 413, the Supreme Court discussed the circumstances when a third-party non-signatory can be bound by an arbitration agreement in the context of the group of companies doctrine. The Court noted that the existence of contractual intent to bind a party must be given effect.

Groups of companies

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

The group of companies doctrine, used to extend the scope of a tribunal's jurisdiction to companies that are not signatory to the agreement itself but are part of the corporate group that the signatory company is a part of, was until recently not recognised in India.

However, in *Chloro Controls*, the Supreme Court held that where there are multiple transactions between parties involving several composite agreements that may have a collective bearing on a dispute, the courts will have the power to direct even a non-signatory to be joined as a party to the arbitration. This would be applicable in exceptional cases only, depending on the commonality of the subject matter and whether the various agreements formed a composite transaction, where the performance of the main agreement would not be possible without the execution of the other agreements. More recently, the Supreme Court has invoked this doctrine in its decision in *Mahanagar Telephone Nigam* by allowing non-signatory parties to be impleaded in an arbitration.

In the case of *Charan Properties Limited v Kasturi and Sons Limited and Ors* (2018) 16 SCC 413, the Supreme Court discussed the circumstances when a non-signatory can be bound by an arbitration agreement. Discussing the group of companies doctrine, the Court held that the relationship of the non-signatory with the signatory, the commonality of the subject matter of the contract or the transaction, and the composite nature of such contract or transaction are significant pointers to determine the issue of binding a non-signatory to the arbitration.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Act does not stipulate any particular requirements for a valid multiparty arbitration agreement. The requirements contained in section 7 of the Arbitration Act for single arbitration agreements are deemed to apply to multiparty arbitration agreements.

In *Olympus Superstructures v Meena Vijay Khetan* (1999) 5 SCC 651, the Supreme Court found that in cases where the main agreement exists among multiple parties, and disputes arise under various sub-agreements to which all parties are not signatories, and a dispute arises in relation to issues that overlap, parties may be referred to a single arbitration by relying upon a widely drafted clause in the main agreement.

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Arbitration Act does not contemplate consolidation of arbitration proceedings. Parties, however, have frequently approached courts or made applications for consolidation of arbitral proceedings. In such cases, the courts endeavour to determine the true essence of the commercial arrangement between the parties in order to uncover the intent of binding a non-signatory who is bound by the actions of a signatory. In *Cheran Properties Ltd v Kasturi and Sons Ltd* (2018) 16 SCC 413 the court applied the group of companies doctrine where circumstances indicate that the intent of the arbitration agreement was to bind both signatories and non-signatories.

In order to comprehensively address this question, the position of law must be gleaned from decisions of the Supreme Court in this regard. The Supreme Court, in *P R Shah, Shares and Stock Broker (P) Ltd v B H H Securities (P) Ltd* (2012) 1 SCC 594 opined as follows:

> *If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But 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 & C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration.*

Thereafter, in *Chloro Controls*, the Supreme Court had occasion to consider a scenario wherein disputes had arisen under multiple agreements signed between different parties, some of which contained arbitration clauses and others which did not. The disputes, having arisen in the context of an incorporated joint venture and various agreements thereunder, were held to be capable of reference to arbitration on the basis that the shareholders' agreement between the parties to the joint venture was the 'principal agreement' to which all subsequent agreements were 'ancillary or incidental'. In arriving at its decision, the Supreme Court, although refusing to opine on the correctness of its decision in *Sukanya Holdings*, seemingly departed from the ratio laid down in that case.

In its decision in *Duro Felguera S A v Gangavaram Port Ltd* (2017) 9 SCC 729, the Supreme Court declined to consolidate arbitration proceedings arising out of multiple agreements executed in the course of a tender bidding process. In this particular case, certain disputes were the subject matter of domestic arbitration while certain others were the subject matter of international arbitration. In such a circumstance, the Supreme Court held that a 'composite reference' to arbitration would not be appropriate considering that a party aggrieved by an arbitral award has wider scope of challenge in the case of a domestic arbitration as compared to an international arbitration. Furthermore, the Supreme Court distinguished the case before it from the decision in *Chloro Controls* on the ground that the arbitration clause considered therein covered disputes arising under or in connection with the principal agreement. It was held that the words 'under or in connection with' were very wide and thus brought within the ambit of the clause all other agreements executed ancillary to the principal agreement. In the absence of a similar clause in the facts before it, the Supreme Court refused to make a composite reference. This was also relied on in *Indus Biotech Private Ltd v Kotak India Venture (Offshore) Fund & Ors* 2021 SCC OnLine SC 268.

The position of law in respect of consolidation of arbitral proceedings is not codified in India and the applicability of 'the doctrine of composite reference' as developed by the Supreme Court in these decisions mainly hinges on the language of the arbitration agreement or clause and the intent of the parties that can be discerned therefrom.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

Yes, the Arbitration Act places certain restrictions on the individual acting as an arbitrator. The rules applicable to the appointment of an arbitrator have seen a graded filter in the recent amendments to the Arbitration Act.

Pursuant to the 2015 Amendment Act, when a person is approached in connection with his or her possible appointment as an arbitrator, he or she is required to disclose in writing circumstances such as the existence, either direct or indirect, of any past or present relationship with, or interest in, any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or another kind, that are likely to give rise to justifiable doubts as to his or her independence or impartiality, or that are likely to affect his or her ability to devote sufficient time to the arbitration, and in particular his or her ability to complete the entire arbitration within a period of 12 months. This declaration is required to be made in accordance with the format provided in the Sixth Schedule. The 2015 Amendment Act has introduced grounds (under the Fifth Schedule) that may determine whether circumstances exist that give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

The 2015 Amendment Act also introduced categories (under the Seventh Schedule) in relation to an arbitrator's relationship with the parties, counsel or the subject matter of the dispute, under which a person shall be ineligible to be appointed as an arbitrator. Some instances of these categories include a person who is an employee, consultant, adviser or has any other past or present business relationship with a party; currently represents or advises one of the parties or an affiliate of one of the parties; represents the lawyer or law firm acting as counsel for one of the parties; or is a lawyer in the same law firm that is representing one of the parties. The fifth and seventh schedules Introduced in the 2015 Amendment Act are largely Inspired by the IBA Guidelines on Conflict of Interest in International Arbitration.

Section 11(1) of the Arbitration Act states that a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. If the parties fail to appoint an arbitrator – or in an arbitration tribunal of three arbitrators, the two arbitrators fail to appoint the presiding arbitrator within 30 days of the dispute – recourse is to the High Court or any designated person or institution for appointment of the arbitrator or presiding arbitrator as the case may be (section 11(6)). In international commercial arbitration, recourse is available only with the Supreme Court or any designated person or institution, as reflected in the 2015 Amendment Act.

The 2019 Amendment Act introduced the Eighth Schedule to the Arbitration Act, setting out the requisite qualifications and experience for an arbitrator; however, this has now been omitted by the Amendment Act of 2021, with effect from 4 November 2020. The requirements can be found in the 'regulations', although this has not been defined at the time of writing.

In a dispute between Assignia-VIL JV and Rail Vikas Nigam decided on 29 April 2016, the Delhi High Court observed that if the arbitrator and the parties enjoy any of the relationships mentioned in the Seventh Schedule to the Arbitration Act, the arbitrator cannot be appointed. One of these relationships is that of employer–employee.

The case Reliance *Industries & Ors v Union of India* (Arbitration Petition No. 27 of 2013, the Supreme Court vide order dated 31 March 2014) highlighted that the trend of appointing an arbitrator from a 'neutral nationality', which is now universally accepted, will also be adopted under the Arbitration Act.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

In the majority of domestic arbitrations, arbitrators are retired judges or practising lawyers. Section 11 of the Arbitration Act provides for the appointment of arbitrators by the parties or the court, as the case may be, which gives discretion with regard to the person appointed as the arbitrator. That being the case, lawyers and judges are preferred in most arbitrations owing to the frequency of arbitrations handled by them and the indispensable practical experience. In disputes requiring technical expertise, non-lawyers such as engineers or securities experts have been appointed as part of three-member tribunals because of their relevant expertise. For instance, the ICA website has a section that contains the names of qualified arbitrators from various fields, such as judges, advocates, engineers, chartered accountants, executives, maritime experts, businesspeople and foreign nationals.

Although the Eighth Schedule introduced under the 2019 Amendment Act permitted professionals such as chartered accounts, company secretaries and cost accountants with more than 10 years' experience to be appointed as arbitrators, the 2021 Amendment has omitted it. At the time of writing, the qualifications of arbitrators are to be determined by 'regulations', which are yet to be defined or notified. There is no specific mandate or direction by any domestic arbitral institutions to ensure gender diversity in appointments. However, several practitioners on the MCIA Council have taken the Pledge for Equal Representation of Women in Arbitration.

Default appointment of arbitrators

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

Section 11 of the Arbitration Act, as amended by the 2019 Amendment Act, prescribes the default mechanism for the appointment of an arbitrator or arbitrators, as follows:

- failing any agreement between the parties on a procedure for appointing arbitrators, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator (section 11(3));
- if a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party, or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made, upon the request of a party, by the arbitral institution designated by the Supreme Court, in cases of international commercial arbitration, or that designated by the High Court, in cases of arbitrations other than international commercial arbitration (section 11(4)); and
- failing any agreement between the parties, in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within 30 days from receipt of a request by one party from the other party to agree, the appointment shall be made, upon request of a party by the arbitral institution designated by the Supreme Court, in cases of international commercial arbitration, or that designated by the High Court, in cases of arbitrations other than international commercial arbitration (section 11(5)).

Pursuant to the recent 2019 amendment, the power of appointment of arbitrators is now solely vested in the arbitral institutions designated by the Supreme Court or the High Courts in terms of section 11(3A) of the Arbitration Act. For international commercial arbitrations, an arbitral institution designated by the Supreme Court shall have the power to appoint the arbitrator. In domestic arbitrations, the power of appointment of arbitrators has been conferred upon arbitral institutions designated by the High Courts.

In *Northern Railway Administration, Ministry of Railway, New Delhi v Patel Engineering Company Limited* (2008) 10 SCC 240, the Supreme Court affirmed that a court cannot intervene in the appointment of an arbitrator where the parties have specified a procedure in the agreement, unless fraud, disqualification or legal misconduct of the arbitrator has been both pleaded and proven.

The Supreme Court, in *Sun Pharmaceutical Industries Ltd v Falma Organics Limited Nigeria* (Arbitration Case No. 33 of 2014, Order dated 3 May 2017), designated the MCIA as the appointing authority. This is the first known instance of the Supreme Court calling upon an independent arbitration institution to act as appointing authority under section 11 of the Arbitration Act.

Challenge and replacement of arbitrators

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

Section 12 of the Arbitration Act, as amended by the 2015 Amendment Act, provides that an arbitrator is required to disclose, in writing, any circumstances that give rise to justifiable doubts as to his or her independence or impartiality, or that are likely to affect his or her ability to complete the arbitration within a period of 12 months.

The 2015 Amendment Act has incorporated a modified version of the IBA Guidelines, under two new Schedules – the Fifth Schedule and the Seventh Schedule – to be read with section 12 of the Act. The Fifth Schedule lists the grounds that give rise to justifiable doubts as to the independence or impartiality of the arbitrators, and contains categories specified in the Non-Waivable Red List, the Waivable Red List and the Orange List, as provided under the IBA Guidelines. A party may challenge its own appointment, or in whose appointment it participated, only for reasons that it becomes aware of after the appointment has been made.

The Seventh Schedule lists the grounds under which an individual is ineligible for appointment as arbitrator. The categories under the Waivable and Non-Waivable Red Lists have been included under the Seventh Schedule. All grounds under this Schedule can be waived by the parties by express agreement in writing.

Section 13 of the Arbitration Act provides that the arbitral tribunal shall decide on the challenge raised by a party under section 12 and then proceed with arbitration. The challenging party may only approach the court once to challenge the award passed by the arbitral tribunal under section 34 of the Arbitration Act. When the court in such an application sets aside the award, the court may decide whether the challenged arbitrator is entitled to any fees.

It is not common practice for courts to refer to the IBA Guidelines, although the Delhi High Court in Shakti Bhog Foods Ltd v Kola Shipping Ltd & Anr 193 (2012) DLT 421, did refer to these Guidelines.

Section 13 of the Arbitration Act lays down the procedure to be followed in cases of challenge. Section 13 provides that a party that intends to challenge an arbitrator shall, within 15 days of becoming aware of the constitution of the arbitral tribunal, which may raise justifiable doubts as to the independence or impartiality of the arbitrator, send a statement of reasons for the challenge to the arbitral tribunal. The arbitral tribunal shall then decide on the challenge. If such challenge is unsuccessful, the tribunal shall continue arbitral proceeding and make an arbitral award. If such award is made, the party challenging the arbitrator may apply to set aside the arbitral award.

Even after the introduction of new grounds of challenge in the 2015 Amendment Act, the Supreme Court in *HRD Corporation (Marcus Oil and Chemical Division) v GAIL (India) Limited* (Civ App 11127 of 2017, judgment dated 31 August 2017), confirmed that even if a challenge arises under Schedule Five that is dismissed by the arbitral tribunal, the court may only interfere after the passing of an award.

The Supreme Court also dealt with the ground of bias in *Perkins Eastman Architects DPC & Anr v HSCC (India) Limited* (2019) SCC OnLine SC 1517, holding that a person with an interest in the outcome of a dispute can neither adjudicate as nor nominate a sole arbitrator. That said, under section 14(3) of the Arbitration Act, if the mandate of an arbitrator is terminated or an arbitrator becomes de jure or de facto unable to perform his or her functions or withdraws from his office, an application can be made to the court to resolve any controversy that remains arising out of such termination of mandate.

Relationship between parties and arbitrators

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

The principles of natural justice, impartiality and a fair trial guide the proceedings of the arbitral tribunal. Fairness, impartiality, independence and neutrality are, therefore, the indispensable qualities of an arbitrator. An arbitral tribunal is not a court and, therefore, the arbitrators are not judges, but the relationship between an arbitrator and the parties to the dispute is analogous to the relationship between a judge and parties to court proceedings.

An arbitrator's remuneration is fixed prior to his or her entering upon the reference of arbitration and can be modified by an agreement between the parties or by an order of the court or tribunal. The parties may also increase the fee of the arbitrator.

The Supreme Court held that: 'The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes' in *Indian Oil Corp Ltd & Ors v M/s Raja Transport (P) Ltd* (2009 (8) SCC 520).

The 2015 Amendment Act has inserted the Fourth Schedule into the Arbitration Act providing for a model fee structure of arbitrators in domestic arbitrations (section 11(14)). This section shall not, however, apply to international commercial arbitration or in arbitrations (other than international commercial arbitration) if parties have agreed for determination of fees as per the rules of an arbitral institution.

Sum in dispute (in rupees)	Model fee (in rupees)
Up to 500,000	45,000
Above 500,000 and up to 2 million	45,000 plus 3.5 per cent of the claim amount over and above 500,000
Above 2 million and up to 10 million	97,500 plus 3 per cent of the claim amount over and above 2 million
Above 10 million and up to 100 million	337,500 plus 1 per cent of the claim amount over and above 10 million
Above 100 million and up to 200 million	1,237,500 plus 0.75 per cent of the claim amount over and above 10 million
Above 200 million	1,987,500 plus 0.5 per cent of the claim amount over and above 200 million, with a ceiling of 3 million

Section 11(14) of the 2015 Amendment Act states that the high courts may frame rules for determining the fees of arbitrators after taking the above model fee structure into account.

Section 12 of the 2015 Amendment Act read with Schedule VI also requires that at the time a party approaches a potential arbitrator for appointment, the arbitrator is required to disclose information required to determine his or her eligibility as prescribed in the Act.

Section 42B, inserted by the 2019 Amendment Act, provides that no suit or other legal proceedings shall lie against the arbitrator for anything which is, in good faith, done or intended to be done under the Arbitration Act or rules or regulations thereunder.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Section 12 of the Arbitration Act provides for the grounds on which an arbitrator's appointment may be challenged. Section 12(1) provides that an arbitrator shall disclose in writing the existence, either direct or indirect, of any past or present relationship with or interest in any of the parties before them. Arbitrators are further required to disclose any interest they may have in the subject matter of the dispute, whether financial, business, professional or any other kind. The form of disclosure countenanced under this provision is prescribed in the Sixth Schedule of the Arbitration Act, while the grounds that may give rise to justifiable doubts as to the independence or impartiality of an arbitrator are enumerated in the Fifth and Seventh Schedule of the Arbitration Act. Section 12(5) of the Arbitration Act stipulates that any person whose relationship with the parties, counsel, or the subject matter of the dispute falls under any of the categories mentioned in the Seventh Schedule of the Arbitration Act shall be ineligible to be appointed as an arbitrator.

Similarly, arbitral institutions also stipulate mandatory disclosures by the arbitrator in terms of his or her impartiality and independence with respect to the reference. For Instance, Rule 6 of the MCIA Rules calls upon the arbitrator to disclose any facts or circumstances that may give rise to justifiable doubts as to his or her impartiality or independence. Should the arbitrator fail to comply with this provision, Rule 10 categorically states that such an arbitrator's appointment is liable to be challenged.

The threshold of showing circumstances giving rise to justifiable doubts as to the arbitrator's independence or impartiality is a rather high bar.

Immunity of arbitrators from liability

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

There are no reported cases of personal liability of the arbitrators for either negligence or intentional breach of duty. However, section 42B, inserted by the 2019 Amendment Act, provides that no suit or other legal proceedings shall lie against the arbitrator for anything which is, in good faith, done or intended to be done under the Arbitration Act or rules or regulations thereunder.

Section 29A, brought in by the 2015 Amendment Act, adheres to a very stringent deadline, whereby arbitrators must decide and make an award within 12 months, extendable by a further six months, failing which their mandate is terminated. Section 29A(4) contains a proviso to the effect that where the delay is attributable to the tribunal, the courts may reduce the arbitrators' fees.

Similarly, section 13(6) of the Arbitration Act states that where an arbitrator's appointment has been challenged before a court at the stage of challenging the award, and the same succeeds, the court is at liberty to also decide whether the arbitrator is entitled to any fees.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

Section 8 of the Arbitration Act makes provisions in relation to the power of a judicial authority to refer parties to arbitration where there is an arbitration agreement. It provides that, when an action is brought before a judicial authority concerning a matter that is the subject of an arbitration agreement, the judicial authority shall refer the parties to arbitration upon an application being made by a party to the dispute requesting that the dispute be referred to arbitration, unless the judicial authority finds that prima facie no valid agreement subsists. The application to refer to arbitration must be accompanied by the original arbitration agreement or a certified copy of the arbitration agreement and must be made to the judicial authority no later than the date of submitting the first statement on the substance of the dispute. The section also provides that if original arbitration agreement or the certified copy thereof is unavailable to the party applying to the judicial authority and the same is retained by the other party to the arbitration agreement, the party applying shall have the right to apply to the judicial authority to call upon the other party to produce the original agreement.

Section 45 (in Part II of the Arbitration Act, which makes provisions in relation to enforcement of certain foreign awards) provides that a judicial authority shall, at the request of one of the parties who have executed an arbitration agreement, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In *Ananthesh Bhakta*, the Supreme Court held that the filing of the application without the original or certified copy of the arbitration agreement but bringing the original arbitration agreement on record at the time when the Court is considering the application, shall not entail rejection of the application under section 8(2).

Jurisdiction of arbitral tribunal

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

The tribunal may rule upon its own jurisdiction, including upon the validity of the arbitration agreement under section 16 of the Arbitration Act. A plea that the arbitral tribunal lacks jurisdiction must be raised at a time no later than the submission of the statement of defence *(MP Rural Road Development Authority v LG Chaudhary Engineers and Contractors* (2018) 10 SCC 826). The section further provides that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope is raised during the arbitral proceedings. However, the tribunal has the power to admit a later plea if it considers delay in raising the plea justified.

If the tribunal accepts the plea that it lacks the requisite jurisdiction to adjudicate a dispute, such an order is an appealable order under section 37(2)(a) of the Arbitration Act.

If the tribunal rejects the plea that it lacks the requisite jurisdiction to adjudicate the dispute, it shall continue with the proceedings and make an arbitral award. The party aggrieved by the ruling may make an application to the court under section 34(2)(iv) of the Arbitration Act for

setting aside the award on the ground that the arbitral award deals with a dispute not falling within the terms of the contemplated arbitration or that the award contains decisions on matters beyond the scope of the submission to arbitration. This application must be made within three months from the date on which the aggrieved party received the arbitral award. However, the court may entertain the application to set aside the award for a further 30 days if the applicant is able to satisfy the court that the delay was with sufficient cause.

Further, the settled position of law regarding parallel proceedings occurring in relation to an arbitration between two parties is possible if a consumer forum is also considering the issue. The Supreme Court, in *Fair Air Engineers (P) Ltd v NK Modi* (1996) 6 SCC 385, held that consumer forums are at liberty to proceed with the matters in accordance with the provisions of the Consumer Protection Act 1986 rather than relegating the parties to arbitration proceedings pursuant to a contract entered into between the parties. The reason is that the Consumer Protection Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action, unless the forums on their own, and on the peculiar facts and circumstances of a particular case, come to the conclusion that the appropriate forum for adjudication of the disputes would be other than those given in the said Act.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Section 20(2) of the Arbitration Act provides that, failing any agreement between the parties on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Furthermore, section 22(2) of the Arbitration Act provides that, failing any agreement on the language to be used in the arbitral proceedings, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

Section 28 of the Arbitration Act provides that in an arbitration other than an international commercial arbitration where the place of arbitration is situated in India, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India. In the case of international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.

It is further provided that any designation by the parties of a law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules. Failing any designation by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given the circumstances surrounding the dispute to identify the legal system which the dispute or its underlying transaction has the closest and most real connection.

In a recent significant decision of the Supreme Court in *BGS SGS Soma JV v NHPC Ltd* (2019) SCC Online SC 1585, it has been held that where there is an express designation of a place of arbitration under an arbitration agreement or clause as being the 'venue' of the 'arbitration proceedings', it can be concluded, in the absence of any contrary indicia, that the venue is really the seat. Further, the reference to 'shall be held' in respect of an arbitration proceedings would also indicate that the parties intended to anchor arbitration proceedings to a particular place, signifying thereby that the place is actually the seat of the arbitration proceedings. The decision crystallises the parameters of interpreting the proper law of the arbitration by giving a wider and fuller interpretation to the designated place of the arbitral proceedings. The Supreme Court's decision holds that where a place has been designated as the venue for arbitration proceedings, the use of the phrase 'arbitration proceedings' necessarily connotes the entirety of the arbitration proceedings, and not just one or more individual hearings. This decision is a comprehensive take on the issue of determining the proper law of the arbitration agreement by determining the seat of the arbitration even in circumstances where the parties have only designated a place or destination as a 'venue', further to its precedents such as *Brahmani River Pellets v Kamachi Industries Ltd* (2019) SCC Online SC 929.

In *Mankastu Impex Private Limited v Airisual Limited* (Arbitration Petition No. 32 of 2018) rendered by the Supreme Court on 5 March 2020, dealt with the parameters for determining the seat and venue and leans towards the principles laid down in *Hardy Exploration* (criticised as bad law in BGS Soma at paragraph 96). Since *BSG Soma* and *Mankatsu Impex* (and *Hardy Exploration*) are decisions of coordinate benches, only a further determination by a larger bench will clarify these issues. The Supreme Court has reiterated the position of BGS Soma in its decision of *M/s Inox Renewables Ltd v Jayesh Electricals Ltd* (2021) SCC OnLine Del 448.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Section 21 of the Arbitration Act provides that in the absence of an agreement between the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration (notice of arbitration) is received by the other party.

The communication by a party of the recourse to arbitration and a requirement that the other party should do something on its part in that regard will in general suffice to define the commencement of arbitration. There are no formal requirements for a notice or request prescribed under the Arbitration Act. The communication should make it clear that the arbitration proceedings are commenced, and not merely indicate the intention of initiating arbitral proceedings.

The commencement of the arbitration proceedings will depend on the nature of the arbitration being ad hoc or institutional. In the case of an institutional arbitration, the rules of the institution will govern the initiation of the arbitration, and in case of an ad hoc arbitration, the arbitral tribunal will determine the procedure of filing the pleadings, etc.

Hearing

28 | Is a hearing required and what rules apply?

Section 24(1) of the Arbitration Act states that the arbitral tribunal shall decide whether to hold oral hearings for presentation of evidence or oral arguments, or whether the proceedings can be conducted on the basis of documents and other materials. The section further provides that the tribunal shall hold oral hearings if a party requests it, unless the parties have agreed that no oral hearings will be held. In order to complete the arbitration in an efficient manner, the section also provides that, as far as possible, the arbitral tribunal shall hold oral hearings for the presentation of evidence on a day-to-day basis and not grant any adjournments, unless sufficient cause is made out and the tribunal is empowered to impose exemplary costs on the party seeking such adjournment without sufficient cause.

Section 19 of the Arbitration Act provides that the parties are at liberty to adopt their choice of procedure governing the arbitral tribunal. The Code of Civil Procedure and the Indian Evidence Act are not applicable to arbitration proceedings, unless otherwise agreed by the parties.

Fast-track procedure is an option available to the parties to an arbitration under section 29B. This provision was introduced under the 2015 Amendment Act. If parties elect the applicability of fast-track procedure, the dispute shall be decided by the tribunal on a 'documents-only' basis (ie, written pleadings, documents and submissions filed by the parties without any oral hearing). Further, section 29B(3)(c) states that an oral hearing may only be held if all the parties make a request or if the arbitration tribunal considers it necessary to have oral hearing for clarifying certain issues.

Evidence

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

The arbitral tribunal endeavours to identify the facts of the case on the basis of the admissibility, relevance, materiality and weight of evidence presented before it The Arbitration Act states that a domestic arbitration is not bound by the Indian Evidence Act 1872. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. Parties and tribunals are free to seek guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

Section 26 of the Arbitration Act authorises the arbitral tribunal to appoint an expert on the specific issues arising from the subject matter of the dispute. The arbitral tribunal records both documentary and oral evidence having regard to its admissibility, relevance, materiality and weight of evidence. When authorising the tribunal to appoint an expert, the parties may also stipulate that the appointment should be made with their consent. It will be open to a party or to the arbitral tribunal to require the expert, after delivery of his or her report, to participate in an oral hearing where the parties would have an opportunity to put questions to him or her. Section 24(3) of the Arbitration Act mandates the arbitral tribunal to communicate to the parties any expert report or evidentiary document on which the arbitral tribunal is relying on.

Witnesses appearing before an arbitral tribunal can be sworn in by the tribunal and required to state the truth on oath before any person authorised to administer oaths. A party to a dispute may agree to be bound by the special oath of the other party and have the evidence taken after administration of a reasonable form of oath. However, arbitrators can force unwilling witnesses to appear before the arbitral tribunal only with the court's assistance, as provided under section 27 of the Arbitration Act. This section prescribes that the application must specify the name and address of any person to be heard as a witness or expert witness, a statement of the subject matter of the testimony required, and a description of any document to be produced or property to be inspected.

Any person failing to attend in accordance with any process, making any other default, refusing to give evidence or being guilty of any contempt of the arbitral tribunal shall be subject to the same penalties and punishment as he or she would incur for the same offences in suits tried before a court.

Court involvement

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

Section 27 of the Arbitration Act provides that the powers of the court in an arbitration matter, upon an application made by the arbitral tribunal or a party with the approval of the arbitral tribunal, includes the power to issue summonses, issue commissions, compel attendance, compel the production of documents, and perform the inspection and discovery of documents. The court may intervene upon the failure of such witnesses to attend, or if they refuse to give evidence or are guilty of any contempt of the arbitral tribunal during arbitral proceedings, and the court may subject such persons to penalties or punishments, after representations from the arbitral tribunal, similar to what they would incur for such offences if they occurred in court.

Confidentiality

31 | Is confidentiality ensured?

The 2019 Amendment Act has introduced section 42A on 'Confidentiality of Information', which imposes a mandatory obligation on the arbitrator, the arbitral institutions and parties to the arbitration agreement to maintain confidentiality of all arbitral proceedings, with the exception of the award where its disclosure is necessitated for the implementation and enforcement of the award.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Section 9 of the Arbitration Act provides a party the right to approach a court before or during arbitral proceedings, or any time after the making of an award but before its enforcement, to seek interim reliefs in the nature of appointment of a guardian for a minor or a person of unsound mind; preservation, interim custody or sale of any goods that are the subject matter of an arbitration agreement; securing the amount in dispute in the arbitration; or the detention, preservation or inspection of property or the subject matter of arbitration, or the appointment of a receiver in respect of such goods. The court may also pass any other order necessary to protect the interests of the parties insofar as it does not impede the arbitration proceedings.

Section 9 further provides that if an order is passed by a court before the commencement of the arbitral proceedings, the proceedings shall be commenced within a period of 90 days from the date of such order or such further time as the court may determine.

In addition, seeking interim reliefs under section 9, a party may approach the arbitral tribunal under section 17 upon its constitution for interim relief of the aforesaid nature during either the arbitration proceedings or after the making of the award (but before it is enforced). Pursuant to the 2015 Amendment Act, once the arbitral tribunal has been constituted, the court shall not entertain an application for interim measures, unless the court finds that circumstances exist that may not render the remedy provided under section 17 efficacious. Section 17 of the amended Arbitration Act clarifies that an arbitral tribunal shall have the same power for making orders as the court has for the purpose of, or in relation to, any proceedings before it. Subject to any orders passed in appeal under section 37, any order issued by the arbitral tribunal under section 17 shall be deemed to be an order of the court for all purposes and shall be enforceable in the same manner as if it were as such.

Interim measures by an emergency arbitrator

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

There are no provisions for the appointment of emergency arbitrators under the Arbitration Act. However, institutional rules of arbitration, such as the International Chamber of Commerce Rules on Arbitration and the Singapore International Arbitration Centre (SIAC) Rules, which

are popularly used as the procedural rules for conducting arbitration proceedings, even if the seat is in India, contain provisions for the appointment of emergency arbitrators by parties to obtain interim measures. The Indian Council of Arbitration Rules for domestic and international arbitrations, however, which have been amended with effect from 1 April 2016, include provisions for the appointment of an emergency arbitrator. The MCIA Rules also make available the services of an emergency arbitrator to determine urgent applications for interim relief before the main arbitral tribunal is appointed.

Though emergency arbitration has not been expressly recognised in the Act, in spite of the recommendations of the 246th LCR, courts have enforced such orders in applications under section 9 of the Act. In *Avitel Post Studioz Ltd v HSBC Pi Holdings (Mauritius) Ltd* (Bombay High Court, App No. 196 of 2014 in Arb Pet No. 1062 of 2012), the Bombay High Court relied on the award of a SIAC emergency arbitrator to grant an interim mandatory injunction on the basis that the petitioner had made out a strong case on merits before the emergency arbitrator.

In the case of *Raffles Design International India Private Limited & Ors v Educomp Professional Education Limited & Ors*, the Delhi High Court ruled that an emergency award in a foreign-seated arbitration cannot be enforced in India under the Arbitration Act. The Court relied on article 17 of the Model Law to find that the court enforcing an emergency arbitrator's award must undertake a review of the substance of the interim measure's claim.

The following arbitral institutions and rules in India provide for 'emergency arbitration':

- the Delhi International Arbitration Centre of the Delhi High Court, in Part III of its Arbitration Rules (section 18A mentions emergency arbitrator);
- the Court of Arbitration of the International Chambers of Commerce – India, under article 29 of the Arbitration and ADR Rules read with Appendix V;
- the International Commercial Arbitration Rules, under section 33 read with section 36(3);
- the Madras High Court Arbitration Centre Rules 2014, under Part IV, section 20 read with Schedules A and D; and
- the Mumbai Centre for International Arbitration (Rules) 2016 under section 3.

Interim measures by the arbitral tribunal

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

As stated above, pursuant to section 17 of the Arbitration Act (as amended in 2015) the arbitral tribunal now has the same powers as that of a court in respect of interim measures. The arbitral tribunal may require a party to provide appropriate security as an interim measure, including detention or preservation of the subject matter of the dispute, if it is considered a necessary measure to safeguard the right of the applicant seeking the interim measure.

Section 38 of the Arbitration Act allows the arbitral tribunal to fix an amount of the deposit or supplementary deposit as an advance for costs it expects will be incurred in respect of the claims submitted to it. This provision also provides for a separate amount of deposit to be paid for counterclaims. This deposit is to be payable in equal shares by the parties, but if one of the parties fails to pay its share, it may be deposited by the other party. If this deposit is not paid by either party, the arbitral tribunal may suspend the proceedings with respect to the claims or counterclaims with regard to which the deposits have not been paid. Pursuant to section 39 of the Arbitration Act, the arbitral tribunal will have a lien on the award for any unpaid costs of the arbitration.

Sanctioning powers of the arbitral tribunal

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

There is no express provision under the Arbitration Act empowering the arbitral tribunal to order sanctions against parties or their counsel who use guerrilla tactics in arbitration. However, generally, it is seen that the arbitral tribunals do impose exemplary or punitive costs on a party for obvious delaying tactics, unjustified challenges, absence from proceedings or even withholding of evidence. Courts even impose costs on a party for a challenge, which has been noticeably used to delay arbitral proceedings. Section 35A of the Code of Civil Procedure deals with compensatory costs in respect of false and vexatious claims. Section 35B deals with costs for causing delays. The 2015 Amendment Act introduced section 31A, which expressly deals with the regime of costs in arbitration proceedings. Subsection 1 of this section strictly deals with costs relating to the proceedings of the arbitral tribunal, namely: fees and expenses of the arbitrators, courts and witnesses; legal fees and expenses; administration fees for the institution supervising the arbitration; and any other expenses incurred in connection with the arbitral or court proceedings, and the arbitral award. Factors determining the imposition of costs as above include the conduct of parties

AWARDS

Decisions by the arbitral tribunal

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

Consistent with the Model Law, section 29(1) of the Arbitration Act provides that in the absence of an agreement to the contrary, any decision of an arbitral tribunal shall be made by a majority of all the members of the tribunal. The Arbitration Act does not require a unanimous verdict of the arbitral tribunal to declare an award.

Dissenting opinions

37 How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are permitted under Indian law. This can also be said to logically flow from section 29(2) of the Arbitration Act, which permits the arbitral tribunal to decide by majority. Courts have held that a dissenting arbitrator may sign the award with his or her dissenting opinion. Alternatively, he or she may not sign the award at all. However, such actions will not affect the validity of an award. An arbitrator refusing to take part in a vote or sign the award will also not impair the award.

Form and content requirements

38 What form and content requirements exist for an award?

The form and content requirement for an award are provided for in section 31 of the Arbitration Act, as follows:

- it should be made in writing;
- it should be signed by the majority of the members of the arbitral tribunal provided that the reason for the omitted signature is stated;

- it should be a reasoned award unless the parties have agreed that no reasons are to be given or it is an award on agreed terms under section 30; and
- it shall include the date and place and be delivered to each party to the arbitration.

Time limit for award

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

Section 29A of the Arbitration Act provides for a time limit of 12 months for the arbitral tribunal to decide and make an award. This period can only be extended by a maximum of six months upon agreement by the parties. If the award is not made within the stipulated period, the mandate of the arbitrators stands terminated. Section 29A also states that where the award is made within a period of six months, arbitrators shall be entitled to claim additional fees from the parties. However, the proviso to section 29A(4) states that if there is any delay beyond the agreed upon or specified extension of time, and if such delay can be attributed to the arbitral tribunal, the fee of the arbitrators will be reduced by up to 5 per cent of the original fee, for each month of such delay.

The International Centre for Alternative Dispute Resolution Rules provide for a specified time for making an award after the conclusion of proceedings in case of a fast-track arbitration. The Indian Council of Arbitration Rules and FICCI Arbitration and Conciliation Tribunal Rules provide that the arbitral tribunal shall render the award preferably within six months and subject to a maximum period of two years from the date of reference. Article 30 of the International Chamber of Commerce Rules on Arbitration (the ICC Rules) states that the arbitral tribunal must render its final award within six months from the date of the last signature by the arbitral tribunal or from the date of the terms of reference of the dispute as set out under the ICC Rules. However, this time limit can be extended at the request of the parties or of the arbitral tribunal by the court of international arbitration under the ICC Rules.

Date of award

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

Section 34(3) of the Arbitration Act provides that an award becomes final after three months from the date of the award, unless one of the parties files an application for setting aside the award. However, if the applicant shows sufficient cause, the court can extend the time limit of three months by a further 30 days. Section 33(1)(a) of the Arbitration Act permits any party to request the arbitral tribunal to correct any computational, clerical or typographical errors, or other errors of a similar nature, within 30 days of the receipt of the arbitral award, unless another period has been agreed upon by the parties.

Section 36 of the Arbitration Act provides that the award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court, upon the expiration of the time limit for filing an application for setting aside the award (provided under section 34(3)) or such application has been refused.

In *Northern Railway v M/s Pioneer Publicity Corp Pvt Ltd*, decided on 1 September 2015, the Supreme Court observed that section 34(3) of the Arbitration Act has no application in the refiling of a petition but only applies to the initial filing of the objections under section 34 of the Act.

Types of awards

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

The arbitral tribunal may grant interim, partial or final awards. An interim award may be passed by the arbitral tribunal subject to the final determination of the dispute. A final award is an award that finally determines all the issues in dispute between the parties that have been referred to arbitration. A partial award may be given by the arbitral tribunal on part of the claims or issues brought before the arbitral tribunal. The parties may continue to arbitrate on the remaining issues.

In terms of the types of reliefs that may be granted by an arbitral tribunal, the tribunal may grant such relief as are not in the exclusive domain of a public forum such as the court.

Under section 30 of the Arbitration Act, if the parties to the dispute arrive at a settlement, the arbitral tribunal may terminate the proceedings and record the settlement in the form of an arbitral award.

Termination of proceedings

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

Section 32 of the Arbitration Act provides that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal in the following circumstances:

- the claimant withdraws the claim unless the respondent objects to the order and the arbitral tribunal concurs with such objection;
- by mutual agreement of the parties; or
- the arbitral tribunal finds that the continuation of the proceedings has, for any reason, become unnecessary or impossible.

Cost allocation and recovery

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

Section 31(8) of the Arbitration Act provides that the costs of the arbitration shall be fixed by the arbitral tribunal. Section 31A of the Act sets out the regime for costs. The following costs are recoverable:

- fees and expenses of arbitrators, courts and witnesses;
- legal fees and expenses;
- administrative fees of the institution supervising the arbitration (where applicable); and
- other expenses incurred in connection with the arbitral or court proceedings, and the arbitral award.

The general rule is that costs shall follow the award (ie, the unsuccessful party will have to bear the costs of the successful party, unless the tribunal, for reasons recorded in writing, decides otherwise). The conduct of the parties and the outcome of the case will have a bearing on costs, although settlement offers will also be taken into account. Any agreement between the parties as to costs shall have effect only if the agreement is made after the dispute has arisen.

Interest

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

Section 31(7)(a) of the Arbitration Act provides that an arbitral tribunal can award interest for the period between the date on which the cause of action arose and the date on which the award is made, and from the date of the award to the date of payment.

Section 31(7)(b) states that unless the award otherwise directs, the sum directed to be paid by an arbitral award shall carry interest at the

rate of 2 per cent higher than the current rate of interest prevalent on the award, from the date of the award to the date of payment.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Section 33 of the Arbitration Act provides that the arbitral tribunal may:

1 at the request of a party, with notice to the other party, correct computational, clerical, typographical or other errors that have arisen by accident or by omission within 30 days of the receipt of such request;
2 at the request of a party, with notice to the other party, give interpretation of a specific point or part of the award within 30 days of the receipt of such request; or
3 on its own motion make a correction of the kind mentioned in item 1 above within 30 days of the date of the arbitral award.

The arbitral tribunal may also, at the request of a party and with notice to the other party, make an additional award on claims presented in the arbitral proceedings but omitted from the arbitral award within 60 days of the receipt of such request. Additionally, the arbitral tribunal may extend the period within which it shall make a correction, give an interpretation or make an additional award, if necessary.

Challenge of awards

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

An award can be challenged under section 34 of the Arbitration Act, by an application to the court for setting aside the award on the following grounds established on the basis of the record of the arbitral tribunal:

- incapacity of a party;
- the arbitration agreement being invalid under the law;
- improper notice of the appointment of an arbitrator or of the arbitral proceedings to the applicant, or the applicant was unable to present his or her case;
- the arbitral award decided on a dispute beyond the scope of the reference to arbitration or contains decisions beyond the scope of the submission to arbitration;
- the procedure for the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is incapable of being settled by arbitration under the law at the time; or
- the arbitral award is in conflict with public policy (this includes awards:
    - affected by fraud or corruption;
    - in contravention with fundamental policy of Indian law or basic notions of morality or justice; and
    - those in violation of confidentiality and admissibility of evidence provisions in the Act.

An application for setting aside an award must be made before the expiry of three months from the date on which the applicant received the arbitral award, unless it is extended by the court for a further period of 30 days if the applicant shows sufficient cause for delay.

In light of the decision of the Supreme Court in the case of *Bharat Aluminium Company v Kaiser Aluminium Technical Service Inc 2012 (8) SCALE 333* (the *BALCO* judgment), parties to a foreign-seated arbitration no longer had recourse to any Indian courts for relief. Courts in India had also granted a wide meaning to public policy and had interpreted that even an illegality under Indian law would be against public policy. The recourse to setting aside an award under section 34 is also no longer available to any party to a foreign-seated arbitration, which was earlier extended by the courts through judicial interpretation. All parties to any such foreign arbitration upon receipt of an award of a foreign tribunal, if required to be enforced in India, would need to present such an award for enforcement under section 48 of the Arbitration Act. An Indian court can review the foreign award to the limited extent provided under section 48 to examine whether it should be enforced. *BALCO* applies to all agreements that have been executed after 6 September 2012 for foreign-seated arbitrations.

The 2015 Amendment Act has clarified the reversal of position in the *BALCO* judgment, by way of insertion of a proviso to section 2(2). The proviso states that sections 9 (interim relief by courts), 27 (court assistance in taking evidence), 37(1)(a) (appeals in respect of interim relief by the courts) and 37(3) (appeals to the Supreme Court) will also be made applicable to international commercial arbitrations, even where the seat of arbitration is outside India, and an award of the said arbitration will be enforceable and recognised under Part II of the Arbitration Act.

In another significant ruling in the case of *Shri Lal Mahal v Progetto Grano Spa Civil Appeal* No. 5085 of 2013, decided on 3 July 2013, the Supreme Court not only restricted the interpretation of 'public policy' in the context of enforcement proceedings, but also held that the scope of public policy is narrower under section 48 than under section 34. The court held that enforcement under section 48 can only be opposed on grounds of public policy where it is contrary to fundamental policy of Indian law, the interest of India or justice and morality. In the case of *ONGC v Western Geco International Ltd* Civil Appeal No. 3415 of 2007, the scope of public policy under section 34(2)(b)(ii) of the Arbitration Act was once again under consideration. The Supreme Court reduced the amount awarded to Western Geco by one-third, stating that the tribunal had committed a 'palpable error'. Further, the court, while examining if the award was in conflict with 'public policy of India', elaborated the scope of 'fundamental policy of Indian law' to include three principles to be followed by the tribunal: a judicial approach, principles of natural justice and the Wednesbury principle of reasonableness.

The Supreme Court in the case of *Associate Builders v Delhi Development Authority* Civil Appeal No. 10531 of 2014, stated that section 34 of the Arbitration Act does not ordinarily permit the courts to review findings of facts made by arbitrators, and subsequently restored the award. The court merely clarified and has not restricted the law concerning public policy and stated that an award can be set aside if it is contrary to fundamental policy of Indian law, interest of India, justice or morality, or if it is patently illegal.

Through the introduction of section 34(2A) by the 2015 Amendment Act, an application for setting aside the award on the ground of 'patent illegality' as a violation of public policy shall only be applicable to awards in domestic arbitrations. Furthermore, an award shall no longer be liable to be set aside merely on the ground of erroneous application of law or re-appreciation of evidence.

As per the 2021 amendment to section 36 of the Arbitration Act, the mere filing of a challenge to an award under section 34 does not render the award unenforceable unless an application is made by the challenging party making out a prima facie ground of the arbitration agreement or the making of the award being induced by fraud; upon which the court may grant a stay on the enforcement of the award. In other words, filing of an application under section 34 does not automatically operate as a stay on enforcement proceedings. A separate application for stay will have to be applied for.

Levels of appeal

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

Ordinarily an appeal under the domestic arbitration regime may be preferred against certain orders of the arbitral tribunal, as enumerated under section 37 of the Arbitration Act. It provides that the following orders shall be appealable to the court authorised to hear such appeals from original decrees of the court passing the order:

- refusal to refer the parties to arbitration under section 8 of the Act;
- a grant or refusal to grant an interim measure under section 9 of the Act;
- setting aside or refusing to set aside an arbitral award under section 34 of the Act;
- a grant of the plea of a party by the arbitral tribunal that it does not have jurisdiction;
- a grant of the plea of a party by the arbitral tribunal that it is exceeding the scope of its authority; and
- a grant or refusal to grant an interim measure by the arbitral tribunal under section 17 of the Act.

No second appeal shall automatically lie against an order passed in appeal under section 37 of the Act. However, it is clarified that nothing in section 37 shall affect or take away a right to seek special leave to appeal to the Supreme Court under article 136 of the Constitution of India against an order passed in appeal under section 37.

There is no set procedure or time line for decisions on the challenge; the actual time generally varies from six months to three years. The costs involved at each level are the attorneys' fees and other legal expenses. Courts usually grant costs to the successful party; however, these costs are generally notional and not commensurate with the actual costs.

Recognition and enforcement

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

Domestic and foreign awards are enforced in India in the same manner as a decree of the Indian courts. This Is true even with respect to consent awards resulting from a settlement between the parties. The distinction between the process of enforcement of an India seated arbitration and a foreign seated arbitration is the application of the Arbitration Act. Part I applies to an India seated arbitration while Part II applies to a foreign seated arbitration.

A foreign award may be enforced in India under the multilateral international conventions or the New York Convention if the conventions apply to the relevant arbitration, the award was made in a country that is a party to the above conventions and the award was made in a country that is notified as a reciprocating territory as on a given date.

It has been held by the courts in India that if a state has been notified as a reciprocating territory for the purposes of recognition and enforcement of awards, then all territories forming part of that state would be covered under such notification. Where such state thereafter separates into different territories, as long as the new territory is also a signatory to the New York Convention, no separate notification would be required for each new territory for the purpose of recognition and enforcement of awards.

In respect of domestic awards, prior to the 2015 Amendment Act, section 36 of the Arbitration Act provided that where the time limit for preferring an application under section 34 of the Arbitration Act has expired or such application has been dismissed, an arbitral award shall be enforceable in the same manner as if it were a decree of the Court. The provision as it stood then came to be interpreted by the Supreme Court as an implied automatic stay on enforceability of an award till such time as a challenge under section 34 of the Arbitration Act may be successful.

Thereafter, the 2015 Amendment Act substituted a new section 36 of the Arbitration Act which provides that the filing of an application under section 34 of the Arbitration Act shall not by itself render the award unenforceable unless the Court grants an order of stay. In considering an application for grant of stay of an arbitral award for payment of money, the Court shall have due regard to the provisions governing grant of stay of money decrees under the provisions of the Code of Civil Procedure 1908. Requisites for the successful enforcement of arbitral awards include:

- lapse of the three-month period from the date of receipt of the award;
- effective service of notice on the opposite party;
- award to be made on a stamp paper of appropriate value;
- steps to attach, arrest or appoint a receiver; and
- compliance with the principles of natural justice.

Requisites for the enforcement of a foreign awards include:

- the original award or an authenticated copy in the manner required by the country where it is made; and
- the original agreement or a certified copy.

The Supreme Court, in its decision in *Board of Control for Cricket in India v Kochi Cricket P Ltd & Ors* (2018) 6 SCC 287, clarified the effect of this amendment as applicable to court proceedings arising out of arbitrations that were initiated after the coming into effect of the 2015 Amendment Act (ie, on 23 October 2015). It further clarified that the amended section 36 of the Arbitration Act would also be applicable to court proceedings pending before the Court on 23 October 2015.

Subsequent to this decision, the legislature, by the 2019 Amendment Act, inserted section 87 of the Arbitration Act so as to nullify the effect of the decision of the Supreme Court in *Kochi Cricket*. The validity of this inserted provision was challenged and in the Supreme Court's decision in *Hindustan Construction Co Ltd v Union of India* (decision dated 27 November 2019 in Writ Petition (Civil) 1074 of 2019 and Connected Matters), the inserted section 87 of the Arbitration Act was struck down as unconstitutional on the ground of it being vitiated by manifest arbitrariness.

The 2021 amendment adds a further filter to staying enforcement proceedings in the form of having to identify a prima facie ground of fraud in the making of the arbitration agreement or the award.

Thus, the position of law as it stands today is that no automatic stay of an arbitral award shall operate merely due to the pendency of an application under section 34 of the Arbitration Act in respect of any arbitration proceeding, whether initiated prior to or subsequent to the commencement of the 2015 Amendment Act, unless a prima facie case of fraud in the making of the arbitration agreement or the award is identified.

Time limits for enforcement of arbitral awards

49 Is there a limitation period for the enforcement of arbitral awards?

The Arbitration Act does not specify a time limit for filing an application for enforcement of an arbitral award under section 36 of the Act. However, section 43 of the Act sets out that the limitation act applies to arbitration. Article 136 of the limitation act prescribes that the

application for enforcement must be made within 12 years from the date at which it becomes enforceable.

Enforcement of foreign awards

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

Under section 48 of the Arbitration Act, enforcement of a foreign award may be refused, at the request of a party against whom it is invoked, only if that party furnishes to the court proof that:

- the parties to the agreement were under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected themselves;
- the party against whom the award has been invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the arbitral award deals with a difference not contemplated or not falling within the terms of submission to arbitration or it contains decisions beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties and failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award has not yet become binding on the parties;
- the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made;
- the subject matter of the dispute is incapable of being settled by arbitration under the laws of India; or
- the enforcement of the arbitral award would be contrary to public policy.

Further, it has been held that a foreign award not bearing stamp duty under the Indian Stamp Act 1899 would not render it unenforceable (M/s *Shriram EPC Limited v Rioglass Solar SA* 2018 SCC Online SC 1471).

Enforcement of orders by emergency arbitrators

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

No, the concept of emergency arbitrators does not yet expressly exist under the Arbitration Act. In its decision in *Amazon.com NV Investment Holdings LLC v Future Retail Ltd & Ors* (2021) SCC OnLine SC 145, the Supreme Court of India acknowledged that the definition of arbitration under section 2(1)(a) has a wide meaning, whether administered by an arbitral institution or not. The Court held that a harmonious reading of sections 2(6) and 2(8) would indicate that even interim orders passed by emergency arbitrators under institutional rules would be included within the ambit of section 17(1) of the Arbitration Act. The Court specifically held that there 'is nothing in Section 17(1), when read with the other provisions of the Act, to interdict the application of rules of arbitral institutions that the parties may have agreed to. This being the position, at least insofar as Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an Emergency Arbitrator.'

Cost of enforcement

52 What costs are incurred in enforcing awards?

Costs incurred in the enforcement of an arbitral award are the costs of an attorney and court fees.

OTHER

Influence of legal traditions on arbitrators

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

Section 26 of the Arbitration Act provides that the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. Section 27 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence and the court may execute the request by ordering that the evidence be provided directly to the arbitral tribunal. In such cases, the court may issue the same processes to witnesses as it may issue in suits tried before it.

There is no tendency towards US-style discovery. Written witness statements are common, followed by cross-examination. Party officers may testify.

Parties and arbitrators are accustomed to dictating minutes of an arbitration meeting or even proceedings in a cross-examination to a stenographer. This is a time-consuming process that may lead to differences of opinion on the actual events. In recording details with a stenographer, often the record may be altered to reflect what is suitable to the arbitrator and the parties. Transcription is being increasingly used but is hardly common in India.

The newly introduced time limit for conducting arbitrations is expected to have a significant impact on the arbitration process and the arbitrators, whose fees may be subject to reduction if the delays are attributable to them. Arbitrators will have to adapt to a more truncated procedure to meet the deadlines.

Professional or ethical rules

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

Currently, there are no rules that regulate the professional or ethical conduct of counsel in international arbitrations in India. However, as per the recommendations of the 246th Law Commission Report, the Arbitration Act was amended in 2015 to incorporate the IBA Guidelines. The Eighth Schedule to the Arbitration Act previously specified the qualification and experience requirements for arbitrators to be accredited by the newly constituted Arbitration Council of India; however, this has now been omitted through the 2021 Amendment Act.

Third-party funding

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

The practice of third-party funding is increasingly prevalent in India, and more so in arbitrations. In 2019, the Supreme Court held that, in India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (of the Bar Council of India Rules) (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. Third-party funding has been expressly recognised in the context of civil suits in states such as Maharashtra, Madhya Pradesh, Gujarat and Uttar Pradesh by virtue of their amendments to Order XXV of the Civil Procedure Code 1908. These amendments empower the court, on its own motion or on application by a party, to secure costs for litigation by asking a financier to become a party and

depositing costs in court. However, if a third-party funding arrangement contains an extortionate or unconscionable object or consideration, such an agreement would be unenforceable under the Indian Contract Act. An arbitrator is required under law to make disclosures of any reason or relation that might be construed as having an effect on his or her ability to adjudicate without bias. Although not specifically codified, this would require the claimant to make the relevant disclosures to the tribunal and the respondent, concerning the identity of a funder. Separately, it is also unclear whether a foreign exchange transaction for third-party funding is permitted or prohibited under Indian laws such as the Foreign Exchange Management Act 1999.

Regulation of activities

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

In *AK Balaji v The Government of India and Others* (AIR 2012 Mad 124), the Madras High Court held that foreign law firms or foreign lawyers cannot practise law in India, on either the litigation or non-litigation side, unless they fulfil the requirement of the Advocates Act 1961 and the Bar Council of India Rules. In a challenge to this judgment before the Supreme Court, the Court passed a final order permitting foreign practitioners to 'fly-in-fly-out' and advise on foreign law. The Bar Council of India has proposed draft rules by which it seeks to maintain a separate roll for foreign law firms that will also be governed by a set of practice rules framed specifically for them. These proposed practice rules, if ratified, would set out practice eligibility conditions for foreign lawyers in India.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The 2021 amendment to the Arbitration Act contemplates that only in cases where the courts are prima facie satisfied that the arbitration agreement or the award is influenced by fraud will the court stay the implementation of the award pending disposal of the challenge under section 34. Thus, a stay can now only be said to operate upon the express grant of the same by a competent court.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Japan acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 20 June 1961, which took effect on 18 September 1961. A declaration was made under article I of the Convention, such that Japan, on the basis of reciprocity, will only apply the Convention to the recognition and enforcement of awards made in the territory of another contracting state.

Other multilateral conventions relating to international commercial and investment arbitration to which Japan is a party are:

- the Protocol on Arbitration Clauses, Geneva, 24 September 1923 (ratified by Japan in 1928);
- the Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927 (ratified by Japan in 1952);
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965 (ratified by Japan in 1967); and
- the Energy Charter Treaty, Lisbon, 17 December 1994 (ratified by Japan in 2002).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Japan is a party to 35 bilateral investment treaties (BITs) as follows:

Country	Signed	Entry into force
Argentina	1 December 2018	-
Armenia	14 February 2018	15 May 2019
Bangladesh	10 November 1998	25 August 1999
Cambodia	14 June 2007	31 July 2008
China*	27 August 1988	14 May 1989
Colombia	12 September 2011	11 September 2015
Côte d'Ivoire	13 January 2020	26 March 2021
Egypt	28 January 1977	14 January 1978
Hong Kong Georgia	15 May 1997 29 January 2021	18 June 1997 23 July 2021
Iran	5 February 2016	26 April 2017
Iraq	7 June 2012	25 February 2014
Israel	1 February 2017	5 October 2017
Jordan	11 November 2018	1 August 2020
Kazakhstan	23 October 2014	25 October 2015
Kenya	28 August 2016	14 September 2017
Korea*	22 March 2002	1 January 2003
Kuwait	22 March 2012	24 January 2014
Laos	16 January 2008	3 August 2008
Morocco	8 January 2020	-
Mozambique	1 June 2013	29 August 2014
Myanmar	15 December 2013	7 August 2014
Oman	19 June 2015	21 July 2017
Pakistan	10 March 1998	29 May 2002
Papua New Guinea	26 April 2011	17 January 2014
Peru	21 November 2008	10 December 2009
Russia	13 November 1998	27 May 2000
Saudi Arabia	30 April 2013	7 April 2017
Sri Lanka	1 March 1982	4 August 1982
Turkey	12 February 1992	12 March 1993
UAE	30 April 2018	26 August 2020
Ukraine	5 February 2015	26 November 2015
Uruguay	26 January 2015	14 April 2017
Uzbekistan	15 August 2008	24 September 2009
Vietnam	14 November 2003	19 December 2004

* Japan, China and Korea entered into a trilateral investment treaty on 13 May 2012, which took effect on 17 May 2014.

Additionally, Japan has entered into the following economic partnership (EPA) agreements and free trade agreements (FTAs) that have sections addressing investment:

Country	Signed	Entry into force
Australia*	July 2014	January 2015
Brunei	June 2007	July 2008
Chile	March 2007	September 2007
EU**	July 2018	February 2019
India	February 2011	August 2011
Indonesia	August 2007	July 2008
Malaysia	December 2005	July 2006
Mexico	September 2004	April 2005
Mongolia	February 2015	June 2016
Philippines*	September 2006	December 2008
Singapore	January 2002	November 2002
Switzerland	February 2009	September 2009

Country	Signed	Entry into force
Thailand	April 2007	November 2007

* The investment chapters of the Japan–Australia EPA and the Japan–Philippines EPA do not provide for investor–state dispute settlement.
** The Japan–EU EPA does not include the protection of investment since negotiations are still ongoing for a future investment agreement.

In addition, after the United States withdrew from a proposed Transpacific Strategic Economic Partnership Agreement (TPP), the remaining 11 signatories signed a revised version of the agreement, renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force on 30 December 2018.

Also, Australia, Brunei, Cambodia, China, Indonesia, Japan, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, South Korea, Thailand and Vietnam signed the Regional Comprehensive Economic Partnership (RCEP) on 15 November 2020. While the RCEP does not stipulate an investor–state dispute settlement mechanism at this time, it provides instead that the parties should discuss this topic within two years of the date of the RCEP's entry into force.

Japan is a member country of the Energy Charter Treaty, which Japan signed on 16 June 1995 and ratified on 23 July 2002 (it entered into force on 21 October 2002).

Domestic arbitration law

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

The primary domestic source of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards in Japan, is the Arbitration Act (Act No.138 of 2003) (English translation at http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=2&re=02). Although the Arbitration Act governs both domestic and international arbitral proceedings, the scope of its application (except for the recognition and enforcement of foreign arbitral awards in Japan) is generally limited to arbitration taking place in the territory of Japan (the Arbitration Act, article 3(1)).

Domestic arbitration and UNCITRAL

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

Japan's Arbitration Act is based on the UNCITRAL Model Law of 1985 (the 1985 Model Law). Although many of the provisions of the Arbitration Act are nearly identical to the 1985 Model Law, there are some differences, such as article 13(4) of the Arbitration Act, which expressly allows for arbitration agreements to be made by way of 'electromagnetic record' (which would include email). By contrast, the 1985 Model Law expressly recognises only documents 'signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication'. It is thus unclear whether an email exchange would qualify. Some of the other differences between Japan's Arbitration Act and the 1985 Model Law are described in subsequent questions.

Mandatory provisions

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

Provisions of the Arbitration Act that are considered mandatory and may not be deviated from even by party agreement include article 5, which outlines the jurisdiction of courts, article 13(2), which describes that arbitration agreements must be in written form, and article 25, which stipulates the equal treatment of all parties.

Substantive law

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

The parties to an arbitration may freely decide on the substantive law applicable to the case (Arbitration Act, article 36(1)). If the parties designate the laws of a given state as the law to be applied by an arbitral tribunal, unless otherwise expressed, this is construed as referring to substantive law rather than conflict of laws rules. However, if the parties fail to agree on the substantive law to be applied to the case, the arbitral tribunal will apply the substantive law of the state with which the civil dispute subject to the arbitral proceedings is most closely connected (Arbitration Act, article 36(2)). This rule differs from that under the 1985 Model Law, in which the arbitral tribunal applies the law determined by the conflict of laws rules that it considers applicable.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The Japan Commercial Arbitration Association (JCAA) is the most prominent arbitration institution in Japan. The JCAA has its own arbitration rules, the JCAA Commercial Arbitration Rules (the JCAA Rules), the latest amendments to which took effect on 1 July 2021.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

The scope of disputes that are generally considered to qualify for arbitration include all civil disputes where there exists a possibility of settlement between the parties, excluding those relating to divorce or marital separation (Arbitration Act, article 13(1)). In addition, arbitration is not permitted for actions relating to personal status, such as cases requesting confirmation of paternity, or confirmation that a patent is invalid, as these cases are not generally capable of settlement. In addition, an arbitration agreement between a consumer and a business for future civil disputes can be cancelled by the consumer (article 3 of the supplementary provisions to the Arbitration Act). Furthermore, an arbitration agreement between an individual worker and his or her employer for future labour disputes is null and void (article 4 of the supplementary provisions to the Arbitration Act).

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The Arbitration Act stipulates that an arbitration agreement must be 'in writing, such as in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including those sent by facsimile deviceor other communication measures for parties at a distance which provides the recipient with a written record of the communicated content), or other documents' (article 13(2)). It is not necessary that the document be signed by all parties, and to fulfil the requirement that the arbitration agreement is documented, it is considered sufficient if there is some type of evidence subsequent to the document recording the arbitration agreement (eg, a bill of lading). In

addition, an arbitration agreement may be made by way of an electromagnetic record (eg, email) (article 13(4)).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

The circumstances in which an arbitration agreement is no longer enforceable are generally the same as those under contract law. Termination or cancellation of the arbitration agreement itself, or the legal incapacity or death of a party to the arbitration agreement (although in the case of death there is the possibility of succession) are the most common circumstances in which an arbitration agreement may become unenforceable.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Article 13(6) of the Arbitration Act provides that in regard to a single contract containing an arbitration agreement, even if the clauses of the contract other than that of the arbitration agreement are not valid due to nullity, rescission or for any other reason, the validity of the arbitration agreement shall not be impaired automatically. This provision is basically the same as the second and third sentences of article 16(1) of the 1985 Model Law.

Third parties – bound by arbitration agreement

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

The general contract law dictates the cases in which a third party can be bound by an arbitration agreement. For example, third parties or non-signatories can be bound by an arbitration agreement in cases of succession and assignment. In addition, some commentators opine that when a legal person, such as a stock corporation, is a party to an arbitration agreement, the legal representatives and other executive officers of such legal person should also be bound by the arbitration agreement if the arbitration agreement would otherwise not make any sense in resolving a dispute.

Third parties – participation

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

The Arbitration Act does not make any provisions with respect to third-party participation in arbitration. This issue is open for debate and is, in practice, resolved through consultation and agreement among the existing parties, the arbitrators and the third party in question on a case-by-case basis or as provided in the applicable arbitration rules that the parties have agreed to.

Groups of companies

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

Where Japanese law governs an arbitration agreement, neither a parent company nor subsidiary companies of a signatory company would be bound by the arbitration agreement, regardless of whether they were involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine. However, it could be possible that the parent company or subsidiary companies of a signatory company be construed as the real signatory company that should be bound by the arbitration agreement depending on the specific circumstances surrounding the case under the doctrine of 'piercing the corporate veil' or otherwise.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Act does not exclude the possibility of multiparty arbitration agreements. There are no special requirements for multiparty arbitration agreements to be valid.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Arbitration Act does not deal expressly with the issue of consolidation. On the other hand, article 57 of the JCAA Rules provides that the arbitral tribunal may, at the written request of a party and when it finds it necessary, consolidate and hear the pending claim(s) with the other claim(s) (as to which no arbitral tribunal has been constituted), if:

- all parties (including the parties to the other claim(s) to be consolidated) have agreed in writing;
- the pending claim(s) and the claim(s) to be consolidated arise under the same arbitration agreement; provided, however, that the written consent to such consolidation by the party to the other claim(s) is necessary when the party has not been a party to the pending claim(s); or
- both the pending claim(s) and the other claim(s) to be consolidated arise between the same parties; and
    - the same or a similar question of fact or law arises from the claims;
    - the dispute is referred by the arbitration agreement to arbitration under the Rules or at the JCAA; and
    - the arbitral proceedings are capable of being conducted in a single proceeding with regard to the place of arbitration, the number of arbitrators, language(s) of the arbitration, and other issues governed by the arbitration agreements under which the claims arise.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

An arbitrator must be an impartial and independent party, possessing the qualifications agreed upon by the parties involved in the arbitration (Arbitration Act, article 18(1)). If a sole or third arbitrator is appointed by the court, due regard must be had for whether it would be appropriate to appoint an arbitrator of a different nationality from the parties (Arbitration Act, article 17(6)(iii)). Retired judges may act as arbitrators. Arbitrators need not be selected from a particular list of arbitrators unless otherwise agreed upon by the parties to arbitration. It is highly likely that courts in Japan will recognise any contractually stipulated requirements for arbitrators based on nationality, religion or gender as

a matter of autonomy, although the validity and enforceability of these types of requirements have yet to be judicially tested in Japan.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

With respect to commercial arbitration in Japan, practising lawyers and law professors regularly sit as arbitrators. Although there is a general interest in gender and other forms of diversity in international arbitration in Japan, there have not been any formal efforts to this effect.

Default appointment of arbitrators

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

Under the Arbitration Act, where there are two parties and no agreement has been reached as to the number of arbitrators, the arbitral tribunal will be a panel of three arbitrators (article 16(2)). In the case of multiparty arbitration where the number of arbitrators has not been agreed upon between the parties, upon request, the number will be determined by a court (article 16(3)). In addition, when the parties fail to agree on the procedure of appointing the arbitrators:

- where there are two parties in an arbitration with three arbitrators, (1) each party may appoint an arbitrator, and (2) the two appointed arbitrators will appoint the third, provided that if such appointments are not made within a 30-day period, a court may make the appointment upon a petition by a party who has already appointed an arbitrator (for the appointment (1)) or either party (for the appointment (2) as the case may be) (article 17(2));
- where there are two parties and a sole arbitrator and the appointment of such arbitrator cannot be decided between the parties, a court will appoint an arbitrator upon the request of a party (article 17(3)); and
- where the appointment of an arbitrator cannot be decided in multiparty arbitration, a court will appoint the arbitrator upon the request of a party (article 17(4)).

Challenge and replacement of arbitrators

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

The Arbitration Act sets out two grounds on which an arbitrator can be challenged: the arbitrator does not possess the qualifications agreed to by the parties; or circumstances exist that give rise to justifiable doubt as to the impartiality or independence of the arbitrator (article 18(1)). In addition, when a party appoints or makes recommendations regarding the appointment of an arbitrator, it may only challenge the arbitrator for reasons that it became aware of after the appointment (article 18(2)).

The parties may decide on the procedure for challenging an arbitrator (article 19(1)). Failing an agreement, the arbitral tribunal will decide (article 19(2)). Where there is no agreement on the procedure for challenge, the challenging party must apply to the arbitral tribunal within 15 days of the later of either the day on which it became aware of the constitution of the arbitral tribunal or the day on which it became aware of the existence of any of the circumstances constituting grounds for challenge. In addition, the party must submit a written request describing the reasons for the challenge to the arbitral tribunal (article 19(3)). If a challenge is denied, the challenging party may request a judicial review of the decision within 30 days of receipt of notice of the decision (article 19(4)). While a review of the challenge decision is pending before the court, the arbitral tribunal may commence or continue the proceedings, and make an arbitral award (article 19(5)).

The removal of an arbitrator may be requested of the court on the grounds of the arbitrator's de jure or de facto inability or undue delay in performing his or her duties (article 20). An arbitrator's mandate is terminated upon his or her death or resignation, the removal of the arbitrator upon agreement by the parties, a decision ruling that grounds for challenge exist or a decision to remove an arbitrator (article 21(1)).

There is a tendency for practitioners of arbitration who deal with international arbitration in Japan to refer for guidance to the IBA Guidelines on Conflicts of Interest in International Arbitration.

Relationship between parties and arbitrators

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

Each arbitrator is considered to have entered into an entrustment contract with all the parties, whether such arbitrator is party-appointed or not. Party-appointed arbitrators are also required to be neutral in performing their duties.

The arbitrators are compensated in accordance with the agreement of the parties. However, failing an agreement between the parties, the arbitral tribunal will determine appropriate compensation (article 47).

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Reasonable doubt as to the impartiality and independence of an arbitrator can be grounds for challenging them (Arbitration Act, article 18(1)). To secure the effectiveness of such a challenge system, arbitrator candidates and arbitrators are obliged to disclose all the facts that may raise doubts as to their impartiality or their independence (Arbitration Act, articles 18 and 18(4), and articles 24 and 24 of the JCAA Rules).

Further, article 24(4) of the JCAA Rules provide that during the course of the arbitral proceedings, an arbitrator shall have an ongoing duty to make reasonable investigation into any circumstances that may, in the eyes of the parties, give rise to justifiable doubts as to the arbitrator's impartiality or independence and to promptly disclose to the parties and the JCAA in writing such circumstances, unless the arbitrator has already disclosed such circumstances.

Immunity of arbitrators from liability

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

There are no provisions in the Arbitration Act providing for immunity for the civil liability of arbitrators. Accordingly, pursuant to the general rules of contract law of Japan, an arbitrator may theoretically be liable to pay damages to the parties if the arbitrator wilfully or negligently breaches his or her duties under the entrustment contract with the parties, unless otherwise agreed upon by the parties. However, article 13 of the JCAA Rules stipulates that arbitrators will not be liable for an act or omission related to the arbitration unless such an act or omission can be shown to constitute wilful or gross negligence.

Any arbitrator who accepts or demands bribes, or any party that offers a bribe, will face criminal penalties (Arbitration Act, articles 50 to 54). Most of these provisions apply even if the crimes are committed outside Japan (article 55).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

If an arbitration agreement exists, but court proceedings are initiated despite this, the court proceedings may be dismissed by request of the defendant (Arbitration Act, article 14(1)). The request for dismissal may not be filed with the court after the defendant pleads on the substance of the dispute (article 14(1)(iii)). This contrasts with the 1985 Model Law, which prescribes that the court shall refer the parties to arbitration in the case of a party arguing the existence of an arbitration agreement. Even when an action is pending in court, an arbitral tribunal may commence or continue proceedings and make an arbitral award (article 14(2)).

Jurisdiction of arbitral tribunal

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

An arbitral tribunal may rule on the existence or validity of an arbitration agreement or its own jurisdiction (Arbitration Act, article 23(1)). A plea that the arbitral tribunal does not have jurisdiction must be raised early, in most cases before the time at which the first written statement on the substance of the dispute is submitted to the tribunal (article 23(2)). If the arbitral tribunal decides that it has jurisdiction, a party may ask a court for judicial review within 30 days of receipt of notice of the decision (article 23).

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

If there is no agreement between the parties regarding the place (Arbitration Act, article 28(2)) or language (Arbitration Act, article 30(2)) of the arbitration, it will be decided by the arbitral tribunal. When deciding the place, the arbitral tribunal will consider the circumstances of the case, including the convenience of the parties.

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 (articles 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 (article 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 (article 36(4)).

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Under the Arbitration Act, the arbitral proceedings commence by one party giving the other party notice to refer the dispute to the arbitral proceedings (article 29(1)).

The JCAA Rules provide that the claimant must submit a written request for arbitration to commence arbitral proceedings to the JCAA, setting forth, in addition to the items required by the Arbitration Act, a reference to the arbitration agreement that is invoked (including any agreement about the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration and the language or languages of the arbitral proceedings), the contact information of the claimant or its counsel and other items (article 14(1)). A signature is not required for this filing. The number of copies of the written request to be filed is the number of arbitrators (three if not yet determined) and the other party or parties plus one (article 22(1)). However, this requirement does not apply to a submission by email, facsimile or any other electronic communication method (article 22).

Hearing

28 | Is a hearing required and what rules apply?

The arbitral tribunal may (or if a party requests, must) hold oral hearings unless otherwise agreed by the parties. An oral hearing may be held for the presentation of evidence or for oral argument by the parties, provided that these are carried out at an appropriate stage of the arbitral proceedings; sufficient advance notice of the time and place of hearings is given to the parties; a party supplying evidence to the tribunal has ensured that the other party is aware of the contents; and the tribunal has ensured that all parties are aware of the contents of any expert report or other evidence (article 32).

Evidence

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

Under the Arbitration Act, each party must be treated with equality and given a full opportunity to present its case in the arbitral proceedings (article 25). Subject to the requirements of the parties' arbitration agreement and the Arbitration Act, the Arbitral Tribunal may carry out the arbitration procedure in such manner as it finds appropriate (article 26).

The JCAA Rules require that written statements setting forth each party's case on the law and facts be submitted (article 44(1)). Further, the arbitral tribunal, at the written request of a party or on its own motion, may order any party to produce documents in its possession that the arbitral tribunal considers necessary to examine after giving the party in possession an opportunity to comment, unless the arbitral tribunal finds reasonable grounds for the party in possession to refuse the production (article 54(4)). In addition, the arbitral tribunal, on its own motion, may examine evidence that a party has not applied to present, which may take place other than at a hearing. One or more experts may be appointed by the arbitral tribunal to advise on any necessary issues; if requested, parties will have the opportunity to put the questions to an expert in a hearing (article 55).

There is a tendency for arbitrators or parties who are familiar with international arbitration practice to refer forguidance to the IBA Rules on the Taking of Evidence in International Arbitration.

Court involvement

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

An application may be made by the arbitral tribunal or a party for a court to assist in taking evidence by any means considered necessary by the arbitral tribunal. The taking of evidence can relate to entrustment of investigation, examination of witnesses, expert testimony, or investigation of documentary evidence or inspection (Arbitration Act, article 35).

The court may assist with service of a notice (article 12), appointment of an arbitrator (article 17), challenge of an arbitrator (article 19), removal of an arbitrator (article 20) and jurisdiction of the arbitral tribunal (article 23). A party may also apply to a court to set aside (article 44) or enforce (article 45) an arbitral award.

Confidentiality

31 | Is confidentiality ensured?

The Arbitration Act does not have any express provisions prohibiting the disclosure of information related to arbitral proceedings, although it is understood that an arbitrator has a confidentiality duty to the parties of arbitral proceedings. The JCAA Rules, however, expressly stipulate that arbitral proceedings and records are to be closed to the public. Also, arbitrators, officers and staff of the JCAA, the parties and their representatives, and other persons involved in the arbitral proceedings may not disclose facts related to arbitration cases except where disclosure is required by law or court proceedings, or based on any other justifiable grounds (article 42).

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Before or during an arbitral proceeding, a party may request from a court an interim measure of protection in respect of a civil dispute that is the subject of the arbitration agreement (Arbitration Act, article 15). The types of interim measures that can be ordered by courts are the same as those permitted by the Civil Provisional Remedies Act (Act No. 91 of 1989) which applies to any types of disputes. These measures include orders of preliminary attachment or preliminary injunction. The power to order interim measures is not exclusive to courts; they may also be sought from arbitral tribunals.

Interim measures by an emergency arbitrator

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

The Arbitration Act does not provide for emergency arbitrators prior to the constitution of the arbitral tribunal. However, the JCAA Rules set out detailed rules for an emergency arbitrator (articles 75 to 79). Under these rules, the JCAA shall use reasonable efforts to appoint an emergency arbitrator within two business days from its receipt of an application for emergency measures (article 76(4)) and the emergency arbitrator shall make reasonable efforts to make a decision on the emergency measures within two weeks of his or her appointment (article 77(4)). The claimant cannot obtain an order of emergency measures from the emergency arbitrator ex parte because the application for emergency measures must be notified to the respondent (articles 16(1) and 75(6)). The applicant must submit a written request for arbitration within 10 days of the application (article 75(7)). The types of emergency measures that the emergency arbitrator may order are the same as the interim measures that may be granted by the arbitral tribunal (article 77(1)). The emergency measures shall be deemed to be interim measures granted by the arbitral tribunal when it is constituted (article 77(5)). However, no determination on emergency measures shall be binding on the arbitral tribunal and the arbitral tribunal may approve, modify, suspend or terminate the emergency measures in whole or in part (article 78).

Interim measures by the arbitral tribunal

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

The Arbitration Act stipulates that at the request of a party the arbitral tribunal may order any party to take an interim measure of protection as the arbitral tribunal may consider it necessary in respect of the subject matter of the dispute and may order any party to provide appropriate security in connection with the interim measure ordered (article 24).

The JCAA Rules include more detailed provisions for interim measures by the arbitral tribunal (articles 71 to 74). Under these rules, the arbitral tribunal may grant, for example, orders to: maintain or restore the status quo; take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings themselves; provide a means of preserving assets out of which a subsequent arbitral award may be satisfied; or preserve evidence that may be relevant and material to the resolution of the dispute (article 71(1)). Neither the Arbitration Act nor the JCAA Rules have any specific provision that addresses whether an arbitral tribunal may order security for costs. However, it is generally understood that an arbitral tribunal is not prohibited from ordering a claimant to provide security for costs at the request of a respondent.

Sanctioning powers of the arbitral tribunal

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

The Arbitration Act stipulates that the claimant shall state the relief or remedy sought, the facts supporting its claim and the points at issue within the period determined by the arbitral tribunal (article 31(1)). If the claimant fails to comply with this, the arbitral tribunal shall make a ruling to terminate the arbitral proceedings, unless there is sufficient cause for such failure or unless otherwise agreed by the parties (article 33(1)(4)). If any party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may make the arbitral award on the evidence before it that has been collected up until such time, unless there is sufficient cause for such failure or unless otherwise agreed by the parties (article 33(3)(4)). However, the Arbitration Act does not provide the arbitral tribunal with any power to order sanctions against parties or their counsel who use guerrilla tactics in arbitration or commit gross violations of integrity of the arbitral proceedings.

The JCAA Rules provide that if one or both parties fail to appear, a hearing may be held in its or their absence (article 52(2)). If one party, without sufficient cause, fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitral proceedings and make the arbitral award based on the evidence before it (article 45(2)). However, the JCAA Rules also do not provide for any sanctioning powers of the arbitral tribunal against guerrilla tactics or gross violations of integrity.

AWARDS

Decisions by the arbitral tribunal

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

Failing party agreement, any decision of the arbitral tribunal may be made by a majority of its members (Arbitration Act, article 37(2)). If an arbitrator refuses to take part in a vote or sign an arbitral award, the reason for any such omission must be stated in the award (article 39(1); article 66(6) of the JCAA Rules).

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

The Arbitration Act does not have any provisions relating to dissenting opinions.

Form and content requirements

38 | What form and content requirements exist for an award?

Under the Arbitration Act, the arbitral award must be made in writing and include the signatures of the arbitrators who made the award, the reasons for such award and the date and place of the arbitration (article 39). The JCAA Rules also prescribe that if the parties have agreed that no reasons are to be given, or if the arbitral tribunal records a settlement in the form of an arbitral award on agreed terms, the reasons shall be omitted (article 66(3)) and that the arbitral award must set out the total amount and allocation of the administrative fees, the arbitrators' remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings (articles 66(4) and 80(1)).

Time limit for award

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

No time limit is stipulated for an award to be rendered under the Arbitration Act. However, the JCAA Rules stipulate that the arbitral tribunal shall use reasonable efforts to render an arbitral award within nine months of the date when it is constituted (article 43(1)). For this purpose, the arbitral tribunal shall consult with the parties, and make a schedule of the arbitral proceedings in writing to the extent necessary and feasible as early as practicable (article 43(2)).

Date of award

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

A party may not apply to set aside the arbitral award if more than three months have elapsed since the party received notice of the award or after an enforcement decision (Arbitration Act, article 46) has become final and conclusive (article 44(2)). A party may request the arbitral tribunal to correct any errors in computation, clerical or typographical errors, or errors of a similar nature generally within 30 days of receipt of notice of the award (article 41(2)). The JCAA Rules stipulate a slightly shorter time limit of four weeks (article 68(2)).

Types of awards

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

There are no specific restrictions applicable to the types of awards or relief to be granted by the arbitral tribunal, provided they are derived from the applicable substantive law. However, the arbitral tribunal may decide *ex aequo et bono* if the parties have expressly authorised it to do so (Arbitration Act, article 36(3)). Partial and interim awards are possible. Additionally, a party may request the arbitral tribunal to make an additional arbitral award in relation to claims presented in the arbitral proceedings but omitted from the award within 30 days of receipt of notice of the award (articles 41(2) and 43(1)). The JCAA Rules amend this time limit from 30 days to four weeks (article 70).

Termination of proceedings

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

Arbitral proceedings can be terminated by a ruling to terminate the proceedings where the claimant withdraws its claim (unless the respondent objects to the withdrawal and the tribunal agrees to such objection), the parties agree to terminate the proceedings, a settlement is reached on the dispute that is the subject of the arbitral proceedings or the arbitral tribunal finds that the continuation of the arbitral proceedings has become unnecessary or impossible (Arbitration Act, article 40). If the parties reach a settlement during the arbitral proceedings, the tribunal may make a ruling on agreed terms, in which case the ruling has the same effect as an arbitral award (article 38).

Cost allocation and recovery

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

The parties may agree on the way in which costs for the proceedings are apportioned between them. Failing an agreement, each party must bear the costs it has disbursed in relation to the proceedings. The parties may agree for the tribunal, in the award or in an independent ruling, to determine the apportionment between the parties of the costs disbursed during the course of the proceedings (Arbitration Act, article 49). The JCAA Rules include more detailed provisions regarding cost allocation in arbitral proceedings (articles 66(4)(5) and 80). The costs of the arbitration to be apportioned between the parties include their legal fees and expenses to the extent the arbitral tribunal determines that they are reasonable (article 80(1)).

Interest

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

Interest may be awarded for principal claims and for costs. If Japanese substantive law applies, interest may be awarded at a rate of 3 per cent per annum (article 404(2) of the Civil Code (Act No. 89 of 1986)) unless other rates are agreed to by the parties.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

The arbitral tribunal may correct an award on its own initiative or upon request by a party (Arbitration Act, article 41; JCAA Rules, article 68(1)). The arbitral tribunal may also interpret an award upon request by a party (Arbitration Act, article 42; JCAA Rules, article 69). If a party requests the correction or interpretation of an award, the request must generally be made within 30 days (Arbitration Act, articles 41(2) or 42(3)) or four weeks (articles 68(2) and 69 of theJCAA Rules) of the receipt of notice of the arbitral award. However, there is no time limit for an award corrected upon the initiative of the tribunal, which distinguishes the Arbitration Act from the 1985 Model Law.

Challenge of awards

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

If an arbitral award is rendered with the place of arbitration being within the territory of Japan, such an award may be challenged and set aside under the Arbitration Act (articles 3(1) and 44). There are limited grounds on which to set aside or challenge arbitral awards, which include:

- an invalid arbitration agreement;
- required notice to appoint arbitrators was not given to a party;
- a party was unable to present its case;
- the award relates to matters beyond the scope of the arbitration agreement or claims of the arbitration;
- the composition of the tribunal or proceeding was not in accordance with the parties' agreement;
- the award was based on a dispute not qualifying as a subject for arbitration; or
- the award is in conflict with public policy (article 44(1)).

These grounds are substantially identical to those stipulated by article 34(2) of the 1985 Model Law. A challenge may not be made if more than three months has elapsed from the date on which the challenging party received notice of the award or after an enforcement decision (article 46) has become final and conclusive (article 44(2)).

Levels of appeal

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

As a general rule, a court decision on a petition for setting aside or challenging arbitral awards can be appealed only once (Arbitration Act, article 44(8)). Such an appeal must be filed within two weeks of receipt of the first-instance decision (article 7). The challenge proceedings at the first instance usually take six months to one year, and the appeal proceedings usually take up to six months. Court fees for these processes are nominal (in many cases less than US$100). The parties have to bear their respective attorneys' fees.

Recognition and enforcement

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

Domestic and foreign awards have the same effect as a final domestic court judgment (Arbitration Act, article 45) and are enforced in a Japanese court (article 46). A party seeking enforcement based on the arbitral award should apply to a court for an enforcement decision. The grounds for refusing to recognise or enforce domestic and foreign awards are the same as those of article 36(1) of the 1985 Model Law or article V of the New York Convention. Even if an award is granted in a state that has not signed or ratified the Convention, these recognition and enforcement rules apply. In that sense, the location of the arbitration is not an issue in the recognition or enforcement of awards. It is generally considered that Japanese courts look favourably upon recognising and enforcing awards.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The Arbitration Act does not provide for a limitation period for the enforcement of arbitral awards.

Enforcement of foreign awards

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

The language employed in the relevant provisions in the Arbitration Act seem to be inconsistent. Article 45 seems to stipulate that foreign awards set aside by the courts at the place of arbitration shall not be recognised or enforced (article 45(1) and (2)(vii)). However, article 46 seems to stipulate that an enforcement decision may be issued for such foreign awards at the discretion of the courts (article 46(8)). Government officers in charge of drafting these provisions have explained that the provisions should be interpreted to mean that courts shall have discretion as to whether such awards will be recognised and enforced, regardless of the language in the provisions. Accordingly, one can say that Japanese courts have discretion to recognise and enforce foreign awards that have been set aside by the courts at the place of arbitration. There has been no court precedent that discusses this issue under the Arbitration Act as yet.

Enforcement of orders by emergency arbitrators

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

The Arbitration Act does not provide for the enforcement of orders by emergency arbitrators, though the subject has been under discussion. Under the JCAA Rules, parties shall be bound by, and carry out, the emergency measures ordered by emergency arbitrators, which shall be deemed to be interim measures granted by the arbitral tribunal when it is constituted (article 77(5)). However, no determination on emergency measures shall be binding on the arbitral tribunal and the arbitral tribunal may approve, modify, suspend or terminate the emergency measures in whole or in part (article 78). Neither the interim measures granted by the arbitral tribunal nor the emergency measures ordered by emergency arbitrators may be enforced with an enforcement decision granted by a Japanese court.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

To enforce an award that has been granted by an arbitral tribunal, but has not been performed voluntarily, a party generally must file a petition for the enforcement decision with the court. The enforcement decision once rendered can be used for compulsory enforcement with the assistance of a judicial authority. The costs required for these procedures are generally borne by the party seeking enforcement of the award.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Experienced arbitration practitioners in Japan can be expected to follow general practices seen in international arbitration globally. In domestic civil proceedings, written witness statements are common before testifying, and party officers may testify. Adversarial witness examination (ie, direct and cross-examination) is also standard. These features are often reflected in arbitration proceedings conducted in Japan. Japan's civil law system provides for limited, if any, discovery in the common law style.

Professional or ethical rules

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

There are no specific professional or ethical rules that are applicable to counsel and arbitrators in international arbitration in Japan. However, arbitration practitioners in Japan generally agree that the best practice of party representation reflects the IBA Guidelines on Party Representation in International Arbitration.

Third-party funding

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

In Japan, there are no statutes or case law specifically prohibiting third-party funding of arbitral claims. However, since there is also no regulation explicitly permitting third-party funding, there is uncertainty as to whether third-party funding is allowed (and if so, to what extent).

Regulation of activities

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

The Attorney Act (Act No. 205 of 1949) stipulates that any person who is not a Japan-qualified attorney or a special legal entity established by practising attorneys, is prohibited from, for a fee and as an occupation, becoming involved in legal problems by giving legal advice, providing legal representation, arbitrating, etc (article 72).

However, the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986) provides that a foreign-qualified lawyer registered in Japan may perform representation in regard to the procedures for an international arbitration case (article 5-3). In addition, foreign lawyers engaged in legal business in a foreign country (excluding a person who is employed and is providing services in Japan based on his or her knowledge of foreign law) may perform representation in regard to the procedures for an international arbitration case (article 58-2).

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UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

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. With the cooperation of the public and private sectors, in February 2018, the Japan International Dispute Resolution Center (JIDRC) was established. On 1 May 2018, the Japan International Dispute Resolution Center (Osaka) (JIDRC- Osaka), the first dedicated facility in Japan for international arbitration and alternative dispute resolution (ADR), started its operations. Also, JIDRC-Tokyo, a world-leading specialised facility for international arbitration and alternative dispute resolution, was opened in March 2020 in Toranomon, Tokyo.

On 29 May 2020, the Amended Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No 66 of 1986) (the Foreign Lawyers Act) was promulgated. This amendment came into effect on 29 August 2020. This amendment, among other things, broadens the definition of an 'international arbitration case' for purposes of foreign attorneys' practice in Japan. Under the amended

Foreign Lawyers Act, foreign attorneys may handle a broader range of arbitrations in Japan.

Amendments to the JCAA Rules came into effect on 1 July 2021. These amendments, among other things, include several amendments to the expedited arbitration procedures, establishment of the Appointing Authority Rules (a new set of rules for when the JCAA serves as the appointment authority of arbitrator in an ad hoc arbitration case) and amendments to its administrative fee.

According to the public record, to date, Japan has not been a respondent state in any International Centre for Settlement of Investment Disputes arbitration. However, in March 2021, it was reported that Japan is facing its first investment treaty claim, though the details of the case have not been publicly disclosed.

Liechtenstein

Thomas Nigg
Gasser Partner

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Since 5 November 2011, Liechtenstein has been a signatory to the New York Convention. Under article 1(3) of the Convention, Liechtenstein declared a reservation of reciprocity (LGBl 2011/325).

Liechtenstein is a member of the International Energy Charter, resulting in the application of the treaty's investment protection rules.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

According to www.unctad.org, Liechtenstein is not a party to any bilateral investment treaties. However, Liechtenstein has concluded a number of bilateral tax treaties, providing for arbitration.

Domestic arbitration law

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

The primary domestic sources of law relating to domestic and foreign arbitral proceedings and the recognition and enforcement of awards are the Liechtenstein Code of Civil Procedure (LCCP; sections 594–635), the Liechtenstein Enforcement Act (article 1(m)) and the New York Convention.

The LCCP governs both domestic and foreign arbitral proceedings. In addition, there are the Liechtenstein Rules issued by the Liechtenstein Chamber of Commerce and Industry, which apply whenever parties agree on them.

Domestic arbitration and UNCITRAL

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

Domestic arbitration law basically corresponds to the Austrian arbitration law, as the country has generally based its Code of Civil Procedure closely on the Austrian model. Since Austrian law itself is strongly influenced by the UNCITRAL Model Law, the Liechtenstein arbitration law today largely matches international standards. Hence, the domestic arbitration law is based on the UNCITRAL Model Law. Liechtenstein law, however, only partly deviates from the provisions of the Model Law, including, inter alia, provisions on the conclusion of arbitration agreements with consumers or employees.

Mandatory provisions

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

The provisions on arbitration are generally dispositive and can thus be overlaid by the arbitration rules. Section 605 of the LCCP, for example, stipulates minimum standards regarding the neutrality of arbitrators. In this respect, an arbitrator may be challenged only if circumstances occur that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not meet the requirements agreed between the parties.

Substantive law

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

Section 620 of the LCCP governs the law applicable in arbitration proceedings seated in Liechtenstein. This provision addresses the law applicable to the merits, not the law applicable to the arbitration agreement.

First, the arbitral tribunal must comply with the parties' choice of law. However, if the parties have not agreed to the law applicable to the merits, the arbitration tribunal has to apply the law it deems appropriate.

A decision based on reasons of equity can only be made if the parties have explicitly empowered the arbitral tribunal to do so.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

Liechtenstein, with its political neutrality, geographically central location, excellent infrastructure and legal framework, is an attractive central European place of arbitration. However, besides the Liechtenstein Arbitration Association (www.lis.li), which is not an arbitral institution in the literal sense, no other arbitral institution is based in Liechtenstein. However, because of its geographical vicinity and legal similarities, a significant number of arbitration proceedings are conducted under the auspices of the Swiss Chambers' Arbitration Institution and the Vienna International Arbitration Centre.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Liechtenstein as a jurisdiction is arbitration-friendly, and thus nearly every matter that could be subject to state court proceedings may be submitted to arbitration as well. Accordingly, section 599(1) of the Liechtenstein Code of Civil Procedure (LCCP) states that any pecuniary claim to be decided by state courts may be subject to arbitration agreements. Nonetheless, there are disputes that are not arbitrable. Family law matters, certain company-related disputes and all disputes arising out of contract articles of apprenticeship cannot be made subject to arbitral agreements.

In summary, all business- and civil law-related matters can be subject to an arbitration agreement. Therefore, all company-related matters are usually open to arbitration if the proceedings are not initiated by the public prosecutor.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

For a natural person, the capacity for arbitration agreements derives from his or her personal statute, whereas a legal person needs to have legal personality to be a party to an arbitration agreement.

Besides the capacity to conclude arbitration agreements, the basic requirement for an arbitration agreement is that it exists in writing. Either a document must be signed by both parties, or it must be included in correspondence (eg, email) or in standard contracts providing a record of the agreement. Available proof of the arbitration agreement equivalent to a written document is required. There is no easing of this requirement.

However, the violation of the requirement of written form can be healed if not objected together with the first submission in the arbitral proceedings (eg, in the case of a respondent, the answer to the statement of claim).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is a contract between two or more parties. Usually, it is up to the parties to agree on specific circumstances under which the arbitration agreement no longer applies. However, the doctrine of separability also applies, and thus an arbitration agreement continues to exist even if the underlying contract has been terminated.

There are several cases where arbitration agreements have been deemed pathological, meaning that they could not be enforced. One of the most common cases concerns the explicit naming of arbitrators in the arbitration clause. If in the case of a dispute the explicitly designated arbitrator is deceased, the arbitration clause is deemed to be invalid because of its unenforceability. The same applies if the arbitral institution designated in the arbitration agreement ceased to exist.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

In Liechtenstein, as in its neighbouring countries, the doctrine of separability applies. This principle is closely linked to the competence-competence of the arbitral tribunal and means that the arbitration agreement is an independent contract as distinct from the main agreement. The validity of the agreements must be examined separately. This applies both to an independent arbitration agreement and to an arbitration agreement that is only a clause of the main agreement (see Manuel Walser, Schiedsfähigkeit im liechtensteinischen Recht, 29 and 371; Voser/Schramm/Haugeneder in Torggler et al (eds), Handbuch der Schiedsgerichtsbarkeit, Rz 795).

Further, section 598 of the LCCP states that the provisions relating to arbitration shall also apply mutatis mutandis to arbitral tribunals, which are ordered in a legally permissible manner by testamentary disposition, or other legal transactions not based on an agreement between the parties or by statutes.

Third parties – bound by arbitration agreement

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

In line with Austrian jurisprudence, legal successors are bound by an arbitration agreement concluded by their predecessor. According to the Liechtenstein Supreme Court, beneficiaries of a foundation or trust who are not explicitly named in the foundation or trust documents (discretionary beneficiaries) are bound by an arbitration agreement in the statutes or by-laws if they decide to accept a distribution by the foundation or trust.

Furthermore, according to Austrian doctrine, the liquidator is also bound by arbitration agreements of the insolvent company.

Third parties – participation

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

Under Liechtenstein law, there are almost no specific provisions with respect to third-party participation in arbitration, such as joinder or third-party notice. Nonetheless, section 633(3) of the LCCP states that with the consent of all parties involved in the arbitral proceedings, third parties may inspect the files and collect copies of documents.

However, various arbitration rules, such as the ICC Rules, contain provisions with respect to third-party participation.

Groups of companies

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

Arbitration agreements are written clauses in contracts, or at least included in standard terms and conditions, and therefore are only enforceable between the corresponding signatories. This is because of general contractual principles. Thus, courts and arbitral tribunals may not extend an arbitration agreement to the non-signatory parent or subsidiary companies of a signatory company. There are no specific provisions or judicature regarding this matter in Liechtenstein.

Thus, it is not established whether the internationally recognised group of companies doctrine applies in Liechtenstein as well. However, the Austrian Supreme Court accepted the application of an arbitration clause to economically related contractual relationships.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

There are only very few special provisions in the LCCP explicitly addressing multiparty arbitrations. Most importantly, section 604(5) of

the LCCP governs a fallback option if a number of parties cannot agree on the appointment of their arbitrator. After a period of four weeks and upon request of a party, the arbitrator can be appointed by the competent state court.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Neither the LCCP nor the Liechtenstein Rules contain provisions as to whether an arbitral tribunal can consolidate separate arbitral proceedings or not.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

Section 605(3) of the Liechtenstein Code of Civil Procedure (LCCP) prohibits judges to sit as arbitrators while being active in service.

Apart from that, the parties are free to agree on certain conditions that arbitrators must fulfil. For instance, article 6 of the Liechtenstein Rules provides, unless otherwise agreed, that all parties or the commissioner, or both, accept that only such persons may be appointed, as they are subject to a legal confidentiality obligation that at least includes criminal liability for violations of that confidentiality obligation, and possess the right to refuse to testify in civil matters. Generally, this includes lawyers, auditors and professional trustees.

However, section 594 et seq does not stipulate that the arbitrators must be legally qualified persons.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Predominantly, lawyers and attorneys-at-law in particular sit as arbitrators. Judges cannot serve as arbitrators during their tenure. Depending on the matter, economists may also sit as arbitrators.

Section 594 et seq do not stipulate that the arbitrators must be legally qualified persons.

Default appointment of arbitrators

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

The parties may freely agree on the number of arbitrators and a mechanism for the appointment. However, if the parties have agreed on an even number of arbitrators, they shall appoint another person as chair. Unless otherwise agreed by the parties, three arbitrators are appointed (section 603 of the LCCP).

Only if the parties fail to agree on the appointment of a single arbitrator after a specific time limit has passed, the court shall appoint an arbitrator (see section 604(2) No. 1 of the LCCP).

Regarding the appointment of a three-member arbitral tribunal, each party usually nominates one arbitrator. These two arbitrators then agree upon a chair. Should they fail to agree, the court shall appoint the presiding arbitrator upon the request of one party (see section 604(2) of the LCCP).

Challenge and replacement of arbitrators

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

The parties are free to agree on a specific challenge procedure. If the parties have failed to agree on a challenge procedure, section 606(2) of the LCCP provides a default procedure. The challenging party needs to file an application with the arbitral tribunal explaining the reasons for the challenge within four weeks of gaining the knowledge that prompted their challenge. If the arbitrator does not resign, the arbitral tribunal rules upon the challenge. It is possible to request the state court to rule upon an unsuccessful challenge within four weeks of the decision to reject that challenge.

If the office of an arbitrator ends prematurely (through, for example, illness, death or resignation) a substitute arbitrator is appointed. The appointment of the substitute arbitrator is enacted in accordance with the rules applicable to the appointment of the arbitrator to be replaced (see section 608 of the LCCP).

Relationship between parties and arbitrators

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

The relationship between the parties and the arbitrators is not the same as the one between parties and judges in ordinary proceedings. This is because the relationship is based on a contractual relationship with corresponding contractual liability. Arbitrators must be impartial and independent. The costs and expenses of the arbitrators are usually determined in the final award, and must be borne by the parties.

The arbitrators' contract is considered a contract for services and contains an obligation to adjudicate upon an arbitral award.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

If a person wishes to assume the office of an arbitrator, he or she shall disclose any circumstances that may cast doubt on his or her impartiality or independence or that are contrary to the agreement between the parties. From the time of his or her appointment and during the arbitration proceedings, an arbitrator shall immediately disclose such circumstances to the parties if he or she has not already communicated them to the parties in advance (see section 605 (1) of the LCCP).

Under the Liechtenstein Rules, however, arbitrators who conduct proceedings under these rules must be impartial and remain independent at all times. Any person requested to act as an arbitrator shall disclose in writing all circumstances likely to cast reasonable doubt on his or her impartiality or independence (see article 10 of the Liechtenstein Rules).

Immunity of arbitrators from liability

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

According to section 611(4) of the LCCP, an arbitrator who fails to fulfil the obligations arising from the acceptance of his or her appointment

or fails to fulfil it in a timely manner shall be liable to the parties for all damage caused by his or her wrongful refusal or delay. Regarding the extent of liability (limited versus unlimited), especially with regard to the arbitration award being made, opinions differ. Nonetheless, the Austrian Supreme Court held in its decision of June 2005 that an arbitrator's liability is limited (9 Ob 126/04 a) and that an arbitrator may only be held liable for damage if the award has been challenged and the challenge was successful (RS0119996).

The possibility of a contractual limitation of liability remains unaffected (Czernich in Czernich, Deixler-Hübner, Schauer (eds), Handbuch Schiedsrecht, 10.131).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

In principle, an existing arbitration agreement shall be given priority over state court proceedings. If court proceedings are initiated in a matter that is subject to arbitration, the court shall reject the claim. However, this is only the case if the defendant in this respect does not raise an objection in his or her oral or written pleadings. If proceedings are pending at court, the arbitration proceedings may still be commenced or continued. According to the ruling of the Liechtenstein Supreme Court, arbitral awards have res judicata effect only between parties to the arbitration and not upon third parties.

Jurisdiction of arbitral tribunal

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

Once arbitral proceedings have been initiated, any objection to the jurisdiction of the tribunal must be submitted at the first opportunity. Otherwise, the party forfeits this right. However, in the event of a convincing excuse, the party may rectify the omission. An arbitral tribunal is capable of deciding on its own competence to rule on a specific dispute; in other words, it has 'competence-competence' and may therefore decide upon its own jurisdiction.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

If there is no agreement on determining the place of arbitration, the arbitral tribunal shall determine its place, taking into account the circumstances of the case, including the suitability of the place of arbitration for the parties (section 612 of the Liechtenstein Code of Civil Procedure (LCCP)). If the parties have failed to stipulate an arbitration language, the arbitral tribunal shall determine the language (section 613 of the LCCP). Section 620 of the LCCP governs the law applicable in arbitration proceedings seated in Liechtenstein. This provision addresses the law applicable to the merits, not the law applicable to the arbitration agreement. First, the arbitral tribunal must comply with the parties' choice of law. Only if the parties have not agreed to the law applicable to the merits, the tribunal may apply the law it deems appropriate. A decision based on reasons of equity can only be made if the parties have explicitly empowered the arbitral tribunal to do so.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

In line with international standards, arbitral proceedings are initiated when the claimant delivers a written statement of claim to the respondent. The statement of claim must (in most cases) include a copy of the arbitration agreement and a fully substantiated statement of claim. The latter requirement is intended to enhance efficiency. Furthermore, the claim should include, inter alia and as a minimum content, the names and contact information of the other parties and their counsel, a proposal as to the number of arbitrators and the language of proceedings (if not agreed on previously) plus, if three arbitrators have been proposed or agreed, the name and contact details of the arbitrator to be appointed by the claimant.

Hearing

28 | Is a hearing required and what rules apply?

If the seat of the arbitral tribunal lies in Liechtenstein, a hearing is required only by request of a party, in accordance with section 615, sentence 2 of the LCCP. However, unless the parties have agreed otherwise, the arbitral tribunal shall decide whether the proceedings shall be oral or written.

Evidence

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

The arbitral tribunal shall decide independently on matters of evidence. Provisions on proceedings and evidence can be found in section 616 of the LCCP. Provisions regarding expert witnesses can be found in section 618 of the LCCP. The arbitral tribunal may appoint an expert witness, following consultation with the parties. However, the parties shall be informed in good time of each hearing and of each meeting of the arbitral tribunal for the purpose of taking evidence. All written pleadings, documents and other communications submitted to the arbitral tribunal by one party shall be forwarded to the other party. Legal opinions and other evidence on which the arbitral tribunal may base its decision shall be also brought to the attention of all parties (section 616 of the LCCP).

Court involvement

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

An arbitration agreement and subsequent arbitral proceedings take precedence over court proceedings. With competence-competence, an arbitral tribunal is competent to make a binding judgment regarding its own jurisdiction. Section 595 of the LCCP states that the court may take action in matters governed by the provisions in the LCCP only to the extent provided in these provisions.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of one party, order provisory or interim measures against another after hearing the counterparty (section 610 of the LCCP). At the request of one of the parties, the state court shall take such a measure. Therefore, parties could apply for interim measures to an arbitral tribunal in the same way as to a court. However, the court must refuse the enforcement of such a measure if certain prerequisites listed in the LCCP were met (section 610 paragraph 4 of the LCCP).

Moreover, the arbitral tribunal, the arbitrator appointed by the arbitral tribunal or one of the parties, with the agreement of the arbitral tribunal, can request the court to perform judicial acts for which the arbitral tribunal is not empowered (see section 619 of the LCCP).

Confidentiality

31 | Is confidentiality ensured?

Although there are no explicit provisions on confidentiality in the LCCP, Liechtenstein complies with international standards. In this regard, confidentiality of arbitration proceedings is guaranteed in all aspects.

The provisions of the Liechtenstein Rules are much more far-reaching than the legal provisions, providing a strong confidentiality obligation. Article 29 of the Liechtenstein Rules imposes a strict confidentiality obligation upon all those involved – the parties and their representatives, the arbitrators, any commissioner, the secretariat and their auxiliary persons – regarding all material submitted, all facts made available and all orders and awards. The confidentiality obligation is protected by a contractual penalty in the amount of 50,000 Swiss francs, but does not cover publicly available information, information already known by the party prior to the proceedings or information that is not adduced by a third party during the proceedings.

Furthermore, confidentiality is ensured by article 6 of the Liechtenstein Rules, according to which a person can be appointed as an arbitrator only if subject to a legal confidentiality obligation.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

In general, the arbitral tribunal has after its formation exclusive jurisdiction over interim measures. The arbitral tribunal may, at a party's request, take any interim measure it deems necessary or appropriate (see section 610 (1) of the Liechtenstein Code of Civil Procedure (LCCP)).

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of one party, order provisory or interim measures against another after hearing the party (section 610 of the LCCP). At the request of one of the parties, the state court shall take such a measure. Therefore, parties could apply for interim measures to an arbitral tribunal in the same way as to a court. However, the court must refuse the enforcement of such a measure if certain prerequisites set forth in the LCCP are met (section 610(4) of the LCCP).

Interim measures by an emergency arbitrator

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

The institution of an emergency arbitrator is not recognised in Liechtenstein domestic arbitration law.

Interim measures by the arbitral tribunal

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

As stated in section 610(1) et seq of the LCCP, at a party's request the arbitral tribunal may take any interim measures it deems necessary or appropriate.

Sanctioning powers of the arbitral tribunal

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

Because of the competence-competence of the arbitral tribunal, it is competent to order sanctions against parties or their counsel who use guerrilla tactics in arbitration. However, the imposition of such sanctions might be rather difficult in practice.

AWARDS

Decisions by the arbitral tribunal

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

Unless otherwise agreed by the parties, the following applies.

In arbitration proceedings involving more than one arbitrator, any decision of the arbitral tribunal shall be taken by a majority of all members. In procedural matters, the chair may decide on his or her own if the parties or all members of the arbitral tribunal have authorised him or her to do so. If one or more arbitrators fail to take part in a vote without justifying reasons, the other arbitrators may decide without him or her. In this case, too, the required majority of votes shall be calculated from the total number of all participating and non-participating arbitrators. In the case of a vote on an arbitral award, the intention is to proceed in such way as to inform the parties in advance (section 621 of the Liechtenstein Code of Civil Procedure (LCCP)). However, the arbitral award shall have the effect of a final judgment between the parties.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

In procedural matters the chair may decide on his or her own if the parties or all members of the arbitration tribunal have authorised him or her to do so. If one or more arbitrators fail to take part in a vote without justifying reasons, the other arbitrators may decide without him or her.

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Form and content requirements

38 | What form and content requirements exist for an award?

Besides final awards, an arbitral tribunal is entitled to make interim, interlocutory or partial awards. However, the award must be made in writing and delivered to the parties. Furthermore, the award must contain the reasons upon which it is based unless the parties have

agreed that no reasons are to be given. In addition, the award must be signed by the arbitrators and contain the date on which the award was made as well as the place of arbitration. An award is final and binding on the parties (see section 624 of the LCCP).

Time limit for award

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

General provisions regarding calculations of time limits cannot be found under the provisions of the LCCP.

Date of award

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

Unless otherwise agreed by the parties, each party can apply to the arbitral tribunal for rectification, clarification and amendment of the award within four weeks from service of the award (see section 627 of the LCCP).

Only an action for judicial annulment may be brought against an arbitral award. This shall also apply to arbitration awards whereby the arbitral tribunal has ruled on its jurisdiction. The claim must be filed within four weeks. The corresponding period shall commence on the day on which the party receives the award or amendments to the award (section 628(4) of the LCCP).

Types of awards

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

In addition to making a final award, the arbitral tribunal is entitled to make interim, interlocutory or partial awards.

Termination of proceedings

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

Arbitration proceedings are usually terminated with an award, an arbitration settlement or an order of the arbitral tribunal according to section 625(2) of the LCCP.

Arbitral settlements settle the claims in dispute between the parties and they terminate any pending proceedings. Since arbitral settlements are not enforceable according to the New York Convention, it is advisable to apply for the rendering of a settlement in the form of an award. An award on agreed terms should still contain the reasons upon which it is based.

Cost allocation and recovery

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

Provisions regarding costs can be found in section 626 of the LCCP. If arbitration proceedings are terminated, the arbitral tribunal shall decide on the obligation to reimburse the costs unless the parties have agreed otherwise. At its discretion, the arbitral tribunal shall take into account the circumstances of the individual case and, in particular, the outcome of the proceedings. The obligation to pay the costs may include all reasonable costs for appropriate prosecution and legal defence. Certain decisions shall only be taken if a party applies for such a decision. If the decision on the obligation to reimburse costs or to determine the amount to be reimbursed is omitted, or is only possible after the end of the arbitration proceedings, a separate award shall be made.

Interest

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

Whether interest may be awarded for principal claims and costs depends on the claims for relief of the parties.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Yes. The arbitral tribunal can either perform a correction of the award – concerning, for example, errors in computation, or clerical or typographical errors – on the grounds of an application by the parties or ex officio. Unless otherwise agreed, either party can make such a request within four weeks of receipt of the award. Provisions regarding the interpretation and correction of awards as well as time limits can be found in section 627 of the Liechtenstein Code of Civil Procedure (LCCP).

Challenge of awards

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

Only an action for judicial annulment can be brought against an arbitral award. This also applies to arbitration awards by which the arbitral tribunal has ruled on its jurisdiction. The action must be filed within four weeks, commencing on the day upon which the party receives the award or the amendments to the award (section 628 of the LCCP).

According to section 628 (2) of the LCCP, an arbitral award shall be set aside if:

- a valid arbitration agreement does not exist, or if the arbitral tribunal has denied its jurisdiction although a valid arbitration agreement does indeed exist, or if a party did not have the capacity to enter into an arbitration agreement in accordance with the law to which the party is personally subject;
- a party was not given proper notice of the appointment of an arbitrator or an arbitral proceeding, or was otherwise unable to present his or her case;
- the award concerns a dispute to which the arbitration agreement does not apply, or it contains decisions on matters beyond the scope of the arbitration agreement or the party's request for relief; if the deficiency relates only to a separable part of the arbitral agreement, that part shall be set aside;
- the formation or composition of the arbitral tribunal conflicts with any provision of this section or any permissible agreement between the parties;
- the arbitration procedure was conducted in a manner in conflict with the fundamental values of the Liechtenstein legal system (public policy);
- the requirements for contesting a court judgment through an application for a new trial pursuant to section 498(1) Nos. 1–5 of the LCCP are satisfied;
- the subject matter of the dispute is not arbitral under domestic law; or
- the arbitration award is in conflict with the fundamental values of the Liechtenstein legal system (public policy).

The challenge of an award does not affect the validity of the arbitration agreement on which the award is based.

Levels of appeal

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

Parties have four weeks to submit a respective claim to the Court of Appeal to set aside an arbitral award. The latter functions as the first and last instance in such challenge proceedings and proceedings involving declaratory claims regarding the existence or non-existence of an arbitral award.

Unless other very specific conditions apply, the possibility of raising a claim to the Constitutional Court as a separate and further level of appeal is not an option (see Michael Nueber, 'OGH als einzige Instanz in Verfahren zur Aufhebung von Schiedssprüchen (rechts) politisch möglich?', ZfRV, 73, 76 (2013)).

Recognition and enforcement

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

Provisions regarding the recognition and enforcement of foreign awards are to be found under section 631 of the LCCP. In general, the provisions of the Liechtenstein Enforcement Act (EO) govern the recognition and declaration of enforceability of foreign arbitral awards, unless otherwise provided for in international treaties or declarations of opposition. The formal requirements for the arbitration agreement are also deemed fulfilled if the arbitration agreement complies with both, the form and requirements of section 600 of the LCCP and the formal requirements of the law applicable to the arbitration agreement.

A submission of the original or a certified copy of the arbitration agreement pursuant to article IV(1)(b) of the New York Convention is only required if requested by a court.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Liechtenstein domestic arbitration provisions do not contain time limits or limitation periods for the enforcement of arbitral awards.

However, when it comes to the enforcement of the award, the limitation periods must be assessed in accordance with the relevant substantive law applicable, which entitles the enforcement of the arbitral award. In Liechtenstein, this would be the EO, which does not, however, contain any provisions regarding limitation periods.

Enforcement of foreign awards

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

Liechtenstein is a signatory to the New York Convention. In the context of this Convention, Liechtenstein has issued a reservation of reciprocity, and therefore only recognises and enforces arbitral awards rendered in the territory of other member states of the New York Convention.

Enforcement of orders by emergency arbitrators

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

Liechtenstein's domestic arbitration jurisdiction and the Liechtenstein Rules lack the legal provisions of an emergency arbitrator.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

According to article 1(1)(m) of the EO, domestic arbitral awards are enforceable and, therefore, liable to enforcement. Such enforcement is approved by the Princely Court in Vaduz (Landgericht) at the request of the party entitled to make such a claim. The creditor (the operating party) must bear the costs in advance. However, these costs are to be reimbursed by the debtor at the creditor's request.

According to article III of the New York Convention, each signatory shall recognise foreign arbitral awards that may be enforced in accordance with the rules of procedure of the territory in which the award is invoked. Under Liechtenstein law, this means that the creditor first must bear the costs of enforcement in advance but at his or her request, these shall be reimbursed by the debtor.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Owing to the fact that Liechtenstein has a relatively young arbitration market, it is unknown so far which dominant features may have an influence on arbitrators. However, the European Human Rights Convention (EHRC) – in particular article 6 – is fully applicable to arbitral proceedings. With respect to evidence finding, the arbitral tribunal has the right to decide on the admissibility of the taking of evidence, to carry it out and to freely assess its outcome. The arbitral tribunal must inform the parties in good time of each hearing and of each meeting for the purposes of taking evidence. All pleadings, documents and other communications submitted by one party to the arbitral tribunal must be brought to the attention of the other party. Written witness statements could be used as documentary evidence.

Professional or ethical rules

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

General ethical rules, such as the EHRC, are applicable to arbitral proceedings. Lawyers, in particular, sit as arbitrators. For this reason, the attorney–client privilege as a professional rule may play a role.

The IBA Guidelines on Conflicts of Interest in International Arbitration (2004) can also be taken into consideration.

Third-party funding

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

In general, third-party funding is one of the most discussed issues in international arbitration (Pestalozzi in Czernich, Deixler-Hübner, Schauer (eds), *Handbuch Schiedsrecht*, 4.60).

Court proceedings in Liechtenstein are usually funded by the parties themselves, whereas section 63 of the Liechtenstein Code of Civil Procedure explicitly provides for the possibility of seeking legal aid. In contrast, arbitration institutions usually assume that parties possess the necessary resources to conduct arbitral proceedings (see, for instance, Dasser and Reithner, The Liechtenstein Rules of Arbitration, Editions Weblaw, Bern 2015, 17).

The Supreme Court holds that if a penniless party to an arbitration agreement files a claim to a state court and the opponent of this party does not declare his or her willingness to advance to this party the costs necessary for the arbitration proceedings, it is to be assumed that the parties depart from the arbitration agreement. The lack of means of a party does not itself render the arbitration agreement ineffective (LES 2009, 27).

Explicit provisions regarding third-party funding, however, are not to be found in Liechtenstein law, so in this regard one should look to general provisions. In Liechtenstein, lawyers are not allowed to assert a contingency fee, and they are further not allowed to purchase any client claim that is the object of current proceedings (see section 879 of the General Civil Code). In the case of successful litigation, only a surcharge to the fees may be agreed.

However, litigation funding by an independent third party is possible in Liechtenstein. It is up to the parties how they fund proceedings.

Regulation of activities

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

A foreign practitioner must bear in mind several provisions regarding work permits and be aware of visa requirements if he or she is not a citizen of a Schengen member state. Before taking up activities as a lawyer, in particular as an attorney-at-law in Liechtenstein, a European Lawyer must report his or her intention to the Liechtenstein Bar Association and prove his or her status as a lawyer (see article 83 of the Lawyers' Act).

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Although Liechtenstein has not concluded any bilateral investment treaties of its own, there exists one multilateral investment treaty between the Republic of Iceland, Liechtenstein, Switzerland and the Republic of Korea. In addition, Liechtenstein is involved in various investment treaties via the Customs Union Treaty with Switzerland and, as an EFTA state, in free trade agreements relating to investment protection aspects.

However, there are no trends or updates with respect to legislative reform and investment treaty arbitration.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Luxembourg is a contracting state to the New York Convention (it entered into force on 9 September 1983). Luxembourg has made a reciprocity reservation under article I(3) of the Convention.

Luxembourg is also party to several treaties facilitating recognition and enforcement of arbitral awards, namely the European Convention on International Commercial Arbitration of 21 April 1961 and the ICSID Convention of 18 March 1965.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Luxembourg has signed over 100 bilateral investment treaties (BITs), including the BITs concluded by the Belgium Luxembourg Economic Union (BLEU).

Domestic arbitration law

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

The Luxembourg law provisions on arbitration are included in Book III, Title 1 of the Luxembourg New Code of Civil Procedure (NCCP, articles 1224 to 1251).

The NCCP is available at: https://legilux.public.lu/eli/etat/leg/code/procedure_civile/20210916.

Domestic arbitration and UNCITRAL

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

Although the domestic law provisions are not expressly based on the UNCITRAL Model Law, they are to a large extent inspired by the UNCITRAL Model Law.

Luxembourg domestic law applies, without distinction, to international or domestic matters. However, article 1225 of the NCCP excludes certain civil matters from arbitration.

Mandatory provisions

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

Some provisions of the NCCP on arbitration are mandatory, such as those of:

- article 1225 NCCP on the non-arbitrability of particular matters; and
- article 1242 NCCP on the enforcement of a foreign award by an order granted by the president of the competent district court.

Substantive law

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

The parties to an arbitration are free to determine the law applicable to the merits of the case. Where no choice was made, the applicable law will be determined in light of the Luxembourg rules of private international law.

It is worth noting that, according to article VII(1) of the European Convention on International Commercial Arbitration, in the event of parties' failure to mention the applicable law, 'the arbitrators shall take into account the terms of the contract and trade usages'.

Pursuant to article I(1)(a), that Convention only applies to disputes between parties having their 'habitual place of residence or their seat in different Contracting States'.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitral institution based in Luxembourg is the Arbitration Centre of the Luxembourg Chamber of Commerce (the Arbitration Centre), found here:

7 Rue Alcide de Gasperi
L-2981 Luxembourg
Tel: +352 4239 39300
arbitrage@cc.lu
https://www.cc.lu/arbitrage

Under the 2020 Rules of the Arbitration Centre of the Luxembourg Chamber of Commerce (the 2020 ACLCC Rules), the parties are free to choose any arbitrators that fulfil their requirements and free to select any seat of arbitration.

Pursuant to article 18 of the Rules, in the event that the parties fail to select a seat, the place where the headquarter of the Chamber of Commerce is located (ie, Luxembourg) will be the default seat of arbitration.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

According to article 1224 of the Luxembourg New Code of Civil Procedure (NCCP), any person may enter into agreements to arbitrate in relation to the rights they have full disposal over. Accordingly, any disputes relating to IP, antitrust, competition law, securities transactions, intra-company may be submitted to arbitration.

Similarly, in a judgment issued on 9 February 2000, the Luxembourg Court of Appeal held that arbitral tribunal can deal with matters of public policy (Luxembourg Court of Appeal, 9 February 2000, Pas. Lux. no. 31, p.301). However, while applying public policy provisions, an arbitral tribunal must comply with Luxembourg settled case law regarding the public policy interpretation. Otherwise, violation of the public policy is a ground for annulment of an award (article 1244 NCCP).

In contrast, according to article 1225 NCCP, issues affecting a party's personal rights are not arbitrable. This includes issues regarding:

- personal capacity;
- marital relationship;
- divorce and judicial separation;
- representation of legally-declared incapable persons and issues on such incapacity; and
- missing or presumed missing persons.

Article L.211-3(13) of the Consumer Code provides that a clause included in a contract between a consumer and a professional supplier, depriving the consumer of his or her right to bring a claim before court, is null and void. The same principle applies to arbitration agreements included in insurance contracts governed by article 46 of the Law of 27 July 1997.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

To be valid under Luxembourg law, the arbitration agreement must:

- as to form: be in writing and documented either through minutes recorded before the arbitrators chosen, or through a notarial deed, or under a private seal agreement (article 1226 NCPC); and
- as to substance: state the reasons upon which it is based and contain the names and domiciles of the arbitrators, the names and domiciles of the parties and the object of the dispute.

With respect to an arbitration agreement, as a member of the New York Convention, Luxembourg applies the writing requirement set out under article II of the New York Convention to any arbitration agreement governed by Luxembourg law.

In a judgment of 26 July 2005, the Luxembourg Court of Appeal clarified the signing requirement of an arbitration agreement under Luxembourg law. The Court ruled that an arbitration agreement does not have to be signed specifically to be valid as long as it is included in an underlying contract signed by the parties (Court of Appeal, 26 July 2005, Pas. Lux. No. 33, p.117). Accordingly, by signing a contract including an arbitration agreement, a party is bound by that arbitration agreement.

It is noteworthy that since article 1135-1 paragraph 2 of the Civil Code was repealed, there is no specific provision prohibiting the inclusion of an arbitration agreement in general terms and conditions. As a result, in light of the judgment issued on 26 July 2005 and article 1135-1 of the Civil Code, an arbitration agreement included in general terms and conditions should be deemed valid provided that:

- the other party has been able to acknowledge the general terms and conditions before signing the contract; and
- it can be inferred from the circumstances that the other party has accepted the terms and conditions.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is valid and enforceable if it complies with either the law chosen by the parties, or the law governing the subject matter of the dispute.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Under the NCCP, there is no specific provision regarding the separability of the arbitration agreement.

In a judgment of 12 March 2003, the Luxembourg Court of Appeal held that since an arbitration agreement is an accessory to the main contract, the nullity of that main contract entails the nullity of the arbitration agreement (Court of Appeal, 12 March 2003, Pas. Lux. No. 32, p.399).

However, in a judgment issued on 26 July 2005, the Luxembourg Court of Appeal considered that as an arbitration agreement is a 'separate part' of the main contract, the law governing the arbitration agreement is not necessarily the same as the law governing the main contract (Court of Appeal, 26 July 2005, Pas. Lux. No. 33, p.117).

Third parties – bound by arbitration agreement

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

A third party may be entitled to apply to join arbitral proceedings.

According to Luxembourg settled case law, an arbitration agreement may be enforceable against a third party in the event of the assignment of a contract.

Similarly, the Luxembourg district court applies the legal succession theory to extend the arbitration agreement concluded by the acquired company to the acquiring company (Luxembourg District Court, 1 June 2012, No. 115/2012, No. 124736 and of the docket).

Finally, the Luxembourg Court ruled that a company joining an Economic Interest Group (EIG) is bound by the articles of associations of such EIG as well as the arbitration agreement included in those articles, even though it did not expressly agree to such an arbitration agreement (Luxembourg District Court, 28 April 2016, No. 171853 of the docket).

Third parties – participation

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

The current arbitration law does not provide any provisions with respect to third-party participation in arbitration.

However, according to article 1231-12 of Bill No.7671 relating to arbitration, any interested third party may join the arbitral proceedings.

Similarly, the 2020 Rules of the Arbitration Centre of the Luxembourg Chamber of Commerce (the 2020 ACLCC Rules) includes

a provision dealing with the intervention and joinder of third parties to the arbitration proceedings (see article 6 of the 2020 ACLCC Rules).

Groups of companies

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

Luxembourg arbitration law and case law that we are aware of do not refer to the 'group of companies' doctrine.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Luxembourg law recognises multiparty arbitration.

Pursuant to article 1227 NCCP, if parties fail to appoint their arbitrator, the president of the competent district court shall appoint the arbitrator.

The 2020 ACLCC Rules include provisions in respect of multiple contracts and multiple parties (see articles 7 and 8 of these Rules).

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

While Luxembourg law does not refer to consolidation, nothing prevents an arbitral tribunal from consolidating separate arbitration proceedings if parties consent to it.

Pursuant to article 6 of the 2020 ACLCC Rules, an arbitral tribunal may, at the request of a party, consolidate several arbitration proceedings:

- if the parties agreed to such consolidation;
- if all claims made in the arbitrations fall under the same arbitration agreement; or
- although the claims are made under multiple arbitration agreements, the arbitrations involve the same parties and arise out of the same legal relationship and the ACLCC Council finds that the arbitration agreements are compatible.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

Luxembourg arbitration law does not require any special qualification to act as an arbitrator. The parties are free to select any arbitrators, as long as they are impartial and independent. Therefore, attorneys, retired judges, foreigners or law professors can be appointed as arbitrator.

While diversity is actively promoted in Luxembourg, parties' autonomy to appoint the arbitral tribunal is not limited by any non-discrimination provisions.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Parties regularly appoint attorneys and law professors.

Default appointment of arbitrators

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

If parties fail to agree on the appointment of arbitrators, then article 1227 of the Luxembourg New Code of Civil Procedure (NCCP) shall apply.

Pursuant to that article, failing prior parties' agreement, the number of arbitrators shall be three.

If one party fails to nominate a co-arbitrator, then the other party may apply to the competent district court for a substitute appointment. The president of that district court will issue an order appointing the co-arbitrator for the defaulting party.

With regard to the presiding arbitrator, pursuant to article 1227 NCCP, the two co-arbitrators shall appoint the arbitrators unless the parties agree otherwise. If those two co-arbitrators fail to agree on the third arbitrator, article 1227 NCCP provides for judicial appointment – the president of the competent district court has jurisdiction to appoint the presiding arbitrator.

Under article 10 of the 2020 Rules of the Arbitration Centre of the Luxembourg Chamber of Commerce (the 2020 ACLCC Rules), if the parties fail to agree on the number of arbitrators, a sole arbitrator shall be appointed unless the Arbitration Council decide that an arbitral tribunal of three arbitrators would be more appropriate taking into consideration the circumstances of the case.

With regard to the failure to appoint a sole arbitrator (by the parties), a co-arbitrator (by the parties), or the presiding arbitrator (either by the parties or the co-arbitrators), the Arbitration Council shall be the competent authority to appoint such arbitrator.

Challenge and replacement of arbitrators

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

Pursuant to article 1235 NCCP, arbitrators can only be challenged for reasons arising after the conclusion of the submission agreement. As the arbitration provisions do not specify the grounds under which an arbitrator can be challenged, the Luxembourg courts refer to the general principles applicable to the challenge of a judge (article 521 of the NCCP). Those general principles mostly refer to the grounds of bias, such as being a relative to one party, having in the past advised one of the parties on the same matter, etc.

A party shall bring a request for challenging an arbitrator before the competent district court.

In an arbitration governed by the 2020 ACLCC Rules, a party may seek to challenge an arbitrator on the ground of lack of impartiality and independence. Pursuant to article 11 of these Rules, the Arbitration Council will rule on such challenge.

Relationship between parties and arbitrators

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

Despite the lack of specific provisions regarding the relationship between the parties and arbitrators, we may infer from article 1227 NCCP that the parties and the arbitral tribunal are bound by an arbitral contract. By virtue of this contract, the arbitrators have to adjudicate the parties'

dispute in person, with due care, independently and impartially. In turn, the arbitrators are entitled to compensation.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

While the current Luxembourg arbitration law does not provide any particular arbitrators' duties, the Bill on Arbitration of 15 September 2020 provides that arbitrators must be impartial and independent (articles 1228-6 and 1228-7 of the Bill).

Article 10 of the 2020 ACLCC Rules requires prospective arbitrators and arbitrators to disclose any matters or circumstances that might compromise their impartiality or independence prior to accepting the appointment. Similarly, article 10 imposes a continuing duty on arbitrators to disclose any potential conflicts that may arise during the arbitral proceedings.

Immunity of arbitrators from liability

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

The Criminal Code provides sanctions against an arbitrator who either:

- is corrupt;
- has an unlawful taking of interest;
- is liable for embezzlement; or
- threatens to hurt a public officer.

Pursuant to article 250 of the Criminal Code, an arbitrator who has directly or indirectly requested or accepted any offer, promise, donation, present or advantage of any kind, for himself, herself or for a third party, may be fined from €2,500 to €250,000 and sentenced to from 10 to 15 years in prison.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

In a judgment of 27 February 1987, the Luxembourg District Court held that if a party to a valid arbitration agreement refers a dispute to a court, that court must grant a stay of proceedings and must refer parties to arbitration (Luxembourg District Court, 27 February 1987, No. 111/87 (III)).

Similarly, article II(3) of the New York Convention ,which is binding over Luxembourg courts, imposes such a stay of proceedings.

Doctrine considers that the court must automatically declare that it has no jurisdiction in the presence of an arbitration agreement. A Luxembourg court ruled in a specific case that consideration to a party's waiver of its right to arbitrate must be given if that party fails to refer to the judicial court the arbitration agreement as soon as the dispute has been brought before that court. Failing to challenge the jurisdiction of the judicial court at the outset, the parties will no longer be able to rely upon such an agreement (Luxembourg District Court, 16 June 2006, No. 101408, BIJ 02/2007, p.35).

Jurisdiction of arbitral tribunal

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

Under domestic rules, courts may not rule on jurisdiction over the arbitral tribunal and the arbitral tribunal is solely competent to rule on its own jurisdiction.

According to article II(3) of the New York Convention and Luxembourg-settled case law, the courts must stay the proceedings and must refer the parties to arbitration.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

The parties are free to select the seat, the language and the law of arbitration of their arbitration.

In the event that the parties refer to institutional arbitration rules, then those rules shall apply, unless otherwise agreed by the parties. Having said that, if the parties apply the 2020 Rules of the Arbitration Centre of the Luxembourg Chamber of Commerce (the 2020 ACLCC Rules), the seat of arbitration will be Luxembourg (article 18 of the 2020 ACLCC Rules).

Unless parties agree on the language, the arbitrator will determine the language of the arbitration, taking into account the circumstances of the case and the language of the contract (article 14 of the 2020 ACLCC Rules).

Pursuant to article 13 of the 2020 ACLCC Rules, failing agreement on the substantive law applicable to the dispute, the arbitrator will determine the applicable substantive law by taking into consideration the contract provisions and the relevant commercial customs and usage.

Commencement of arbitration

27 How are arbitral proceedings initiated?

Pursuant to article 3 of the 2020 ACLCC Rules, arbitration proceedings are considered to be pending as soon as one party submits its request for arbitration to the Secretariat of the Arbitration Centre of the Luxembourg Chamber of Commerce.

The request shall include, but is not limited to:

- the name in full, description, address and other contact details of each of the parties, and their representatives;
- a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
- a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
- all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of article 10 of the Rules; and
- all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The party submitting the request shall submit a sufficient number of copies of the Request for each other party, each arbitrator and the

Secretariat. It shall make payment of the filing fee required by Annex I paragraph 8 of the Rules.

In the event that the claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the claimant must comply, failing which the file shall be closed without prejudice to the claimant's right to submit the same claims at a later date in another Request.

Hearing

28 | Is a hearing required and what rules apply?

Luxembourg domestic rules provide that parties and arbitrators shall, during the proceedings, follow the timelines and formalities established for courts provided they have not agreed otherwise. This means that unless the parties have agreed otherwise, a hearing would be required as it would have been required had it been a judicial procedure.

Article 18 of the 2020 ACLCC Rules governs hearings of an ACLCC arbitration.

Evidence

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

The procedure to be followed for taking evidence is a matter to be determined by the parties or, in the absence of any agreement, by the tribunal. However, in the event that parties do not determine the procedure, Luxembourg law shall apply.

While the Luxembourg New Code of Civil Procedure (NCCP) section on arbitration does not provide for any specific provision on the evidentiary proceedings, we consider that arbitrators may apply articles 58, 59 and 60 NCCP on the general principles of evidence, unless parties agree otherwise.

Pursuant to article 58 NCCP, each party should prove the facts its claims are based on. According to article 59 NCCP, a judge is allowed to order the parties to provide all evidence admissible by law. Article 60 NCCP provides that the parties should assist in the taking of evidence. If not doing so, the judge shall infer from the party's lack of cooperation or refusal, any appropriate outcomes. Additional articles of the NCCP apply to experts' appointment, testimonies and other investigative measures.

Article 17 of the 2020 ACLCC Rules provide that arbitrators may request the parties to provide further evidence to allow them to analyse the case.

Court involvement

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

Apart from article 1227 NCCP entitling the president of the competent district court to appoint an arbitrator if parties or arbitrators fail to do so, the NCCP does not provide any specific provision on court involvement in the arbitration proceedings.

However, unless parties agree otherwise, there is nothing to prevent arbitrators from requesting assistance from a court.

Confidentiality

31 | Is confidentiality ensured?

While the current Luxembourg arbitration law is silent on confidentiality, parties may address the subject of the confidentiality under their arbitration agreement.

Parties may also refer to article 458 of the Criminal Code. That article imposes a duty of professional secrecy on those who, owing their status or profession, obtain knowledge of secrets that are entrusted to them. Such a provision may apply to the arbitrator.

Bill No. 7671 on Arbitration lays down the confidentiality of the arbitration proceedings.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Under domestic law, the courts have jurisdiction to order interim measures unless parties have expressly excluded their jurisdiction over interim measures in the arbitration agreement.

According to article 20 of the 2020 ACLCC Rules, interim measures may be ordered by courts before the arbitration proceedings have been initiated.

Pursuant to article 21 of the Rules, in the event that the arbitration proceedings have been initiated, and unless parties agree otherwise, arbitral tribunals have jurisdiction to order interim measures.

Interim measures by an emergency arbitrator

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

Neither Luxembourg arbitration law nor the 2020 ACLCC Rules provides for an emergency arbitrator prior to the constitution of the arbitral tribunal.

Interim measures by the arbitral tribunal

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

Arbitrators have powers to grant interim relief. However, the awards providing for interim reliefs as well as final awards may be enforced only after they have been declared enforceable by the president of the district court save where the award is declared provisionally enforceable by the arbitral tribunal (articles 1242 and 1249 of the Luxembourg New Code of Civil Procedure (NCCP)).

Under the 2020 ACLCC Rules, an arbitral tribunal can grant any interim measures it considers necessary.

Such interim measures may be rendered in the form of an order or, when the tribunal considers appropriate, an award (article 21 of the 2020 ACLCC Rules).

Sanctioning powers of the arbitral tribunal

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

Neither Luxembourg arbitration law nor the 2020 ACLCC Rules refer to the sanctioning powers of the arbitral tribunal.

AWARDS

Decisions by the arbitral tribunal

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

Pursuant to article 1237 paragraph 2 of the NCCP, an arbitral award shall be made by a majority of the members of the arbitral tribunal. Article 24 of the 2020 ACLCC Rules states a similar provision. However, it adds that in the event that no majority can be reached, the president of the arbitral tribunal shall rule on the dispute, alone.

In the event that an arbitral tribunal consists of a certain number of arbitrators, article 1238 NCCP provides that failing to reach a decision on the dispute at stake, the arbitrators shall appoint an umpire. Failing appointment of an umpire by the arbitrators, the president of the competent district court will appoint the umpire upon the request of the 'most diligent' party. According to article 1239 NCCP, the umpire shall rule on the dispute within one month after its appointment, unless the time frame was extended. It shall first discuss the dispute with the arbitrators, and then issues the award settling the dispute. If the arbitrators fail to attend a meeting then the umpire issues the award alone.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

In the event of an umpire being appointed, article 1238 NCCP requires each arbitrator to draft a grounded opinion to be recorded through common minutes or under separate minutes. The umpire may issue an award taking into account those opinions

Otherwise, since no provision prevents an arbitrator from drafting an dissenting opinion, parties may agree whether or not they entitle the dissenting arbitrator to draft one.

Form and content requirements

38 | What form and content requirements exist for an award?

The award is delivered once each of the parties has been able to produce its arguments, defences and exhibits. The award shall be delivered in writing and signed by each of the arbitrators. In the event that there are more than two arbitrators, and provided some arbitrators refuse to sign it, the other arbitrators shall mention it, and the judgment shall have the same effect as if it had been signed by each of the arbitrators.

Pursuant to article 1244(8) NCCP, an award shall state the reasons upon which it is based. Failure to comply with the requirement for reasoning may expose an award to annulment.

Time limit for award

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

According to article 23 of the 2020 ACLCC Rules, the arbitral tribunal shall issue the final award within six months after the last member of the arbitral tribunal or the last party signed the terms of reference, or, in the event that a party refused to set the terms of reference, after the Secretariat notified to the tribunal arbitral the terms of reference.

However, the Council may set another time frame in accordance with the procedural timetable issued by the arbitral tribunal.

Date of award

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

In an ACLCC arbitration, the six-month time frame starts to run from the date under which the last member of the arbitral tribunal or the last parties signed the terms of reference, or, in the event that one party refuses to set the terms of reference, the date under which the Secretariat notified to the tribunal arbitral the terms of reference.

Types of awards

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

According to Luxembourg arbitration law and the 2020 ACLCC Rules, an arbitral tribunal may issue interim measures, procedural orders, partial awards, consent awards and final awards.

Termination of proceedings

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

The NCCP contains no provisions on other means than an award to terminate the arbitration proceedings. Parties may expressly agree on terminating the arbitration proceedings.

In contrast, under the 2020 ACLCC Rules, the parties may terminate an arbitration by a consent award. According to article 25 of these Rules, if parties to an arbitration succeed in reaching a negotiated resolution of their dispute, the parties may request to the arbitral tribunal, and if the tribunal agrees, to record the terms of the settlement in a consent award.

Cost allocation and recovery

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

The NCCP contains no provisions on the costs of arbitration proceedings, including their estimation and allocation. The costs of arbitration are usually defined by the arbitration agreement or the chosen institutional rules.

According to the 2020 ACLCC Rules, the costs of the arbitration include the fees and the expenses of the arbitrators and the ACLCC administrative expenses fixed by the Council. The costs of arbitration also include the attorneys' fees, and the fees and expenses of any experts (article 32 of the Rules).

The arbitral tribunal must decide which of the parties shall bear the cost of arbitration or in what proportion they shall be borne by the parties. To that end, the arbitral tribunal may take into account any relevant circumstances that it considers appropriate, including the parties' celerity and contributions to the efficient conduct of the proceedings and the avoidance of unnecessary costs and delays (article 33 of the Rules).

Interest

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

Interest may be awarded for principal claims at the rate specified in contracts entered into between parties or at the legal interest rate.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

The 2020 ACLCC Rules entitle an arbitral tribunal to correct a substantive calculation error or substantive typographical error included in the award, as long as the Council approved such correction within 30 days from the issuance of the award.

The parties may also request the arbitral tribunal to interpret or to correct substantive calculation error or substantive typographical error. To that end, a party shall submit its request to the secretariat within 30 days from the issuance of the award. Such request is subject to comments by the other party within 30 days from the notification of the request to that party. The arbitral tribunal shall issue and shall refer to the Council a draft decision within 30 days from the end of the time frame allowing the later party to submit its comments on the request for correction or interpretation.

The decision to correct or to interpret the award is considered as part of the award.

Challenge of awards

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

If the arbitral tribunal has failed to rule on one or more points of the dispute that may be dissociated from the points on which it has ruled, this tribunal may, at the request of one of the parties, complete its award, even if the time limit set for the arbitrators has expired, unless the other party disputes that points were omitted or that the omitted points can be dissociated from the points on which it was decided. In this case, the dispute is brought by the most diligent party before the district court. If the latter decides that the omitted points can be dissociated from the points on which the award has ruled, he or she refers the parties to the arbitral tribunal to have the award completed (article 1248 of the Luxembourg New Code of Civil Procedure (NCCP)).

The award can only be appealed to the district court by way of annulment. The nullity of the award may only be pronounced in the following cases:

- the award is contrary to the public policy;
- the dispute could not be settled by way of arbitration;
- there was no valid arbitration agreement between parties;
- the arbitral tribunal has exceeded its competence or powers;
- the arbitral tribunal has failed to rule on one or more points of the dispute and if the points omitted cannot be dissociated from points on which it has been decided;
- the award was rendered by an arbitral tribunal irregularly formed;
- there has been a violation of the rights of the defence;
- the award is not grounded, unless the parties have expressly dispensed the arbitrators from justifying the grounds therein;
- the award contains contradictory provisions;
- the award was obtained by fraud;
- the award is based on evidence declared false by an irrevocable court decision or on evidence recognised as false; and
- if, since the award was rendered, a document or other evidence has been discovered that would have had a decisive influence on said award and that had been retained by the opponent.

The application for annulment of the award is only admissible if the award can no longer be challenged before the arbitrators.

Levels of appeal

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

Under Luxembourg arbitration law, an arbitral award may be challenged before the competent district court, which implies that the unsuccessful party may appeal before the Luxembourg Court of Appeal. Ultimately, the challenge may be brought before the Luxembourg Supreme Court.

The unsuccessful party should bear the costs of the appeal proceedings unless the Luxembourg judges rule otherwise.

Recognition and enforcement

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

Articles 1250 and 1251 NCCP govern the recognition and enforcement of arbitral awards.

Luxembourg is party to several treaties facilitating recognition and enforcement of arbitral awards, namely the New York Convention of 10 June 1958, the European Convention on International Commercial Arbitration of 21 April 1961 and the ICSID Convention of 18 March 1965.

Enforcement of a foreign award is granted by the president of the district court, upon request of the applicant.

The request is brought before the president of the district court in whose jurisdiction the party against whom enforcement is requested has domicile or residence. If the defendant has no domicile or residence in Luxembourg, the request is brought before the president of the district court of the place where the sentence is to be executed.

The applicant must elect domicile in the district of the court with which the application is filed.

The grounds to deny the enforcement of an award are primarily the grounds stated by the New York convention, which are as follows:

- there is no valid arbitration agreement;
- a party was denied an opportunity to present its case;
- the award deals with matters outside the scope of the arbitration agreement;
- the composition of the arbitral tribunal or the arbitral tribunal was not in accordance with the parties' arbitration agreement;
- the award was not binding or has been set aside in the arbitration seat;
- the disputes were non-arbitrable; and
- the award violates the public policy.

In the event that the New York Convention does not apply, namely, where the reciprocity requirement is not fulfilled, article 1251 NCCP applies. That article provides three grounds to deny the enforcement of an award:

- the award is not final, in other words, the award is subject to appeal and the tribunal arbitral did not issue an order to provisionally enforce the award;
- the award or the enforcement of such award violates the public policy or in the event that the dispute was non-arbitrable; and
- if the award falls within article 1244(3) to (12) on annulment.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Luxembourg arbitration law does not provide for a limitation period about the enforcement of awards.

Enforcement of foreign awards

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

According to article V(1)(e) of the New York Convention, recognition and enforcement can be refused if the award has been set aside by a competent authority of the country of which, or under the law of which, that award was made.

However, in the event that the New York Convention does not apply to the award, article 1251 NCCP does not preclude the enforcement of an award that has been set aside by a competent authority of the country of which, or under the law of which, that award was made.

Enforcement of orders by emergency arbitrators

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

There is no provision under Luxembourg arbitration law on the enforcement of orders by emergency arbitrators.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Costs are mainly those in relation with bailiff costs for service and enforcement procedure.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Since Luxembourg is a civil law jurisdiction, the Luxembourg New Code of Civil Procedure (NCCP) does not provide for a discovery phase.

However, Luxembourg arbitrators may request the production of specific documents relevant and material to the outcome of the case, and written witness statements. Document production should, in principle, be limited to the documents critical to each party's case, and avoid the costs and delays associated with discovery in common-law jurisdictions. However, we have seen in some cases that document production was used, ending up like US-style discovery.

Professional or ethical rules

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

Counsels and arbitrators admitted to the Luxembourg bar, involved in an international arbitration, are subject to the Luxembourg rules on professional and ethical conduct. Having said that, if the parties or the selected institution arbitration rules require, they may also be subject to the IBA Guidelines on Party Representation in International Arbitration.

Third-party funding

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

There is no specific prohibition on a party having its arbitration financed by a third party. However, the third party cannot be a party in the arbitration proceedings without having the quality, capacity and a proper legitimate interest to bring proceedings. Furthermore, as part of the lawyers' obligations, lawyers must ensure that the financing of a dispute does not contravene any of the applicable anti-money laundering provisions. The lawyer must, in principle, take instructions from the client and the third-party funder is not allowed to influence the arbitration strategy set out between the lawyer and the client, in particular where the interests of the party to the arbitration are not protected.

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Regulation of activities

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

Luxembourg does not involve any adverse particularities that a foreign practitioner should be aware of.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

On 15 September 2020, Bill No. 7671 was filed and is still under discussion before the Luxembourg House of Representatives to modernise the current arbitration regime set under the Luxembourg New Code of Civil Procedure (NCCP). That bill is mainly based on the French arbitration law and the 2006 UNCITRAL Model Law.

Under that Bill, the major changes in the Luxembourg regime arbitration are as follows:

- the opening of a bankruptcy procedure has no impact on the validity of an arbitration agreement. However, disputes arising from collective proceedings are non-arbitrable (article 1226 of the Bill);
- article 1227 of the Bill clarifies that an arbitration agreement may be either an arbitration clause or a submission agreement;

- article 1227-2 sets forth the principle of separability and the principle of competence-competence, which allows, under Luxembourg law, an arbitral tribunal to rule on its own jurisdiction;
- pursuant to article 1227-4, a judicial court has jurisdiction to grant interim measures as long as the arbitral tribunal is not yet set – prior to the constitution of the arbitral tribunal;
- according to article 1231-9, an arbitral tribunal may grant any interim measures except a garnishment or attachment order;
- regarding the arbitrator's qualifications, article 1228-1 requires that the arbitrator be a natural person with legal capacity;
- under article 1228-6, the arbitrators must be independent and impartial;
- chapter 4 of the Bill (articles 1229 to 1230) sets forth a support judge to assist the party in the constitution of the arbitral tribunal and the conduct of the arbitral proceedings. The president of the competent district court is the support judge, and his or her involvement in the arbitral proceedings shall be limited;
- according to article 1231, in an international dispute, the parties are free to select any applicable substantive law to the dispute. Failing parties' choice of law, the tribunal shall apply the law it considers appropriate;
- arbitrators can be appointed in equity;
- article 1231-2 recognises parties' procedural autonomy to fashion the arbitral procedure;
- according to article 1231-12, an interested third party may join the arbitration proceedings; and
- pursuant to article 1232-3, an arbitral award is final and binding.

With regard to the enforcement of an arbitral award, Chapter 7 of the Bill draws a distinction between an award issued in Luxembourg and a foreign award. The bill is available in French at: https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&id=7671.

Macau

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

The application of the New York Convention has been extended to the Macau Special Administrative Region of the People's Republic of China (Macau) on 19 July 2005, by way of a note from the People's Republic of China (PRC) to the Secretary-General of the United Nations. Such extension is subject to the same reciprocity and commercial reservations that PRC had made on 22 January 1987, pursuant to article I of the 1958 New York Convention.

Macau has signed bilateral arrangements on mutual recognition and enforcement of arbitral awards with PRC (in 2007) and Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong SAR) (in 2013).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Macau entered into an agreement to increase economical and commercial relations between Macau and PRC (CEPA), signed on 17 October 2003, as well as with the Hong Kong SAR, signed on 27 October 2017.

Macau is also a party to the following bilateral agreements:

- the Agreement for Trade and Cooperation between the European Economic Community and Macau, dated 15 June 1992;
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965;
- the Agreement between the Portuguese Republic and Macau regarding the reciprocal protection of investments, dated 17 May 2000;
- the Agreement between the Kingdom of the Netherlands and Macau regarding the reciprocal protection of investments, dated 22 May 2008;
- the Agreement for Interconnection and Cooperation in Intellectual Property Rights between the National Intellectual Property Administration and the Macau Economic Bureau, which entered into force on 16 June 2020;
- Treaties for the Avoidance of Double Taxation entered into with:
    - the Portuguese Republic, dated 28 September 1999 (with an additional protocol dated 21 June 2018);
    - the PRC, dated 27 December 2003 (with additional protocols dated 15 July 2009, 26 April 2011, 19 July 2016 and 28 November 2009);
    - Belgium, dated 19 June 2006;
    - Mozambique, dated 15 June 2007;
    - Cape Verde, dated 15 November 2010;
    - Taiwan (related to airlines only), dated 10 December 2015;
    - Vietnam, dated (16 April 2018); and
    - the Hong Kong SAR, dated 25 November 2019.

On 1 July 2017, Macau has entered into the General Agreement for the Strengthening of the Guandong-Hong Kong-Macau Cooperation and Promotion of the Greater Bay Area Development, signed by and between Macau, the Hong Kong SAR, the People's Government of the Guandong Province and the National Development and Reform Commission.

Domestic arbitration law

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

In Macau, Law No. 19/2019, approved on 17 October 2019 and in force since 4 May 2020 (the Macau Arbitration Law), governs both domestic and external arbitral proceedings (for the purposes of the Macau Arbitration Law, arbitration proceedings with connection to the PRC, although not foreign, are considered external, since they are related to a different jurisdiction).

The Macau Arbitration Law applies to all arbitration proceedings initiated after its entry into force. In relation to all arbitration proceedings initiated after its entry into force, the Macau Arbitration Law is only applicable if the parties agree to it or if one party submits a proposal to that effect and the other party does not oppose it within 15 days from receiving notice thereof (if there's no agreement or non-objected proposal, the arbitration initiated prior to the entry into force of the Macau Arbitration Law is governed by Decree-Law no. 29/96/M, of 11 June 1996, governing internal arbitrations, and Decree-Law No. 55/98/M, of 23 November 1998, governing external commercial arbitrations).

As to recognition and enforcement of awards, further to the New York Convention and bilateral arrangements with PRC and Hong Kong SAR, Chapter VIII of the Macau Arbitration Law is especially dedicated to the recognition and enforcement of arbitral awards issued abroad.

In this respect, awards rendered locally or by an arbitral tribunal seated in Macau are automatically enforceable, whereas awards rendered abroad must be subject to court proceedings before the Court of Second Instance in order to be recognised and consequently become enforceable. Afterwards, the enforcement of such awards shall be made through the Court of First Instance. For awards rendered in the PRC or in the Hong Kong SAR, please see paragraph 48 below.

Domestic arbitration and UNCITRAL

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

Law No. 19/2019 (the Macau Arbitration Law) is primarily based on the UNCITRAL Model Law, as revised in 2006, with certain differences, notably: (1) the fact that Macau Arbitration Law is applicable to both domestic and international arbitration whereas the UNCITRAL Model Law applies to international commercial arbitration only; (2) the fact that the Macau Arbitration Law has an entire Chapter X dedicated to the arbitration of disputes of an administrative nature; and (3) the fact that the Macau Arbitration Law has created an 'emergency arbitrator' that may be appointed prior to the arbitral tribunal upon the parties' agreement (on the arbitration agreement or otherwise), to award interim relief when required (the Macau Arbitration Law also allows the arbitrators to conduct a conciliation procedure in case the parties instruct them to do so).

Mandatory provisions

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

Macau Arbitration Law stipulates that the parties are free to agree upon the procedure to be followed by the tribunal in conducting the proceedings, which may abide by the rules of an arbitral institution or be entirely decided by the parties. The following are mandatory procedural rules:

- The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods or documents (article 57/3 of the Macau Arbitration Law).
- All statements, documents or information supplied by one party to the arbitral tribunal shall be communicated to the other party, as shall be communicated to the parties any report or document presented as evidence on which the arbitral tribunal may rely in making its decision (article 57/4 of the Macau Arbitration Law).
- 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 (article 62/1 of the Macau Arbitration Law); and
- The arbitral award shall be made in writing and shall be signed by the arbitrator or arbitrators (article 64/1 of the Macau Arbitration Law). The arbitral award shall state its date and the place of arbitration and the award shall be deemed to have been made at that place (article 64/4 of the Macau Arbitration Law.

During the proceedings, the following legal principles apply:

- autonomy (parties shall be free to choose arbitration to resolve their disputes and to determine the rules governing the arbitration);
- audi alteram partem (parties are guaranteed effective participation in the proceedings);
- equality;
- confidentiality;
- informality and simplicity (proceedings should be conducted in forms that serve the interests of the parties and adapted to the terms of the dispute);
- timeliness and efficiency (the tribunal should conduct the proceedings in a rapid, dynamic, effective, and economic way, respecting the parties' guarantees);
- impartiality and Independence; and
- minimal intervention by judicial courts.

Substantive law

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

Macau Arbitration Law allows parties to freely decide on the rules of law applicable to the merits of the dispute (without prejudice of the International Law Principle, applicable in Macau, according to which the foreign or external laws governing the dispute should have been chosen pursuant to a relevant concern of the parties, or have an evident connection with any of the relevant elements of the dispute – and any circumstances the parties have created, with the fraudulent purpose of derogating the applicability of the otherwise applicable laws, may be deemed irrelevant).

If the parties fail to designate the applicable rules, the arbitral tribunal shall apply the law determined by the conflict of law rules that would be considered applicable according thereto.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

In Macau, there are the following arbitral institutions:

The Macau Lawyers Association Arbitration Center (the MLAAC)
Avenida da Amizade, 918, World Trade Center, 11st Floor A-D, Macau
www.aam.org.mo/centro-de-arbitragem/

World Trade Center Macau Arbitration Center (the WTCAC)
Avenida da Amizade, 918, World Trade Center, 16th Floor, Macau
www.wtc-macau.com/arbitration/eng/contact.htm

The Macau Consumers Council Arbitration Center
www.consumer.gov.mo/CAC/intro.aspx?lang=pt

The rules of the first two institutions provide considerable freedom to the parties regarding choice of place, language, applicable law and selection of arbitrators. Both have an indicative fee structure table that can be accessed through their respective websites.

The MLAAC rules over any other conflicts of a civil, commercial or administrative nature, in addition to conflicts between lawyers among themselves or between lawyers and respective clients.

The Macau Consumers Council Arbitration Center in turn aims exclusively to conflicts related to consumption. The arbitration proceedings provided thereby are free of charge.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

In general, all disputes regarding which the parties may enter into a settlement agreement can be subject to arbitration. Nevertheless, in Macau, kinds of disputes cannot be submitted to arbitration, as follows:

- disputes related to rights that cannot be disposed of by the person in whom they are vested (eg, parental authority);
- disputes over which the courts of Macau have exclusive jurisdiction; and
- disputes where the public prosecutor intervenes in representation of individuals who cannot appear in court by themselves, such as minors or interdicted persons.

The Macau Arbitration Law expressly provides that even disputes of an administrative nature may be arbitrable, if they are related to administrative contracts, involve liability for damages resulting from actions performed by public entities, decisions on rights of recourse, and are related to equity rights or legally protected interests, including amounts payable other than tax.

Requirements

9 What formal and other requirements exist for an arbitration agreement?

The Macau Arbitration Law sets forth that the arbitration agreement shall be in written form, including but not limited to a document in physical format. An arbitration agreement is deemed to be in writing when there is an exchange of statements of claim and defence in arbitral proceedings, in which the existence of an agreement is alleged by one party and not denied by the other.

The arbitration agreement is also deemed to be in writing when there is an exchange of statements in arbitral proceedings in which the agreement is alleged by one party and not denied by the other.

Furthermore, the arbitration agreement shall comply with the Macau public policy and general rules applicable to the formation of contracts.

Enforceability

10 In what circumstances is an arbitration agreement no longer enforceable?

Enforcement of an arbitration agreement is not possible when such arbitration agreement is void, which would be the case in Macau if made on a dispute that cannot be subject to settlement, when entered into between individuals without legal capacity or if not made in writing.

There are other situations however where an arbitration agreement is valid but may cease to be enforceable, such as when parties thereto decide to revoke it. According to Macau Arbitration Law, an arbitration agreement can be revoked by the parties thereto, in writing, until the arbitral decision is awarded.

Death or dissolution of the parties shall not cause the arbitration agreement to expire, and does not entail the termination of arbitration proceedings, unless stipulated or agreed by the parties.

Separability

11 Are there any provisions on the separability of arbitration agreements from the main agreement?

Article 46/3 of the Macau Arbitration Law provides that, in case the arbitral tribunal decides that the contract is null and void, this shall not automatically entail the invalidity of the arbitration clause. Also, the arbitration agreement may be contained in an autonomous agreement (article 11/6 of the Macau Arbitration Law).

Third parties – bound by arbitration agreement

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

The Macau Arbitration Law does not contain any disposition on this matter and, pursuant to article 400/2 of the Macau Civil Code, contracts only bind third parties if stipulated by law.

Under Macau law, assignment and succession determine that a party takes over the contractual position of the original party to a contract, therefore, the assignee or successor will become a party to the agreement and therefore, technically, they are not third parties.

Third parties – participation

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

The Macau Arbitration Law is omissive in respect to third-party participation in an arbitral proceedings but considering that the regime is structured on the basis of the parties agreement, third-parties shall be allowed to join provided that all parties agree and the arbitral tribunal consents on such participation.

As an example, there is a specific provision in the MLAAC's regulations, to which parties may agree to adhere, whereby a third-party may intervene in an arbitration, at any of the party's request or by decision of the chair, upon hearing the non-requesting party or parties. After the composition of the arbitral tribunal, such intervention to an ongoing arbitration is only possible if the intervening third party declares its acceptance to the actual composition of the tribunal.

Groups of companies

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

Macau laws do not recognise the concept of 'group of companies'.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

Multiparty appointment of arbitrators is not expressly addressed under the Macau Arbitration Law. Nonetheless, there are no limitations as to the number of parties in an arbitration agreement. A formal requirement is that the agreement shall be in writing.

In the case of multiplicity of claimants or defendants, the Macau Arbitration Law stipulates that, if all the claimants or all the respondents do not appoint the arbitrator or the arbitrators within 30 days from the receipt of a request to this effect by the other party, or if the arbitrators appointed fail to reach an agreement with regard to the choice of the last arbitrator within 30 days from the final appointment by the parties, the appointment is made, at the request of any claimant or respondent, by the judicial court (or by the head of the arbitral institution, if applicable, as is the case of the MLAAC and the WTCAC).

The judicial court may also, if it considers it justified to ensure equality of the parties, appoint all the arbitrators, and, if applicable, from among them, the president, rendering ineffective the appointment of an arbitrator or of arbitrators that one of the parties has made in the meantime.

There not being agreement by all the claimants and all the respondents in the choice of the sole arbitrator, when applicable, the sole arbitrator shall be appointed, at the request of any of the claimants or of any of the respondents, by the judicial court.

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Macau Arbitration Law does not contain any provisions on whether an arbitral tribunal may consolidate separate arbitral proceedings or not.

As an example, there is a specific provision in the MLAAC's regulations, to which parties may agree to adhere, whereby the Chair of the

Executive Counsel of the Center may decide to merge two or more arbitrations into one single arbitration, at the request of any of the parties thereto or by its own initiative, after having heard the former and the respective arbitrators.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

The Macau Arbitration Law requires arbitrators to be individuals with full legal capacity but also provides for the possibility of a legal entity being appointed as arbitrator. Unless otherwise agreed by the parties, no person shall be precluded from exercising the role of arbitrator on the grounds of nationality or lack of residency. Furthermore, both Macau Arbitration Law and, as an example, the MLAAC regulation (article 14) impose that any person acting as arbitrator shall be independent and impartial.

The WTCAC regulation also provides for specific rules on the matter, according to which the arbitrators panel shall be composed by any individual, who may or may not reside in Macau, of any nationality, with proven moral and professional credibility, whom, regardless of their professional background, is qualified to arbitrate under the guidance of the centre the disputes submitted thereto with independence and impartiality.

Arbitration institutions may also impose as an additional requirement for arbitrators to be members thereof.

The Macau Arbitration Law does not preclude judges (active or retired) to act as arbitrators.

Background of arbitrators

18 Who regularly sit as arbitrators in your jurisdiction?

The number of arbitration proceedings in Macau may not be sufficient to extrapolate trends. In any case, according to our experience in international arbitrations with seat in Macau, parties often appoint retired judges (non-Macau based) and practising lawyers as arbitrators (although there is no obstacle to the appointment of other professionals, such as engineers or architects, where the parties deem more convenient).

Default appointment of arbitrators

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

Under the Macau Arbitration Law, parties are free to determine the number of arbitrators that comprise the arbitral tribunal by mutual agreement and, in the absence of an agreement, the tribunal shall be composed of three arbitrators.

In case parties fail to agree in the appointment of arbitrators, the default rules with respect to this matter are as follow:

- in proceedings with three arbitrators, each party appoints one arbitrator, who in turn will jointly appoint the chair of the arbitral tribunal. If the co-arbitrators fail to appoint the chair, the judicial court will do so at the request of any of the parties (or by the head of the arbitral institution, if applicable, as is the case of the MLAAC and the WTCAC);
- in an arbitration with two or any other even number of arbitrators, each of the parties shall appoint an equal number of arbitrators; and
- in an arbitration with one sole arbitrator, if the parties are unable to agree on the arbitrator, the arbitrator shall be appointed by the court at the request of any or the parties.

Challenge and replacement of arbitrators

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

The Macau Arbitration Law determines that the appointment of an arbitrator may be challenged only if circumstances exist that may raise justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed to by the parties or required by law. A party may only challenge an arbitrator appointed by itself on grounds that became known by such party after such appointment.

The procedure for challenging an arbitrator may be agreed by the parties or in their absence, the law provides that a party interested in challenging the arbitrator shall file the respective plea in writing directly to the arbitral tribunal, setting forth its reasoning.

Unless the challenged arbitrator withdraws from the office or the other party agrees to the challenge, the arbitral tribunal, including the challenged arbitrator, shall decide on the challenge, which shall be subject to no appeal.

An arbitrator appointment may be terminated by the parties or end by self-withdrawal in cases where the arbitrator becomes, by law or in fact, unable to perform its office or fails to perform its role within a reasonable period.

Macau Arbitration Law further stipulates that in all cases where, for whatever reason, the office of an arbitrator terminates, a substitute arbitrator shall be appointed, according to the rules originally applicable to the appointment of the substituted arbitrator.

Relationship between parties and arbitrators

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

Parties and arbitrators are bound by a contractual relationship, and both party-appointed and non-party-appointed arbitrators must, in the performance of their duty, proceed independently and impartially.

Arbitrators' fees and expenses shall be included in the arbitration agreement or agreed by the parties thereto. In the absence of such agreement, the fees and expenses (as well as any payment advance thereof) are fixed by the arbitral tribunal, in accordance with the table of one of Macau SAR's arbitral institutions, pursuant to the Macau Arbitration Law.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

When someone is approached in view of becoming an arbitrator, that person is legally under the obligation to disclose any circumstances that may impact its impartiality or independence for the role.

Subsequently, such duty of disclosure persists throughout the whole arbitral proceedings with respect to any facts or developments that may occur or had not been disclosed in advance.

Immunity of arbitrators from liability

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

Under the Macau Arbitration Law, an arbitrator cannot be held liable for decisions made within his or her role as an arbitrator, save that he or she will be held liable for any breach, by act or omission, of the duties to which he or she is contractually or legally bound with respect thereto.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

Pursuant to the Macau Arbitration Law, in cases where a dispute is brought before a judicial court in Macau despite an existing arbitration agreement, such court shall, by request of the respondent until the moment of submitting their first statement on the substance of the dispute, acquit the respondent without deciding on the merits of the case, unless it deems that the arbitration agreement is null and void, unenforceable, or not susceptible of being performed.

Nonetheless, the arbitration proceedings can be commenced or continued, and an arbitral decision may be awarded, while the issue is still pending before the judicial court. If the judicial court decides, in a final judgement, that the arbitral tribunal has no jurisdiction, the arbitral award will cease to be effective.

Jurisdiction of arbitral tribunal

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

The Macau Arbitration Law stipulates that the arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence, validity, or efficacy of the arbitration agreement.

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence or might be ruled by the arbitral tribunal as a preliminary question or in the award on the merits.

If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request the judicial court to decide the matter, within 30 days of having received notice of that ruling. The decision of the judicial court shall not be subject to appeal.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

According to the Macau Arbitration Law, parties may freely agree on the place, language or languages and procedural law of the arbitral proceedings. Furthermore, parties may freely decide on the rules of law applicable to the merits of the dispute.

If the parties fail to designate the rules that shall apply to the dispute, the arbitral tribunal shall apply the law that is determined by the conflict of law rules in force in Macau. Parties may agree that sets of legal rules are to be applicable to the merits of the cause, including laws of a country or state, region, or even public or private international sets of rules (such as lex mercatoria, INCOTERMS, OHADA or the UNIDROIT principles of international commercial contracts).

The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only when the parties have expressly authorised it to do so.

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages applicable to the relevant underlying transaction.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

The proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Hearing

28 | Is a hearing required and what rules apply?

The requirement for a hearing to take place is a matter that the Macau Arbitration Law leaves to the discretion of the arbitral tribunal, unless the parties specifically agree on this matter.

However, under the same law, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

If deemed convenient, the tribunal, at the request of the parties or on its own initiative, may take depositions, hear witnesses, carry out expert examinations and determine the production of any other evidence it may find necessary. The parties and the tribunal may freely determine upon the procedural rules applicable to the hearing.

To this respect, parties are required by law to give sufficient advance notice of any hearing and of any meeting of the arbitral tribunal, so to allow for proper inspection of goods or documents with respect thereto. In addition, notice to the other party shall be given with respect to all statements, documents or information supplied to the arbitral tribunal and any report or document presented as evidence on which the arbitral tribunal may rely in making its decision shall be also disclosed to all parties under dispute.

Evidence

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

The arbitral tribunal decides on all aspects relating to the taking of evidence.

The Macau Arbitration Law would allow parties or party officers to testify (which is not allowed in Macau judicial court proceedings), if admissible under the procedural rules agreed by the parties.

Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the tribunal, which may require any of the parties to provide to the expert all relevant information or to produce or provide access to any relevant documents or goods for the expert's inspection.

Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of the written or oral report, participate in a hearing where the parties have the opportunity to question the expert and to present expert witnesses to testify on the points at issue.

The IBA Rules on the Taking of Evidence in International Arbitration may be applied (and have been) in international arbitration proceedings with seat in Macau.

Court involvement

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

The Macau Arbitration Law provides the tribunal, or any of the parties with the tribunal's approval, may request judicial courts urgent intervention for assistance in obtaining evidence, especially when the evidence to be produced depends on the will of one of the parties or of a third party and they refuse to cooperate.

Confidentiality

31 | Is confidentiality ensured?

The arbitrators, the parties and any other person who, in the exercise of their role, have contact with the procedure are subject to a special legal duty of confidentiality with respect to all information and documents of which they become aware within the procedure.

Such duty of confidentiality may only be set aside if imposed by law or by agreement of the parties or in cases where disclosure is required to proceed with the registration of the arbitral award or for the exercise of any rights of the parties in court.

Under such confidentiality duty, unless any of the parties opposes within five days of the date of communication of the arbitral decision, the arbitrators or the arbitration institutions are allowed to publish arbitral awards, provided that the elements that identify or make it possible to identify the parties thereto are omitted.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

There is no exclusivity for the judicial courts or for the arbitral tribunal in respect of the ordering of interim measures.

Any party may request an interim measure from a judicial court, before or during arbitral proceedings and such court may grant it or not.

If the interim measure is granted by a judicial court prior to the commencement of the arbitration proceedings, the applicant shall take the necessary steps to set up such arbitral proceedings within the timeframe set out by civil procedure law for filing judicial proceedings on which the measure depends, otherwise such interim measure will expire.

On the other hand, the Macau Arbitration Law also determines that, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of any party and after hearing the party against whom it is directed, grant interim measures.

The same law further determines that, unless otherwise agreed by the parties, a party may, without notice to the other party, make a request for an interim measure coupled with a request for a preliminary order in cases where the prior disclosure of the request for the interim measure to the party may jeopardise the purpose of the requested interim measure.

Interim measures by an emergency arbitrator

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

The Macau Arbitration Law recognises the possibility of appointment of an emergency arbitrator.

The parties may, in the arbitration agreement or subsequently, agree on the appointment of an emergency arbitrator, in which case they must also agree on the rules for its appointment, otherwise such arrangement will be null and void.

The appointed emergency arbitrator can issue urgent interim measures, at the request of any party and after hearing the party against whom it is directed and keeps the competence to decide on the urgent interim measure request even if the arbitral tribunal is constituted in the meantime. Said competence ends with the decision or with the constitution of the arbitral tribunal.

Interim measures by the arbitral tribunal

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

Under the Macau Arbitration Law, the arbitral tribunal has powers to issue any interim measures it finds appropriate while the resolution of the dispute is still pending, including but not limited to ordering a party to:

- maintain or restore the situation existing previously to the dispute;
- take measures that would prevent, or refrain from taking action that may cause, current or imminent harm or prejudice to the arbitral proceedings;
- provide the necessary means to safeguard the assets which will allow for the enforcement of a subsequent arbitral award; and
- preserve evidence that may be relevant and material for the resolution of the dispute.

The party requesting an interim measure (except preservation of evidence) shall demonstrate that:

1 if the interim measure is not granted, it is likely to result in harm not adequately repairable by an award of damages, and such harm substantially exceeds the harm that would result to the party against whom the measure is requested if the measure is granted; and
2 there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

With regard to a request for an interim measure for preservation of evidence, the requirements in item (1) of the previous paragraph only apply to the extent considered adequate by the arbitral tribunal.

The law also stipulates that the arbitral tribunal may require a party requesting an interim measure to provide appropriate security (we also note that the party requesting an interim measure is liable for any costs and damages caused by the measure, if the arbitral tribunal later determines that, in the circumstances, the measure should not have been granted, and the tribunal may, at any moment during the procedure, make an award against the responsible party for such costs and damages).

Sanctioning powers of the arbitral tribunal

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

There is no express provision pursuant to which an arbitral tribunal may impose sanctions on the recalcitrant parties or their counsel who use guerrilla tactics to delay or obstruct arbitration proceedings. However, the parties are free to introduce any rules or guidelines into

their arbitration agreement to govern the arbitration proceedings. Furthermore, sanctions may be justified if applied to enforce the general legal principle of timeliness and efficiency applicable to arbitration.

The tribunal may apply penalties to parties that fail to comply with an order of the arbitral tribunal (and the proceeds of such penalties shall revert to the counterparty).

AWARDS

Decisions by the arbitral tribunal

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

In an arbitral tribunal composed by more than one arbitrator, a unanimous vote is not required for the tribunal to decide on any matter, as the majority will suffice.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

If divergent opinions prevent that a decision by simple majority is obtained, the tribunal shall indicate to the parties the necessity of appointing an additional arbitrator in order to form a majority (unless otherwise agreed by the parties or stipulated in the rules governing the arbitration, the appointment of the additional arbitrator is effected by the other arbitrators or, if these do not reach an agreement within 30 days, by the court, at the request of any party).

The Macau Arbitration Law does not address dissenting opinions against the opinion of the simple majority of the arbitrators. In these cases, the dissent arbitrator may state the grounds of its disagreement in writing, if agreed by the parties or allowed under the rules of the arbitration institution to which they have adhered to, but such declaration would not impact the award itself in any way.

Form and content requirements

38 | What form and content requirements exist for an award?

The arbitral award must be made in writing and signed by the arbitrator or arbitrators who compose the tribunal. It has to state the date and the place of arbitration, and a copy thereof signed by the arbitrators shall be delivered to each party.

In arbitration 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 in the award.

The arbitral award shall include a detailed explanation of the grounds that based the decision, unless the parties have agreed that no reasons are to be given, or if the arbitral award is an award on agreed terms by a settlement.

Under the MLAAC regulation, the award shall also be expressed in the form of a written document signed by the arbitrator or arbitrators and shall include a report with the parties' identification and a summary of the dispute, the grounds for the decision where questions of fact and law, the decision, the determination of costs and sharing between the parties and the date and place on which it is issued.

Time limit for award

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

The Macau Arbitration Law does not stipulate a time limit for the award to be rendered.

The MLAAC regulation contains a provision that requires the final decision to be rendered within 12 months from the date of the first meeting of the arbitral tribunal – subject to extension upon the party's consent.

Date of award

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

The time limit for a challenge or for a request for correction or interpretation of an award is 30 days counted from the date of the receipt of such award by the parties.

In addition, a party may, upon notice to the other party, request the arbitral tribunal, within 30 days from the date of receipt of the award, to render an additional award with respect to claims presented to the tribunal but omitted and not addressed in the arbitral award.

An application for setting the award (a judicial challenge under limited grounds, as detailed under paragraph 46 below) shall be made within three months from the date of receipt of the arbitral award or, if applicable, from the date of receipt of the decision on a request for correction or interpretation.

Types of awards

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

The Macau Arbitration Law does not include any specific rule on partial awards but unless otherwise agreed by the parties, final awards and partial awards are generally recognised.

The MLAAC regulation includes an express provision whereby, in addition to final awards, the arbitral tribunal is entitled to, where it considers appropriate, grant partial awards when deciding on the merits of the case.

Termination of proceedings

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

Arbitration proceedings are normally terminated by a final arbitral award. Nevertheless, proceedings may also terminate by means of a settlement affirmed by the tribunal or termination order.

Cost allocation and recovery

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

The Macau Arbitration Law merely stipulates that, in the absence of an agreement between the parties, the fees, expenses and payment of the arrangements are determined by the arbitral tribunal, according to the table of fees of one of the Macau arbitration institutions.

In relation to allocation, there is no statutory default rule. As an example, under the MLAAC regulation the award shall include a determination of costs and sharing between the parties and the date and place on which it is issued.

Interest

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

Under Macau law, the issue of interest normally falls within the scope of substantive law and an arbitral tribunal would award interest pursuant to the provisions of the applicable substantive laws at the request of one or both parties.

Interest applicable to the transaction under dispute is a matter of substantive law and an arbitral tribunal with seat in Macau, or applying Macau laws, may award the same at the request of one or both parties if that is its determination pursuant to the applicable substantive law (we further note that there are usury or interest limitation laws in Macau, according to which interest is limited at three times the legal interest rate, which currently stands at 9.75 per cent per annum but may be varied, and any higher rate may be deemed inapplicable due to being contrary to public policy).

Macau law does not regulate interest on judicial or arbitral costs, but interest on costs incurred with arbitration may be awarded when agreed by the parties and claimed by any one of them.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Upon reception of an arbitral award and notice to the other party, any of the parties may, within 30 days, request the arbitral tribunal to correct in the text of the arbitral award any errors of computation, clerical, typographic, or of a similar nature. The tribunal will then have an indicative period of 30 days to issue the interpretation or correction, if the request is deemed justified. In addition, the tribunal may be requested to interpret a point or specific part of the arbitral award, if the parties agree in this regard.

The arbitral tribunal may also, on its own initiative, correct any of the errors mentioned above, within the same time frame.

Within the same deadline, unless agreed otherwise, a party, with notice to the other party, may request the tribunal to make an additional award on claims duly presented but omitted in the award. The tribunal will then have an indicative period of 60 days to issue the said additional award, if the request is deemed justified.

Challenge of awards

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

Pursuant to the Macau Arbitration Law, a judicial challenge to the arbitral award may only be made by an application for setting aside, with limited grounds:

- the party's incapacity;
- invalidity of the arbitration agreement;
- failure to notify a party to appoint an arbitrator or such party could not assert their rights for any other reason;
- the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope thereof;
- the composition of the tribunal or the procedure was not in accordance with the parties' agreement, unless such agreement conflicted with a mandatory legal provision or, failing such agreement, was not in accordance with this law;
- the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Macau laws; or
- the court finds that the award conflicts with public policy.

Levels of appeal

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

No appeal is possible against the award of the arbitral tribunal, unless the parties have agreed on the possibility of appeal (and on the terms of the appeal) to another arbitral tribunal, before the arbitral award is rendered. The costs incurred with an appeal, and their apportionment, will largely depend on the parties' agreement and the chosen arbitral institution.

In case a preliminary issue is referred to the judicial courts (eg, assistance on the appointment of arbitrators failing parties' agreement, challenge and termination of appointment of arbitrators, decision on jurisdiction), the court's decision is not subject to appeal.

In case a judicial challenge is made to set aside the arbitral award, the respective judicial proceeding will follow the general rules of the Macau Civil Procedure Code and subject to three levels of appeal (First, Second and Last Instance). Costs will depend on the amount of the claim and, in case there are appeals on the three levels, the issuance of a final decision will likely take more than four or five years. Notwithstanding, the submission of the application to set aside the arbitral award will not have a suspensive effect, meaning that a proceeding to enforce the award may be initiated.

Recognition and enforcement

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

Domestic awards are immediately enforceable, allowing the interested party to begin the enforcement of judgment as soon as the decision is definitely rendered by the tribunal.

Awards issued outside of Macau are only enforceable after undergoing a procedure for recognition and confirmation with the Macau Court of Second Instance. In such cases, the requesting party shall provide the original or a certified copy of the award, translated into one of Macau's official language (if applicable).

The recognition of an arbitral award may only be refused:

- at the request of the party against whom it is invoked, if such party provides evidence that:
  - any of the parties to the arbitration agreement suffered from some incapacity;
  - the arbitration agreement is not valid under the law to which the parties subjected it or under the law or region where the arbitral award was made;
  - the party against whom the award is invoked was not given proper notice of the choice or appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable exercise their rights for whatever reason;
  - the arbitral award deals with a dispute not covered by the arbitration agreement or contains decisions that exceed the scope thereof;
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties ´ agreement or was not in accordance with the law of the state or region where the arbitration took place; or

- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country or region in which, or under the law of which, that award was made; or
- if the court finds that:
  - the subject matter of the dispute is not capable of settlement by arbitration under the law of Macau; or
  - the recognition of the arbitral award would be contrary to the public policy.

The bilateral arrangements on mutual recognition and enforcement of arbitral awards, entered into by and between Macau and the PRC (for awards on civil and commercial matters issued in the People's Republic of China by arbitration institutions of the People's Republic of China pursuant to the laws of the People's Republic of China) and the Hong Kong SAR (for awards issued in the Hong Kong SAR pursuant to the arbitration law of the Hong Kong SAR), set out slightly different recognition and confirmation procedures.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The general rule in Macau, pursuant to article 302 of the Macau Civil Code, is that the time limit for exercising a right is 15 years, which is generally applicable to arbitral awards.

Enforcement of foreign awards

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

The Macau Arbitration Law states that the enforcement of an arbitral award may be refused when the award has been set aside or suspended by a state court at the place where the arbitration took place.

Enforcement of orders by emergency arbitrators

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

Emergency arbitrators may issue orders at the request of any party, upon hearing the party against whom such interim measure is being requested.

Urgent interim measures issued by the emergency arbitrator are equivalent to interim measure issued by the arbitral tribunal, and therefore shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the court, irrespective of the country or region in which such interim measure has been decided (without prejudice to the general grounds for refusal of enforcement).

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Upon enforcement of an award, the applicant will have to advance judicial fees for submission of the initial request, which depend on the amount being claimed and ultimately will be imputable to the defeated party. Lawyers' fees are also partially imputable to the losing party.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

The legal system of the Macau SAR is of civil law, based on the rule of law and the prevalence of statute over custom, equity and precedent. Principles like judge's discretion to decide on the matters of fact and law at hand are likely to be upheld by Macau-based arbitrators, as well as parties' reliance on documentation and other evidence that it is able to produce on its own (rather than a discovery process - without prejudice, parties' agreement to undergo such process would be recognised).

Witness verbal testimonies will likely be preferred to witness statements (which are not required) by Macau-based arbitrators, as local courts place great value on the most direct possible means of acquisition of evidence.

Parties and parties' officers are not allowed to testify in judicial proceedings in Macau (as it is understood they have a direct interest in the case and may be biased), although they may be called by the counterparty to testify in a court hearing on specific matters, for the sole purpose of obtaining the acknowledgement of detrimental facts. In case the parties have agreed that parties and parties' officers are to be allowed to testify, it is likely that a Macau-based arbitrator will qualify the evidence resulting from their testimony or statement based on the foregoing.

Professional or ethical rules

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

Although there is no legislation on this issue, local arbitration institutions have approved arbitrators' ethical codes (namely the MLAAC), which do not contradict the IBA guidelines but tend to reflect civil law traditions.

When an arbitrator is also a lawyer, the Macau Lawyers Association ethical code will also be applicable.

Third-party funding

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

The Macau SAR has not enacted a specific statutory or regulatory framework for third party funding, making it unclear whether or not this practice is admitted. In any event, the following areas would generate concerns and limitations:

- the funder cannot be considered as the unlicensed operator of a banking or financial institution activity in Macau (which would typically be the case if several litigations are funded); and
- the absence of arbitrators' conflict of interest, their neutrality, impartiality and independence, as well as their disclosure duty must be assessed vis-à-vis the funder also.

A Macau lawyer is not allowed to fund the party insofar as that would represent a form of quota litis, which is expressly forbidden under the Macau Lawyers Association ethical code.

We also note that, in Macau, a party is under no obligation to disclose if it is being funded by a third party, and courts do not have to assess the parties' capability to support court or lawyers' fees.

Regulation of activities

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

The Macau Arbitration Law exempts non-Macau based arbitrators from any administrative authorisation for the exercise of their respective activity, and may remain in Macau for the duration of the arbitration proceedings – however, travel and entry bans, namely in relation to the coronavirus pandemic, would supersede this exemption. Other than arbitrators, any other intervenient in an arbitration must comply with all administrative and professional requirements, as there is no other applicable exemption.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The Macau Arbitration Law entered into force during 2020 and the Macau arbitration sector is now more equipped to host local and international arbitrations (whether applying Macau laws substantive or curial laws). The arbitration system is now simpler and more aligned with standard international practices, and the sector is adapting and trying to increase the relevance of alternative dispute resolution mechanisms.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Mexico is a contracting state to the New York Convention (signed on 14 April 1971). No declarations or notifications were made. Likewise, Mexico is a party to other treaties governing international commercial arbitration agreements, such as the Inter-American Convention of International Commercial Arbitration (the 1975 Panama Convention) and the Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards (the 1979 Montevideo Convention).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Regarding arbitration, Mexico entered into a bilateral treaty: the Convention between Mexico and Spain on Recognition and Enforcement of Court Judgments and Arbitral Awards in Civil and Commercial Matters, which was effective 1992.

Domestic arbitration law

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

Because Mexico entered into the North American Free Trade Agreement (NAFTA) with the United States and Canada and as part of Mexico's economic modernisation, the country made legislative changes to allow the incorporation of the international trade to Mexico. Therefore, Mexico adopted the UNCITRAL Model Arbitration Law on 22 July 1993 by amending the Code of Commerce in its Fifth Book (the Mexican Arbitration Law).

The Mexican Arbitration Law governs both domestic and foreign arbitration proceedings and the enforcement of awards.

Under article 1416 (III) of the Mexican Arbitration Law, international arbitration exists when:

- the parties, when executing the arbitration agreement, have their establishments in different countries; or
- the seat of arbitration of the arbitration agreement or the place of fulfilment of the substantial obligations of the relation or the place in which the subject of the dispute has closer relationship is located outside the place in which the parties have their establishment.

Domestic arbitration and UNCITRAL

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

Yes, Mexico has adopted most of the UNCITRAL Model Arbitration Law, although there are some differences. The UNCITRAL Model Arbitration Law applies to international commercial arbitration (article 1) while the Mexican Arbitration Law is applicable to both international and national arbitration (article 1415). If the parties fail to agree on the number of arbitrators, the UNCITRAL Model Arbitration Law allows for three arbitrators (article 10) as opposed to the one arbitrator foreseen in the Mexican Arbitration Law (article 1426). The UNCITRAL Model Arbitration Law contains dispositions regarding the conditions for granting interim measures, applications for preliminary orders and conditions for granting preliminary orders, the specific regime for preliminary orders, modification, suspension, termination, disclosure and cost and damages of interim measures (articles 17, 17A, 17B, 17C, 17D, 17E, 17F, 17G). In contrast to the UNCITRAL Model Arbitration Law, the Mexican Arbitration Law contains dispositions regarding arbitration costs (Chapter VII, articles 1452–1456) and the procedures to be followed by the national courts when intervening in arbitration matters (Chapter X).

Mandatory provisions

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

The arbitration agreement should be executed by parties whose consent should be absent of error and fraud and was not given under duress. The arbitration agreement has a legal and lawful purpose, including that the subject matter is subject to arbitration. The parties should have the legal capacity to execute the arbitral agreement. The arbitral agreement should be in the form required by law.

Pursuant to article 1423 of the Mexican Arbitration Law, the arbitration agreement should be in writing and should be contained in a document signed by the parties, or in an exchange of letters, telex, telegrams and other means of communications in which the agreement is included. The arbitration agreement can also consist of an exchange of statement of claim and defence in which one party alleges the existence of an agreement and the other party does not deny it. Furthermore, an arbitration agreement is enforceable whenever there is a reference in a contract to other documents that contain an arbitral clause in writing, provided that the reference is clear as to make that clause part of the contract.

Substantive law

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

The Mexican Arbitration Law allows parties to freely decide on the applicable law to the merits of the dispute. Article 1445 of the Mexican Arbitration Law states that in the absence of any express provision, the Arbitral Tribunal shall decide the applicable law considering the characteristics and connections of the case.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The main Mexican Arbitral Institutions are the Arbitration Center of Mexico (CAM) and the Mediation and Arbitration Commission of the National Chamber of Commerce (CANACO).

The Arbitration Rules of CAM are similar to the ICC Rules. The CAM offices are located at:

Felix Cuevas 301, Suite 304
Del Valle Centro
Benito Juárez 03100
Mexico City
Tel: +52 55 7158 7384
camex@camex.com.mx
www.camex.com.mx

CANACO follows the UNCITRAL Arbitration Rules. Its office is located at:

Morelos 67, 5th Floor
Juárez
Cuauhtémoc 06600
Mexico City
Tel: +52 55 3685 2269
centroarbitraje@arbitrajecanaco.com.mx
www.arbitrajecanaco.com.mx

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Yes, in Mexico some types of disputes are excluded from arbitration. The national courts have exclusive jurisdiction in matters related to:

- land and water located in national territory, including subsoil, airspace, territorial sea and the continental shelf;
- resources of the exclusive economic zone or related to sovereign rights of said zone; and
- acts of authority or acts related to the internal regime of the state and of local and federal entities.

Likewise, public works and public purchases executed between public entities and individuals can be subject to arbitration. However, the Law of Public Works and Related Services (article 98) and Law of Procurement, Leasing and Services for the Public Sector (article 80) states that disputes arising out of administrative rescission and early termination are excluded from arbitration.

The Public-Private Partnerships Law (article 139) allows arbitration but establishes that revocation of concessions, authorisations and acts of the authorities are not subject to arbitration.

The Hydrocarbons Law foresees arbitration for contracts for oil exploration and extraction but excludes administrative rescission from arbitration (article 21).

Regarding industrial property matters, not all disputes may be subject to arbitration – just commercial and civil disputes derived from the application of the Industrial Property Law that only affect individual interests (article 227). In connection with telecommunications matters, pursuant to the Mexican Telecommunications and Broadcasting Law, disputes between the concessionaires and the federation, states and municipalities are exclusively under the jurisdiction of specialised courts (article 5); however, disputes between concessionaires and licensed holders can be arbitrable. Antitrust matters are not arbitrable under Mexican law.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Pursuant to article 1423 of the Mexican Arbitration Law, the arbitration agreement should be in writing and contained in a document signed by the parties, or in an exchange of letters, telex, telegrams, and other means of communications in which the agreement is included. The arbitration agreement can also consist of an exchange of statement of claim and defence in which one party alleges the existence of an agreement and the other party does not deny it. Furthermore, an arbitration agreement is enforceable whenever there is a reference in a contract to other document that contains an arbitral clause in writing, provided that the reference is clear as to make that clause part of the contract.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

A valid arbitration agreement can cease to have effect for various reasons. For example, if the parties have implicitly or explicitly revoked the arbitration agreement, in a dispute that has already been decided (in arbitration or through litigation) and therefore is res judicata, that the dispute has been settled, or when the dispute can no longer be solved by arbitration because the time limit for filing the claim has been prescribed.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The principle of separability of the arbitration clause is embodied in article 1432 of the Mexican Code of Commerce, which states that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Therefore, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Therefore, any party challenging the enforceability of the entire commercial agreement containing an arbitration clause should pursue said claim before the arbitral tribunal and not before the national courts.

Third parties – bound by arbitration agreement

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

The Mexican Arbitration Law does not foresee this scenario. However, consent is required in order to be bound by an arbitration agreement. A party can be bound if it can be demonstrated that consent was given even though the party did not sign the arbitration agreement.

Traditionally, there are two mechanisms that allow a third party or a non-signatory to participate in an arbitration procedure. First, by means of transmission – this is carried out in those cases in which the effects of the arbitration clause extend to a party outside the pre-existing obligation, such as in the assignment of a contract. Second, by extension – this occurs in cases where a party unrelated to the pre-existing obligation is affected by the arbitration clause, such as through a contract, and by virtue of said extension is part of the arbitration procedure. Some of the frequently heard examples have been the 'alter ego' theory, the 'group of companies' theory, the 'piercing the corporate veil' theory and cases of joint ventures.

Third parties – participation

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

While there are no specific provisions in the domestic arbitration laws on the participation of third parties in arbitration, practices have been generated in three areas, mainly to be able to involve them in an arbitration procedure. These are, through joinder, intervention, and cross-claims.

With a joinder, the plaintiff can appoint a third party when submitting his or her claim to prevent a situation of inequity when an award is rendered, as well as for other reasons such as efficiency and eliminating future contradictory decisions. In an intervention, the third party requests to join a dispute between two other parties, and is admitted if it is part of the arbitration agreement and, usually, if the arbitral tribunal has not yet been established. Finally, a cross-claim presents itself when there is a claim between parties on the same side of the arbitration. This is when opposing interests are evident and present difficulties when appointing an arbitrator.

Groups of companies

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

The Mexican Arbitration Law does not foresee this scenario; nevertheless, it is possible to extend an arbitration agreement to a non-signatory parent or subsidiary companies under the group of companies doctrine if it can be proven that the parent or the subsidiary company has consented to the arbitration agreement, either for active participation in the negotiation of the contract or if it is involved in its compliance.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The Mexican Arbitration Law does not have a disposition applicable to a multiparty arbitration agreement. However, since the cornerstone of a valid arbitration agreement is consent, a valid multiparty arbitration agreement requires consent from all the parties involved.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Mexican Arbitration Law does not provide for the consolidation of multiple arbitral proceedings into a single proceeding. The consolidation of multiple arbitral proceedings may operate whenever the parties have agreed on it, either by expressly foreseeing it or by agreeing on the application of specific rules of arbitration that have dispositions governing the consolidation of arbitrations, for example, article 10 of the ICC Rules of Arbitration.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

No, there are no restrictions as to who may act as an arbitrator. In Mexico, it is possible for non-lawyers to act as international arbitrators and parties can select whoever they consider best for the position. Article 1427 of the Mexican Arbitration Law provides that the parties are free to agree the procedure for selecting arbitrators. This means that, even though it is not recommended because it would counter the efficiency of the proceedings, parties can stipulate restrictions in the arbitration clause regarding who is eligible.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

In Mexico, it is common to see highly qualified attorneys with extensive backgrounds in the legal area acting as arbitrators. There are currently many measures in place for increasing equal opportunity in appointments in the arbitral community, such as the 'The Pledge', which seeks to increase the number of women appointed as arbitrators to achieve a fair representation, with the ultimate goal of full parity.

Default appointment of arbitrators

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

Article 1426 of the Mexican Arbitration Law allows parties to freely determine the number of arbitrators. In the absence of agreement regarding the number of arbitrators, the arbitration will be conducted by a sole arbitrator. Article 1427(II) establishes that the parties are free to agree the procedure for selecting arbitrators. In the case of a sole arbitrator, parties shall designate him or her jointly. If that is not possible, any party may request a judge to appoint the sole arbitrator. In the case of an arbitral tribunal, each party shall appoint an arbitrator and the two arbitrators will jointly designate the third arbitrator. If one of the parties has not appointed an arbitrator within 30 days of receiving the request from the other party, or if the two arbitrators designated by the parties do not agree on the third arbitrator within 30 days of their appointments, a judge will make the appointment at the request of any party.

According to article 14 of the Rules of Arbitration of the Arbitration Center of Mexico, where the parties have not agreed on the number of arbitrators, the dispute shall be submitted to a sole arbitrator. The parties may designate the sole arbitrator by common agreement. If they fail to make a nomination, the sole arbitrator shall be appointed by the General Council. Where the parties have agreed that the dispute shall be referred to three arbitrators, each party shall nominate an arbitrator, and if there is no specific procedure for the designation of the third arbitrator agreed by the parties, the third arbitrator shall be appointed by the General Council.

Similar dispositions are contained in the Rules of CANACO in articles 7–10. According to the Rules, the Commission shall designate the arbitrators if the parties have failed to do so.

Challenge and replacement of arbitrators

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

The grounds to challenge an arbitrator can be found in article 1428 of the Commercial Code, which establishes that the only grounds for which an arbitrator can be challenged is if circumstances give rise to a justified doubt regarding their impartiality or independence.

Article 1428 of the Mexican Arbitration Law establishes that any person that has been approached regarding his or her possible appointment as arbitrator should disclose any circumstances likely to give rise to justifiable doubts about his or her impartiality or independence. However, this article does not provide any legal standard governing conflicts of interest and does not have standards applicable to what circumstances must be disclosed by arbitrators.

Article 1429 of the Mexican Arbitration Law allows parties to freely agree on the procedure for challenging an arbitrator. If a party fails to agree, the party challenging an arbitrator should file a written statement of the reasons for the challenge, within 15 days of becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance raising doubt regarding the arbitrator's impartiality or independence.

The IBA Guideline of Conflicts of Interest in International Arbitration will only be applicable whenever the parties agree so.

Relationship between parties and arbitrators

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

The relationship between a party and its arbitrator is always one of neutrality. Regardless of whether a party has appointed him or her, every arbitrator must always comply with the principles of impartiality and independence, in accordance with article 1428 of the Mexican Arbitration Law.

Regarding remuneration and arbitrator expenses, according to article 1453 of the Mexican Arbitration Law, the arbitral tribunal should fix the cost of the arbitration in the award. Article 1455 of the Mexican Arbitration Law states that costs should be borne by the unsuccessful party; however, the arbitral tribunal may distribute the costs between the parties if the tribunal deems it appropriate.

Likewise, when defining costs, article 1416 of the Mexican Arbitration Law states that costs of arbitration can include the representation and legal assistance costs of the prevailing party if such costs were requested.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Aside from the obligation included in article 1428 of the Mexican Arbitration Law for arbitrators to disclose any circumstances likely to give rise to justifiable doubts about their impartiality or independence, there are no other duties.

The Rules of Arbitration of the Arbitration Center of Mexico, in article 13, disposes that the prospective arbitrator should sign a statement of independence and disclose in writing to the Secretary General any facts or circumstances that might be of such a nature as to call into question his or her independence in the eyes of the parties.

Likewise, article 12 of the Rules of CANACO establishes the obligation for a prospective arbitrator to disclose any circumstances likely to give rise to justifiable doubts about his or her impartiality or independence.

Immunity of arbitrators from liability

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

Mexico does not provide immunity from civil lawsuits to arbitrators. Article 1480 of the Mexican Arbitration Law, amended in 2011, provides that an arbitral tribunal is responsible for damages caused by provisional measures rendered by that arbitral tribunal.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

If a party initiates a procedure before a court despite there being an arbitration agreement, pursuant to article 1424 of the Mexican Arbitration Law, the party resisting the procedure may request the judge to refer parties to arbitration. According to article 1464 of the Mexican Arbitration Law, the request should take place in the first pleading of the procedure initiated by claimant. However, there has been judicial criteria stating that if the respondent did not answer the claim and did not allege the existence of an arbitration agreement, that does not entail the extinction of its right to request the remit of the issue to arbitration since article 1424 does not fix a time frame for the petition.

Jurisdiction of arbitral tribunal

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

Since Mexico adopted the UNCITRAL Model Arbitration Law, the Mexican Arbitration Law has recognised the competence-competence principle. Article 1432 states that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

If the arbitral tribunal has decided on its jurisdiction before ruling on the merits of the case and has decided that the arbitral tribunal has competence to rule on the dispute, any party, within 30 days following the process of service of the award, can file a request before a court to decide definitively about the competence of the arbitral tribunal. The ruling of the court is not subject to appeal.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Article 1436 of the Mexican Arbitration Law provides that in the absence of the parties' agreement on the seat of arbitration, the arbitral tribunal

will determine the place of arbitration, taking into account the circumstances of the case, including the suitability of the parties. Article 1438 of the Mexican Arbitration Law provides that, in the absence of the parties' agreement on the language or languages to be used in the arbitral proceedings, the arbitral tribunal shall determine the corresponding language to be used in the arbitration. If the parties fail to agree on the substantive law of the arbitration, article 1445 of the Mexican Arbitration Law establishes that the arbitral tribunal will determine the law applicable to the merits of the dispute.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

According to article 1437 of the Mexican Arbitration Law, unless the parties have agreed to something specific, the arbitration proceedings on a dispute will be deemed to have started on the date the defendant has received the initial demand or request for arbitration. Furthermore, article 1439 of the Mexican Arbitration Law establishes that, within the initial document, the plaintiff must state the facts on which the claim is based, the controversial points and the benefits that he or she claims. Also, the document must be accompanied by all the documents it deems pertinent, that it has or makes reference to and the documents and evidence that it is going to present.

According to the CANACO Rules, article 3 establishes that the party interested in initiating the arbitration procedure must first notify the institution, which will then communicate the notification to the respondent. The arbitration will be considered as initiated on the day the notification is received. The notification must contain:

- the express mention that the dispute is submitted to arbitration;
- the name and address of the parties;
- a reference to the arbitration clause being invoked;
- a reference to the contract or the legal relationship from which the controversy arises or to which the controversy is related;
- the general nature of the claim and, if applicable, the indication of the amount involved;
- the matter or object that is demanded; and
- a proposal on the number of arbitrators, which may be one or three, when the parties have not previously agreed on it.

The arbitration notice may also contain the proposal regarding the appointment of the sole arbitrator, the notification regarding the appointment of the arbitrator in the tribunal and the brief of claim.

The Rules of CAM provide that a party wishing to initiate an arbitration proceeding should submit its request to the Secretary General. The Secretary General will notify the claimant and respondent parties of the receipt of the request and the date of the receipt. The date when the request is received by the Secretary General shall, for all purposes, be deemed to be the date of commencement of the arbitral proceeding and the request will, at least, contain:

- names in full and addresses and, if possible, the email address, telephone and fax number, of each of the parties;
- a description of the facts and legal circumstances of the dispute giving rise to the claims of the claimant;
- a statement of the relief sought by the claimant including, to the extent possible, an indication of the amounts claimed; the claimant's comments concerning the number of arbitrators and any nomination of an arbitrator required thereby; and
- a proposal as to the place of arbitration, the applicable rules of law and the language of the arbitration.

A copy of the arbitration agreement and the contract or document serving as basis to the action should be annexed to the request and the claimant shall give a sufficient number of copies to provide one copy for each party, plus one for each arbitrator and one for the Secretariat and shall make an advance in the payment of the institution.

Hearing

28 | Is a hearing required and what rules apply?

Article 1440 of the Mexican Arbitration Law provides that if there is no agreement between the parties, the arbitral tribunal has the power to determine whether it is necessary to hold a hearing with the parties. For this, the tribunal must notify in advance the date of the hearing as well as provide the parties with any statement, document, expert opinion or information that has been delivered to them for presentation at the hearing.

Article 26 of the Rules of CAM establishes that the arbitral tribunal may decide the case solely based on the written submissions and on the documents presented by the parties, unless one of them requests a hearing. Likewise, the arbitral tribunal may decide to hold a hearing to interview the witnesses, experts appointed by the parties or any other person in the presence of the parties, or in their absence provided they have been duly summoned. Article 30 of the Rules of CANACO contains rules applicable to the hearings.

Evidence

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

Article 1435 of the Mexican Arbitration Law provides that, in the absence of any agreement between the parties, the arbitral tribunal may conduct the arbitration proceedings in the way it deems appropriate. Therefore, they can determine the admissibility, relevance and value of the evidence. The arbitral tribunal may resort to any means of evidence that it considers appropriate if the principle of equality and due process between the parties is respected. However, the most prominent ones consist of documentary evidence, testimonials, technical or expert opinions and physical inspections.

The IBA Rules on the Taking of Evidence in International Arbitration are widely accepted as guidance.

Court involvement

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

Pursuant to article 1421 of the Mexican Arbitration Law, in matters governed by the Mexican Arbitration Law, judicial intervention will not be required, except in the specific cases foreseen. For example, according to article 1444 of the Mexican Arbitration Law, the arbitral tribunal, or any party with the approval of the arbitral tribunal, may request the assistance of the judge with the evidence.

Courts may intervene in arbitration matters related to appointment of arbitrators; challenge to arbitrators; release of evidence; interim measures; enforcement of arbitration agreement; arbitrators fees; setting aside awards; and enforcing arbitral awards.

Confidentiality

31 | Is confidentiality ensured?

Mexican law does not have a provision regulating the confidentiality of arbitration proceedings. However, article 1435 of the Commerce Code gives the parties discretion to determine the arbitration proceedings, therefore the parties can decide whether the arbitration is confidential or not. In that sense, any confidentiality agreement included by the parties in their arbitration agreement would also be binding on the arbitrators.

Arbitration proceedings are confidential under some institutional arbitration rules, including domestic institutions such as CAM and CANACO.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Whenever there is an arbitral agreement and even before the arbitration starts or during the arbitration, a party may request a judge interim measure according to article 1425 of the Mexican Arbitration Law. Based on article 1478, judges have full discretion when adopting interim measures.

Interim measures by an emergency arbitrator

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

Mexican law does not mention anything about the emergency arbitrator, but the Rules of CAM and CANACO do.

Article 30-bis of the Rules of CAM foresees rules applicable to urgent conservatory and interim measures. Article 50 of the Rules of CANACO governs urgent protection measures.

Interim measures by the arbitral tribunal

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

In Mexico, the arbitral tribunal enjoys broad powers to grant interim relief. Article 1433 of the Mexican Arbitration Law provides that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures. Mexico did not include all the provisions of the UNCITRAL Model Arbitration Law related to the interim measures (it did not include provisions defining the types of interim measures that an arbitral tribunal may grant). Therefore, arbitral tribunals have complete discretion in granting all types of measures, such as conservatory, preliminary and interim measures. Moreover, judges enjoy the same powers according to articles 1425 and 1478 of the Mexican Commerce Code.

In 2011, the Mexican Arbitration Law was amended to add a section that addresses the enforcement of measures granted by arbitral tribunals. Article 1479 of the Mexican Arbitration Law states that interim or provisional relief granted by arbitral tribunals are binding upon the parties and must be recognised and enforced unless the court is allowed to refuse such recognition according to article 1480. Article 1470 of the Mexican Arbitration Law establishes that a summary proceeding shall be followed for the recognition and enforcement of the interim measures granted by the arbitral tribunal.

A party that obtained an interim or provisional relief from the arbitral tribunal shall file a request before the corresponding judge. After the process of service to the defendant, the latter shall present its answer within the following 15 days (article 1473). If proofs were offered, there will be a probationary period of 10 days (article 1475). After three days, a hearing for closing arguments shall take place (article 1474), and afterwards, the judge shall issue his or her ruling (article 1476).

Sanctioning powers of the arbitral tribunal

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

Mexican Arbitration Law and the Rules of CAM and CANACO do not contain rules regarding sanctions against parties or the counsel who uses 'guerrilla tactics' in arbitration.

AWARDS

Decisions by the arbitral tribunal

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

According to article 1448 of the Mexican Arbitration Law, if there is more than one arbitrator, the signatures of a majority shall be sufficient to issue a decision, if the reasons for the remaining arbitrators' failure to sign are set forth. An award or decision rendered by majority decision is perfectly valid and the opinion of the dissident arbitrator has no effect on a potential challenge of an award.

Dissenting opinions

37 How does your domestic arbitration law deal with dissenting opinions?

The Mexican Arbitration Law does not deal with dissenting opinions.

Form and content requirements

38 What form and content requirements exist for an award?

According to article 1448 of the Mexican Arbitration Law, the awards shall be in writing and shall contain the signatures of the arbitrators. In the case of an arbitral tribunal, the signatures of the majority of the arbitrators are required. The award should contain the date in which it was rendered and the seat of arbitration.

Time limit for award

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

The Mexican Arbitration Law does not set forth a specific time limit for rendering the award.

Pursuant to article 31 of the Rules of CAM, the Arbitral Tribunal must render the award within four months, which starts to run from the date of the last signature of the terms of reference, or the date of notification by the Secretary General to the arbitral tribunal of the approval of the terms of reference by the General Council. The Secretary General may extend the time limit if he or she decides it is necessary to do so or pursuant to reasoned request from the arbitral tribunal.

Date of award

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

The date of the award is decisive since, according to article 1458 of the Mexican Arbitration, the request for setting aside an award shall be filed

within three months from the date of delivery of the award. If there has been a request for correcting an award, the time limit for challenging the award are three months from the date of the ruling of the petition of correction of the award.

Types of awards

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

There are several types of awards. The final award decides all the merits of the case. A partial award, although it is final, does not decide all the matters of the dispute. Normally, a partial award deals with jurisdiction claims, liability claims, etc. A consent award is an award that reflects the transaction agreed by the parties.

Pursuant to article 1447 of the Mexican Arbitration Law, the Arbitral Tribunal may terminate the proceeding if both parties request so and if the parties request that the transaction agreed by them is contained in an award. This award shall have the same natures and effects as a final award ruling all the dispute. Such award shall be in writing and signed by the arbitrators. An award by consent shall comply with article 1448 of the Mexican Arbitration Law.

Termination of proceedings

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

Pursuant to article 1449 Mexican Arbitration Law, the arbitral proceedings may terminate by a final award or an order of the arbitral tribunal whenever:

- the claimant withdraws his or her claims;
- the parties agree to terminate the proceedings; or
- the arbitral tribunal finds that continuation of the arbitral proceedings is unnecessary or impossible.

Cost allocation and recovery

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

The Mexican Arbitration Law, in article 1452, grants the parties the freedom to adopt, either directly or by reference to any arbitration institution rules, rules governing the costs of arbitration. In absence of a specific agreement on costs of arbitration, article 1453 of the Mexican Arbitration Law states that the arbitral tribunal shall fix the costs of arbitration in the award.

As per article 1455 of the Mexican Arbitration Law, the costs of arbitration shall be borne by the unsuccessful party; however, the arbitral tribunal may distribute the costs between the parties if the arbitral tribunal deems it appropriate.

The cost of arbitration includes the arbitral tribunal fees and their expenses, as well as the fees of the arbitral institution. Likewise, when defining costs, the Mexican Arbitration Law in article 1416 states that costs of arbitration can include representation and legal assistance costs of the prevailing party if such costs are requested.

Interest

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

The Mexican Arbitration Law does not foresee interest of the principal claims and of costs. In Mexico, post-award interest does not run automatically, therefore, for them to accrue it is required that the arbitral tribunal expressly grant them in the award, after parties have requested this.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Article 1450 of the Mexican Arbitration Law states that within 30 days of notification of the award, unless the parties have agreed to another time limit, either party may, with notification to the other, request the arbitral tribunal issue an additional award correcting any calculation, copy, typographical, or similar errors in the award, or interpreting a specific point or part of the award.

The arbitral tribunal may correct, on its own initiative, any calculation, copy, typographical or similar errors in the award within 30 days of the date of the award.

Challenge of awards

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

The Mexican Arbitration Law follows the UNCITRAL Model Law on International Commercial Arbitration, so Mexico incorporated the same grounds for setting aside an arbitral award as the Model Law. In Mexico, arbitral awards are final and binding and not subject to an appeal. An arbitral award can only be set aside pursuant to article 1457 of the Mexican Arbitration Law after following the summary proceeding set forth in articles 1472–1476.

The grounds for vacating an arbitral award established in article 1457 are as follows:

- the party making the application furnishes proof that:
  - 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 Mexican 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 or her case;
  - the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside; or
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Mexican Arbitration Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Mexican Arbitration Law; or
- the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Mexican law; or the award is in conflict with the public policy of Mexico.

Levels of appeal

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

First, it is important to note that the ruling issued in the procedure for setting aside an award and of the enforcement of an arbitral award is not

subject to an appeal pursuant to article 1476 of the Mexican Arbitration Law. Such a procedure normally takes an average of six months to one year.

Since the ruling is not subject to appeal, there are no ordinary remedies, but the party that is unsuccessful in setting aside an award or on the enforcement procedure may file an *amparo* claim to challenge the ruling of the court.

With the 2011 amendment to the Mexican Commerce Code, the procedure for setting aside or enforcing an arbitral award was understood as a principal procedure, in contrast to an incidental procedure, and it was interpreted that the corresponding *amparo* to be filed against the enforcement ruling was a direct *amparo*, which is not subject to any review. However, in December 2019, the First Chamber of the Supreme Court issued a criterion (jurisprudence) establishing that against a ruling of the court of enforcement or of setting aside an award, the indirect *amparo* proceeds. As a consequence, against the judgment issued in the indirect *amparo*, it is possible to file a motion to review. The indirect *amparo* and the motion to review may take jointly an average of 10 months.

In Mexico, access to justice is free so the only costs incurred are those of the representation of the parties.

Recognition and enforcement

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

Pursuant to article 1461 of the Mexican Arbitration Law, an arbitral award, regardless of the country where it was made, is binding and the party seeking recognition and enforcement of an arbitral award shall supply the original award or a copy of it, as well as the original of the arbitration agreement of copy thereof. If the arbitral award or the arbitration agreement is not in Spanish, a translation by an official translator expert is required. The petition for the recognition and enforcement of an arbitral award may be filed either before the state or federal court of first instance of the respondent's address or of the place where the assets are located (article 1422).

Article 1462 of the Mexican Arbitration Law provides the grounds for refusing recognition and enforcement of an arbitral award. These grounds are almost identical to those contained in article 1457. However, article 1462 contains an additional section (I)(e) that states as ground for the refusal 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, that award was made.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The Mexican Arbitration Law does not foresee a specific limitation period for enforcing arbitral awards, so the general rule of 10 years will apply.

Enforcement of foreign awards

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

The courts in Mexico have discretionary powers to decide whether to enforce an arbitral award that previously has been set aside in the court of the seat of arbitration. Article 1462 of the Mexican Arbitration Law provides the grounds for refusing recognition and enforcement of an arbitral award. Section (I)(e) of the aforementioned article provides states as ground for the refusal 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, that award was made. The party resisting the enforcement of the award should prove the ground for refusing the enforcement of the award.

Enforcement of orders by emergency arbitrators

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

Although the Mexican Arbitration Law does not specifically refer to enforcement of orders by emergency arbitrators, it governs the enforcement or interim measures granted by the arbitral tribunal. In its article 1479, it disposes that any interim measure issued by the arbitral tribunal shall be recognised as binding and, unless the arbitral tribunal provides otherwise, will be executed when requested before the competent judge. This disposition may also be applicable to orders by emergency arbitrators.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Domestic law does not provide any costs to the enforcement of the arbitral awards. As per constitutional mandate, the access to justice is free, so the only costs incurred are those of the representation of the parties.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Mexican law does not contain dispositions governing the production of documents or written witness statements. Nevertheless, it is a common practice in arbitration that merely derives from the agreement of the parties. The parties can expressly agree the production of documents in the arbitration and the amplitude of such exchange will depend on what the parties have agreed on.

If there is no agreement regarding the production of documents, the arbitral tribunal may have the authority to order the disclosure of documents based on dispositions of the rules of arbitration applicable according to the agreement of the parties. The authority of the arbitral tribunal is only over individuals and entities that are party to the arbitration, but not over third parties.

The IBA Rules on the Taking of Evidence in International Arbitration have served as guidance for arbitrators in Mexico.

Professional or ethical rules

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

There are no mandatory rules of professional ethics in Mexico that apply to counsel or arbitrators acting in international arbitration. The Mexican Arbitration Law only establishes that they must conduct themselves with impartiality and independence during the arbitration process.

Counsel or arbitrators acting in arbitration that are members of the Mexican Bar Association should observe the ethical code of such bar. However, Mexican law does not provide mandatary membership to a bar.

Third-party funding

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

Mexican law does not foresee third-party funding. Therefore, they are not subject to regulatory restrictions.

Regulation of activities

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

In Mexico, arbitration is mainly subject to the agreement of the parties. However, substantive laws in Mexico refer to specific topics that are not subject to arbitration. It is important to bear that in mind when entering into an arbitration agreement.

Even though there are no mandatory ethical rules, in Mexico, most arbitrators and counsel are guided by the IBA Guidelines on Conflicts of Interest in International Arbitration and the IBA Guidelines on Party Representation in International Arbitration. Likewise, in evidence matters, the IBA Rules on the Taking of Evidence in International Arbitration are effective guidance.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

In the face of the entry into force of the T-MEC treaty, arbitration in T-MEC has been in a big trend. The Investment chapter is divided into two sections: 'Disciplines for investment protection' and 'Investor-State Dispute Resolution Mechanism'. Likewise, transparency and equal opportunities in appointments are topics that are being discussed in Mexico.

The Mexican Arbitration Law is not subject to any revision.

Regarding investment arbitration, there are some investment arbitration cases pending to which Mexico is a party:

- *L1bre Holding, LLC (US) v United Mexican States* (ICSID Case No. ARB/21/55);
- *Finley Resources Inc (US), MWS Management Inc (US), Prize Permanent Holding, LLC (US) v United Mexican States* (ICSID Case No. ARB/21/25);
- First Majestic Silver Corp (Canadian) v United Mexican States (ICSID Case No. ARB/21/14);
- *Coöperatieve Rabobank UA v United Mexican States* (ICSID Case No. ARB/20/23);
- *Espiritu Santo Holdings, LP (Canadian) v United Mexican States* (ICSID Case No. ARB/20/13)
- *Carlos Sastre and others v United Mexican States* (ICSID Case No. UNCT/20/2);
- *Odyssey Marine Exploration, Inc v United Mexican States* (ICSID Case No. UNCT/20/1);
- *Terence Highlands v United Mexican States* (ICSID Case No. ARB/19/26);
- *Legacy Vulcan, LLC (US) v United Mexican States* (ICSID Case No. ARB/19/1);
- *PACC Offshore Services Holdings Ltd (Singaporean) v United Mexican States* (ICSID Case No. UNCT/18/5);
- *Alicia Grace and others v United Mexican States* (ICSID Case No. UNCT/18/4); and
- *B-Mex, LLC, Neil Ayervais and others (US) v United Mexican States* (ICSID Case No. ARB(AF)/16/3).

Most recently, two awards were rendered regarding the following ICSID cases:

- *Eutelsat SA v United Mexican States* (ICSID Case No. ARB(AF)/17/2); and
- *Lion Mexico Consolidated LP v United Mexican States* (ICSID Case No. ARB(AF)/15/2).

In the first proceedings, Mexico won against Eutelsat a French company that was suing the Mexican state for allegedly affecting legitimate investment expectations and for unfair equitable treatment by the communications secretariat of Mexico, ordering the claimant to cover the expenses incurred by the Mexican state in its defence. In the second case, the designated tribunal determined in favour of Lion Mexico Consolidated LP that Mexico had breached the NAFTA agreement by various actions taken by the Mexican judicial power. The court ordered Mexico to pay C$47 million as compensation for the damages, plus the payment of a portion of the procedural costs.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

New Zealand signed the New York Convention on 6 January 1983, and it came into force on 7 April 1983.

New Zealand made a reciprocity reservation under article I, but it was not carried into the Arbitration Act 1996. Pursuant to article X, New Zealand did not extend accession to the New York Convention to the territories of Niue or the Cook Islands.

New Zealand is also party to:

- the Geneva Protocol on Arbitration Clauses 1923;
- the Geneva Convention on the Execution of Foreign Arbitral Awards 1927; and
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966.

Bilateral investment treaties

2 Do bilateral investment treaties exist with other countries?

As at January 2021, New Zealand is party to four BITs according to the UNCTAD Investment Policy Hub. Two of those treaties are in force and the remaining two have been signed but have not yet been entered into force. New Zealand is also party to 17 other treaties (bilateral or multilateral) that contain investment provisions.

Domestic arbitration law

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

The Arbitration Act 1996 (the Act) came into force on 1 July 1997 and applies to domestic and international arbitration where the seat of arbitration is New Zealand (section 6, the Act). The recognition and enforcement of domestic and foreign awards is contained in articles 35 and 36 of Schedule 1.

The common law is also relevant (*Methanix Motunui Ltd v Spellman* [2004] 1 NZLR 95 (HC)).

Domestic arbitration and UNCITRAL

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

The Act is based on the UNCITRAL Model Law.

Schedule 1 sets out the Model Law (slightly modified) and applies to all arbitrations held in New Zealand, domestic or international.

Schedule 2 sets out additional provisions intended to fill any gaps in the Model Law. According to section 6 of the Act, Schedule 2 applies:

- in domestic arbitrations unless the parties 'opt out'; or
- in international arbitrations if the parties 'opt in'.

Mandatory provisions

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

Schedule 1:

- article 16 – competence of tribunal to rule on its own jurisdiction;
- article 18 – equal treatment of the parties;
- article 24(2) – sufficient advance notice of any hearing or meeting;
- article 24(3) – disclosure of documents and reports provided to tribunal;
- article 27 – court assistance in taking evidence;
- article 30(2) – settlement of the dispute;
- article 31 – form and content of the award (subsections (1), (3) and (4));
- article 34 – power to set aside awards; and
- article 36 – grounds for refusing recognition and enforcement of awards.

Substantive law

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

Under article 28(1) of Schedule 1 the tribunal shall decide disputes either:

- in accordance with the rules of law chosen by the parties;
- failing that, the tribunal shall apply the law as determined by the conflict of laws rules that the tribunal considers applicable; and
- in all substantive law matters, the tribunal shall decide in accordance with the terms of any contract and any applicable trade usages.

Arbitral institutions

7 What are the most prominent arbitral institutions situated in your jurisdiction?

New Zealand International Arbitration Centre

The New Zealand International Arbitration Centre (NZIAC) is a forum for settlement of international trade, commerce, investment and

cross-border disputes in the Trans-Pacific region. NZIAC provides fully administered dispute resolution processes, including arbitration, mediation and arb-med services.

New Zealand International Arbitration Centre
Ground Floor, 9 Anzac Street
Takapuna 0622
New Zealand
Tel: +64 9 486 7153
www.nziac.com

The NZIAC 2018 Rules include standard Arbitration Rules that apply to all arbitrations where the claim exceeds or is equal to NZ$2.5 million. The NZIAC Expedited Arbitration Rules apply where the claim is for less than NZ$2.5 million or the claimant seeks declaratory relief only, and provide expedited arbitration procedures of 60, 90 or 120 working days.

The New Zealand Dispute Resolution Centre (NZDRC) provides private commercial dispute resolution and conflict managements services nationwide. It provides international dispute resolution services through NZIAC.

Arbitrators and Mediators Institute of New Zealand Inc

The Arbitrators and Mediators Institute of New Zealand Inc (AMINZ) is a membership organisation that supports and promotes its dispute resolution professional members and dispute resolution generally.

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AMINZ nominates people to perform dispute resolution roles under various New Zealand legislation and identifies lists and panels of qualified professionals that are promoted on its website. AMINZ members must abide by a code of ethics and a complaints process administered by the organisation.

Resolution Institute

The Resolution Institute is the largest dispute resolution membership organisation across both New Zealand and Australia and provides accreditation and grading systems. It offers a nomination service to assist the public in finding dispute resolution practitioners.

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ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Any dispute that parties have agreed to submit to arbitration under an arbitration agreement may be determined, unless it is contrary to public policy or under any other law is not capable of determination by arbitration (section 10(1), the Arbitration Act 1996 (the Act)).

Arbitration of certain trust matters under the Trust Act 2019 (sections 142–148) are capable of determination by arbitration (section 10A, the Act).

Consumer contracts can, with certain safeguards, be referred to arbitration (section 11, the Act).

Disputes under competition and consumer protection legislation are arbitrable as are employment, IP, company and insolvency disputes. However, disputes about sharing the proceeds of crime or anti-competitive arrangements that contravened the Commerce Act 1986 would not be arbitrable.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

An arbitration agreement may be made either orally or in writing (article 7(1), the Act).

If the dispute involves a consumer, then the separate agreement required by section 11 of the Act must be in writing.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

Given the doctrine of separability, the circumstances where the arbitration agreement itself will not be enforceable are limited. For an arbitration clause to be considered null and void, the alleged defect must be specifically referable to the arbitration clause. For example:

- an allegation the contract did not come into existence;
- there were forged signatures;
- an agent signing who had no authority;
- the party to the agreement was, in fact, a different party than the one purporting to enforce the arbitration agreement; or
- there was a fundamental mistake that goes to the existence of both the main contract and any arbitration agreement.

A contract and therefore the arbitration agreement may also be void ab initio due to grounds such as duress, fraud, mistake undue influence or incapacity. General contractual principles apply here.

The parties can agree to terminate the agreement to arbitrate.

An agreement to arbitrate can also be expressly or impliedly repudiated.

The right to arbitrate can be waived or abandoned.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The doctrine of separability is codified in article 16(1) of Schedule 1 of the Act.

Third parties – bound by arbitration agreement

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

As recognised in article II of the New York Convention, only those parties to the arbitration agreement can appear as parties in the proceedings.

There are recognised instances where a related person can benefit from the arbitration agreement; for example:

- if an agency or principal relationship exists;
- if the implied consent of a non-signatory could be given in relation to the arbitration clause;
- the doctrine of alter ego (the author is not aware of its application in New Zealand);
- assignment of the underlying contract;
- the doctrine of estoppel may apply to compel arbitration;
- third-party beneficiaries can claim the benefit of a contract (contractual privity) under the Contract and Commercial Law Act 2017;
- a guarantor may be bound by an arbitration agreement in an underlying contract; or
- a successor to the rights and obligations of a named party to a contract will be bound.

Third parties – participation

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

The Act does not make any provision with respect to third parties, who cannot be joined without the consent of the parties and the third parties themselves.

Groups of companies

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

The group of companies doctrine is not recognised in New Zealand. New Zealand arbitrators would follow *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm).

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Multiparty agreements to arbitrate are common. The Act does not deal directly with such agreements but does contemplate there being more than two parties to an arbitration:

- article 11(6) of Schedule 1 provides for a situation where there are 'more than two parties'; and
- the definition of 'party' in section 2 of the Act contemplates there being more than two parties to the agreement to arbitrate.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Issues of consolidation are addressed in Clause 2 Schedule 2 of the Act.

Where a tribunal is appointed on a number of concurrent arbitral proceedings then, on the application of at least one party to each of the arbitral proceedings, the tribunal may order that the proceedings are:

- consolidated;
- heard at the same time or sequentially; or
- stayed (Clause 2(1), the Act).

Where the arbitral proceedings do not have the same tribunal, the tribunal in any of the proceedings may, upon the application of a party to those proceedings, make a provisional order that the proceedings be consolidated with the other arbitral proceedings. The order remains provisional until consistent provisional orders have been made for all of the arbitral proceedings concerned (Clause 2(2), the Act).

Where a tribunal refuses or fails to make a consolidation order then any of the parties may apply to the High Court to obtain consolidation orders.

The parties can agree among themselves to consolidate the proceedings (Clause 2(9), the Act).

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

There are no restrictions on who may be appointed as arbitrator, other than restrictions imposed by the parties in the agreement to arbitrate. Appointments are provided for in article 11 of Schedule 1 of the Arbitration Act 1996 (the Act).

No person shall be precluded from acting as arbitrator by reason of nationality, unless otherwise agreed by the parties (article 11(1)). The Act does not require any particular qualifications or training. The arbitral institutions have panels of who they consider to be suitably qualified arbitrators and subject matter experts.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Lawyers and non-lawyers both sit as arbitrators in New Zealand. The majority of arbitrators come from a legal background: solicitors, barristers and retired judges.

Non-legally trained arbitrators often focus on specialist areas of expertise: rent, valuations, technology and intellectual property disputes, construction, engineering and quantity surveying issues.

Default appointment of arbitrators

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

The default provisions for the appointment of arbitrators are set out at articles 10 and 11 of Schedule 1 of the Act. Failing agreement by the parties, the number of arbitrators for an international arbitration shall be three and in every other case only one (article 10).

Article 11 addresses various scenarios where the parties cannot agree on appointments. Appointments are made by a body appointed by the High Court (in New Zealand this is the Arbitrators and Mediators Institute of New Zealand Inc (AMINZ)). A party can apply to the High Court to appoint an arbitrator if the appointed body is unable or fails to appoint within 30 days of receiving a request to do so (article 11 (7)).

Challenge and replacement of arbitrators

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

An arbitrator can only be challenged if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence, or where the arbitrator does not possess qualifications that were agreed to by the parties in the arbitration agreement (article 12(2), the Act). The test for justifiable doubts is decided upon the ordinary meaning of those terms considered together with relevant principles of New Zealand law. Actual bias requires the arbitrator to have been consciously biased. Apparent bias is an objective test that asks whether 'the reasonable informed observer would think that the impartiality of the adjudicator might be or might have been affected'. The observer will be considered to:

- have been properly informed;
- be fair-minded, presumed to be intelligent and to view matters objectively; and
- appreciate that context forms an important part of the issue.

The IBA Guidelines on Conflicts of Interest in International Arbitration are not part of New Zealand law but often used as a guide.

The process for challenge is established in article 13 of Schedule 1 of the Act. The parties can agree on a procedure for challenge but failing agreement a party must, within 15 days of becoming aware of any circumstances referred to in article 12(2), send a written statement of the reasons for a challenge to the tribunal. The tribunal shall decide the challenge (article 13 (2)). An unsuccessful challenge can, within 30 days, be taken to the High Court, whose decision is final.

An arbitrator can also be removed if:

- he or she are unable to perform the functions of the office;
- he or she failed to act without undue delay;
- his or her mandate terminates on withdrawal from office; or
- the parties agree.

A party can apply to the High Court to decide on the termination of the mandate. The High Court's decision is final (article 14(1)).

Relationship between parties and arbitrators

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

The relationship between the parties and the tribunal is primarily contractual in nature, although there is a view that there is also a quasi-judicial status for the arbitrator arising from the obligations and protections available to the arbitrator under the Act.

Party-appointed arbitrators must act with impartiality and independence as required under article 12 of Schedule 1 of the Act.

The obligation on the parties to meet the remuneration and expenses of arbitrators is contractual in nature and will typically arise from a separate agreement between the parties and the arbitrator.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The duties of disclosure established by article 12(1) of Schedule 1 of the Act continue throughout the arbitral proceedings. The obligation is on the arbitrator to disclose any possible issues of impartiality or lack of independence at the time they arise. The arbitral institutions also impose disclosure obligations on arbitrators who are members. For example, AMINZ Ethical Statement 2.

Immunity of arbitrators from liability

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

Statutory immunity exists for arbitrators who are 'not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator' (section 13, the Act). This immunity would not cover the arbitrator for any acts before he or she was appointed and is unlikely to provide immunity for, for example, a failure to meet pre-appointment disclosure obligations (article 12(1), the Act).

Arbitrators typically include a common law immunity within their terms of engagement. This is not excluded by the enactment of section 13.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

Article 8 of Schedule 1 of the Arbitration Act 1996 (the Act) requires that the court stay any proceedings in a matter that is the subject of an arbitration agreement provided the requesting party brings the stay proceedings no later than when submitting its first statement on the substance of the dispute, unless the court finds that the arbitration agreement was null and void, inoperative or incapable of being performed. In addition to the Model Law wording, article 8 also provides that the court can decline a stay if there is not in fact any dispute between the parties on the matters referred to arbitration.

Jurisdiction of arbitral tribunal

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

Once arbitral proceedings have been initiated then jurisdiction issues are addressed by article 16 of Schedule 1 of the Act. The tribunal can rule on its own jurisdiction, including objections regarding the existence or validity of the arbitration agreement (article 16(1), the Act). Any challenge is to be raised no later than the provision of the statement of defence; however, a later plea can be admitted if the tribunal considers any delay to be justified (article 16 (2), the Act). The tribunal can rule as either a preliminary question or an award on the merits. If ruled as a preliminary question, then any party may within 30 days seek a determination on that challenge from the High Court whose decision is final (article 16(3), the Act).

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Failing agreement by the parties, the place of arbitration is determined by the tribunal in accordance with article 20 of Schedule 1 of the Arbitration

Act 1996 (the Act). The tribunal must have regard to the circumstances of the case including the convenience of the parties. The tribunal can, unless the parties agree otherwise, elect to meet in any place it considers appropriate for consultation, hearing witnesses, experts or the parties or for the inspection of goods and property (article 20 (2), the Act).

The tribunal will determine the language or languages to be used in the proceedings if there is no agreement between the parties (article 22 (1), the Act).

The substantive law is determined in accordance with article 28 of Schedule 1 (see above).

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Unless the parties agree otherwise, arbitral proceedings are said to commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent (article 21, Schedule 1, the Act).

Hearing

28 | Is a hearing required and what rules apply?

The parties can agree not to hold a hearing (article 24, Schedule 1, the Act). Failing agreement, the tribunal can decide whether to hold a hearing or not. However, if one of the parties requests a hearing then one shall be held (article 24(1), the Act).

The rules for any hearing are either going to be:

- agreed by the parties;
- set by any institution that the parties have agreed to in the arbitration agreement; and
- determined by the tribunal.

Evidence

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

There is no reference in the Act to procedures applying to evidence gathering and presentation. The New Zealand Evidence Act 2006 does not apply to arbitration (section 5(3)).

The tribunal has 'the power to determine the admissibility, relevance, materiality, and weight of any evidence.' (article 19(2), the Act).

In domestic arbitration documentary evidence is usually obtained through a document production or disclosure process and may be annexed to pleadings, witness statements or expert reports or provided separately. Witness and expert evidence is typically exchanged by way of written statement or report followed by oral examination at a hearing. Party experts are more common than tribunal-appointed experts.

Tribunals may be guided by or refer to the IBA Rules on the Taking of Evidence in International Arbitration, but the Rules are not typically a formal part of domestic arbitration.

Court involvement

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

The court can only intervene in accordance with Schedule 1 (article 5, the Act). The permissible interventions are:

- sections 14E–14F providing for confidentiality of arbitral or court proceedings;
- article 8 – stay of proceedings;
- article 9 – interim measures;
- article 11 – appointment of arbitrators;
- article 13 – challenge of procedure;
- article 14 – termination of mandate of arbitrator;
- article 16 – issues regarding jurisdiction of tribunal;
- articles 17L and 17M – recognition and enforcement of interim measures;
- article 27 – court assistance in taking evidence;
- article 34 – applications to set aside awards; and
- articles 35 and 36 – recognition and enforcement of award.

Schedule 2, if applicable, provides for court involvement in:

- Clause 2 – applications for consolidation;
- Clause 3 – procedural powers;
- Clause 4 – determination of preliminary points of law;
- Clause 5 – appeals and questions of law;
- Clause 6 – costs; and
- Clause 7 – extension of time for the commencement of arbitral proceedings.

Confidentiality

31 | Is confidentiality ensured?

The Act does not expressly provide for confidentiality. Unless the parties agree otherwise, every arbitration agreement is deemed to provide that the parties and the tribunal must not disclose confidential information (section 14B(1)). This is an implied term regarding confidentiality.

Confidential information is defined in section 2 of the Act and includes pleadings, evidence, notes made by the tribunal, transcript of oral evidence, submissions, rulings of the tribunal and the award.

The Act identifies the limits on the prohibition regarding disclosure of confidential information (sections 14A to 14I) and the parties can agree in writing that these provisions do not apply.

Challenges to awards are typically in open court – section 14F.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

The courts can grant interim measures and have the same powers as a tribunal under articles 17A and 17B (article 9 Schedule 1, the Arbitration Act 1996 (the Act)).

Interim measures by an emergency arbitrator

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

The appointment of emergency arbitrators is not provided for under the Act. However, section 2 of the Act includes in the definition of an 'arbitral tribunal' an emergency arbitrator appointed under an arbitration agreement or the arbitration rules of any institution or organisation.

Interim measures by the arbitral tribunal

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

Unless agreed otherwise by the parties, a tribunal has the power to make either preliminary orders or interim measures as defined in article 17 of Schedule 1 to the Act (articles 17, 17A to 17M). Under article 17A, the tribunal has the power to order interim measures:

- to maintain or restore the status quo pending determination;
- to order a party to take action or refrain from taking action to cause current or imminent harm or prejudice to the arbitral proceedings;
- to preserve assets by which an award may be satisfied;
- to preserve evidence that may be relevant and material to the dispute; and
- to order security for costs (article 17B).

A preliminary order expires after 20 days, although a tribunal may grant an interim measure adopting or modifying a preliminary order (article 17F). A preliminary order does not constitute an award and is binding on the parties but not enforceable by a court (article 17G). An interim measure is both binding and enforceable by a competent court under article 35 (article 17L and 17M).

Sanctioning powers of the arbitral tribunal

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

There is a generally recognised common law obligation for the parties to an arbitration to cooperate in all aspects of the procedure and to comply with the award. In civil law there is a tradition concerning the duty of good faith, which applies to parties to an arbitration agreement.

If Schedule 2 applies to the arbitration, then under Clause 3(1), unless the parties agree otherwise, the tribunal has significant powers, which includes making orders as may reasonably be needed to enable an award to be made properly and efficiently. This includes the ability for the tribunal to request court assistance in the exercise of any of these powers (Clause 3(2)).

Sanctions against a party or counsel are rare and the tribunal has sufficient power to make orders that should deal with guerrilla tactics. Assistance can be sought from the courts and any ongoing breach may result in a party or counsel being at risk of contempt of court. Sanctions for delay, etc, are typically dealt with by the issue of cost allocation.

AWARDS

Decisions by the arbitral tribunal

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

Article 29 of Schedule 1 of the Arbitration Act 1996 (the Act) provides that, failing agreement by the parties, any decision of the arbitral tribunal (with more than one arbitrator) may be made by majority. If the dissenting arbitrator does not sign the award, then the reason for that should be stated (article 31(1)).

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

There is no right for a dissenting opinion to be provided by the minority. It has no legal status and is not formally part of the award. Typically, domestic arbitration awards in New Zealand are given by a sole arbitrator so the issue does not often arise.

Form and content requirements

38 | What form and content requirements exist for an award?

The form and content requirements for an award are set out in article 31 of Schedule 1 of the Act:

- an award is to be in writing;
- signed by the arbitrator or arbitrators;
- if there is more than one arbitrator then it is sufficient if the award is signed by the majority, with the reason for any omitted signature stated;
- the award should give reasons unless the parties have agreed otherwise;
- the award shall state the place of arbitration in accordance with article 20(1);
- a signed copy of the award is to be delivered to each of the parties; and
- unless the arbitration agreement provides or the award directs, then a sum directed to be paid should carry interest from the date of the award.

Time limit for award

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

The Act does not contain any time limits for rendering an award. The parties may have agreed a time frame for delivery of the award within the agreement to arbitrate. The arbitrator, in accepting appointment, will be bound by that unless the parties' consent to an extension. Many institutions now have expedited arbitration rules and rules for emergency arbitration that typically impose time constraints on the tribunal for delivery of the award.

Date of award

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

The date on which the award is received by a party is the date that is relevant for setting time limits under the Act. Any application for correction or interpretation of an award under article 33 must be made within 30 days of receipt of the award unless another time period has been agreed by the parties.

Under article 34, an application for setting aside an award may not be made after three months have elapsed from the date the party making the application received the award (or the date that any request under article 33 had been disposed of by the tribunal).

Types of awards

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

Section 12 of the Act stipulates that, unless the parties agree otherwise, the tribunal can grant any relief or remedy that could have been ordered by the High Court. This includes:

- general, special or exemplary damages;
- specific performance;
- restitution;
- injunctions;
- declaratory relief;
- rectification of a contract;
- remedies under the Companies Act 1993;
- filling gaps by means of contractual interpretation;

- claims for contribution under the Law Reform Act;
- indemnities; and
- interest and costs.

Tribunals can issue interim, partial, final and consent awards (article 30(1), Schedule 1, the Act). What constitutes an award is defined by section 2 of the Act and focuses on decisions on the substance of the dispute. The definition refers to interlocutory awards, which is an anomalous term and is a leftover from the 1976 UNCITRAL Arbitration Rules. The terms partial (or partial final) and final awards are preferred.

Termination of proceedings

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

The tribunal can terminate proceedings if the claimant fails to communicate the statement of claim in accordance with article 23(1) (see article 25(a) of Schedule 1 of the Act).

The proceedings will be terminated where, during the proceedings, the parties have settled the dispute (article 30(1)).

Termination is otherwise dealt with in article 32 of Schedule 1. In addition to termination by the final award, termination can occur when:

- the claimant withdraws the claim (provided the respondent does not object);
- the parties agree on the termination; or
- the tribunal finds that continuation of the proceedings has become unnecessary or impossible (article 32 (2)).

Cost allocation and recovery

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

In the absence of agreement between the parties, the tribunal can determine the issue of costs and expenses and make an award allocating costs (Clause 6, Schedule 2, the Act). In the absence of an agreement or award on costs, the parties are to meet their own legal and other expenses and pay an equal share of the fees and expenses of the tribunal.

The High Court may on the application of a party make an order varying the amount of costs ordered (Clause 6(3)). Any such application cannot be made after three months have elapsed from the date on which the party making the application received an award. There is no right of appeal from the High Court.

Costs typically follow the event. There is an increasing trend towards indemnity costs.

Interest

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

The tribunal has the right to award interest on the whole or any part of any sum up to the date of payment in full or on a sum that was at issue in the proceedings but was paid before the date of the award (section 12, the Act).

Article 31(5) states that 'a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt' unless the arbitration agreement or the award otherwise directs.

The discretionary issues for the tribunal are whether to grant pre-award interest, the date interest should run from, the rate of interest and whether interest should be calculated on a compounding basis. There is an increasing trend for tribunals to award compound interest.

Interest on a costs award is available under section 12(1)(a).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Article 33 of Schedule 1 of the Arbitration Act 1996 (the Act) allows the parties to request the correction or interpretation of an award or for the tribunal to correct any computational, clerical or typographical errors of its own accord. The tribunal may correct any error on its own initiative within 30 days of the date of the award.

A party requesting the tribunal to correct an award must do so within 30 days of receiving the award unless another time period has been agreed by the parties. If both parties agree then a party may request the tribunal give an interpretation of a specific point or part of the award (article 33(1)).

If the arbitral tribunal considers that a request is justified, it shall make the correction or give the interpretation within 30 days of receipt of the request.

Unless agreed otherwise by the parties, a party can request, within 30 days of receipt of the award, that the tribunal make an additional award as to claims that have been presented in the proceeding but were omitted from the award. If the tribunal considers this request to be justified, it shall make the additional award within 60 days.

The tribunal can extend the time periods for giving a correction, interpretation or issuing an additional award (article 33(4)).

Challenge of awards

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

Applications can only be made on the grounds set out in article 34 of the Act and within a specified time limit. The grounds substantially replicate those set out in the New York Convention.

Challenges are by way of application to the High Court and may not be made after three months have elapsed from the date on which the party making the application either received the award or the date that any request under article 33 was disposed of by the tribunal. This time frame does not apply to an application for setting aside on the basis that the award was induced or affected by fraud or corruption.

The grounds upon which an award may be set aside are:

- a party to the arbitration was under an incapacity or the arbitration agreement is not valid;
- the party was not given proper notice of the appointment of an arbitrator or the proceedings or was unable to present their case;
- the award deals with a dispute not contemplated or within the terms of the submission to arbitration or is beyond the scope of the submission to arbitration;
- the tribunal or the arbitral procedure were not accordance with the agreement of the parties;
- the subject matter of the dispute was not capable of settlement by arbitration; or
- the award was in conflict with public policy.

Levels of appeal

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

If Schedule 2 of the Act applies to the arbitration, the parties have a right to appeal a question of law to the High Court under Clause 5 in certain circumstances. Appeals on questions of fact are not allowed.

There are potentially three levels of appeal on a point of law:
- the High Court;
- the Court of Appeal (with the leave of the High Court or special leave of the Court of Appeal); and
- an appeal from the Court of Appeal to the Supreme Court if the Supreme Core grants leave.

Recognition and enforcement

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

An award, irrespective of the country in which it was made, must be recognised as binding and on application to the court must be enforced for entry as a judgment (article 35, the Act). This is subject to certain procedural requirements (article 35(2)). An award can be enforced in either the High Court or the District Court, depending on the amount of the award (below NZ$350,000 it goes to the District Court).

Article 36 of Schedule 1 deals with the grounds for refusing recognition or enforcement. They reflect the same grounds in article 34 with one additional ground, where the award has not yet become binding on the parties or has been set aside or suspended by a court in the country under whose laws the award was made.

The New Zealand courts look favourably upon the enforcement of awards.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Section 35 of the Limitation Act 2010 states that the limitation period for enforcing an arbitral award entered as a judgment is six years after the date on which the judgment became enforceable in the country in which it was obtained.

Neither the Act nor the Limitation Act specifies the point in time at which an award becomes enforceable. This may mean the date from which the respondent refused to honour the award as opposed to the date of the award itself.

Enforcement of foreign awards

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

The domestic courts support a general presumption in favour of the enforcement of foreign awards. That a final award has been set aside by the courts at the place of arbitration is one of the factors taken into account by the New Zealand courts (article 36(1)(a)(v)).

The courts may exercise their discretion to enforce the award despite the fact it has been set aside at the place of arbitration where, for example, the setting aside process was tainted by a failure of substantive or natural justice.

Enforcement of orders by emergency arbitrators

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

The regime for interim measures and preliminary orders set out in articles 17 and 17A to 17M, which includes recognition and enforcement of interim measures, is applicable to emergency arbitrators in New Zealand.

In addition, the rules of some domestic arbitration institutions provide for enforcement.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The costs incurred in enforcing awards include the following:
- court filing fees;
- legal fees for the application made to court;
- disbursements relating to serving the respondent party with the enforcement application; and
- legal and other costs associated with enforcing any award against the respondent's assets.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Common law legal traditions are familiar to most domestic arbitration practitioners, which means:
- document production will be ordered in some form, whether limited or akin to High Court discovery;
- written witness statements are common practice as is the expectation that witnesses will be cross-examined on their evidence. Typically, common law cross-examination practices are adopted;
- the presumption of costs following the event is applied; and
- rules of privilege are applied.

Professional or ethical rules

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

There are no specific professional or ethical rules that apply to international arbitration in New Zealand. New Zealand practitioners are bound by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 if they are a practising barrister or solicitor, together with any codes of conduct or ethics that may relate to membership of a domestic arbitral institution – for example the Arbitrators and Mediators Institute of New Zealand Inc (AMINZ) Code of Ethics.

Third-party funding

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

There is currently no legislation or regulatory framework in New Zealand for governing litigation funding. The applicable principles have been developed by the courts. The Supreme Court of New Zealand has stated that the main grounds for court intervention are:
- a manifest abuse of process on traditional grounds;
- the funding arrangement amounts to assignment of a bare cause of action where this is not permissible; and
- a representative action has been promoted to prospective litigants using misleading statements.

Litigation funders are subject to the provisions of the Fair Trading Act 1986 regarding consumer protection. Domestic funders may need to register as a financial service provider under the Financial Markets Conduct Act 2013.

Regulation of activities

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

There are no restrictions under the Arbitration Act 1996 limiting whether a foreign practitioner can act as counsel or arbitrator. Any immigration, visa requirements or tax obligations should be the subject of independent advice.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Arbitration is well established in New Zealand and the Arbitration Act 1996 has been amended several times since it came into force. The most recent amendment was 2019 and included the introduction of the new Trust Act 2019 arbitration provisions.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Norway is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention was acceded to by Norway on 14 March 1961 and has been in force since 11 June 1961. Norway will apply the Convention only to the recognition and enforcement of awards made in the territory of one of the contracting states, and the Convention will not be applied to differences where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property.

Norway signed the ICSID Convention in 1966, the Energy Charter Treaty in 1995 and the International Energy Charter in 2015. So far, there has been no decision in an investment arbitration case against Norway. However, a request for arbitration under the Latvia–Norway BIT was made in March 2020, and the case has been registered as ICSID Case No. ARB/20/11 (*Peteris Pildegovics and SIA North Star vKingdom of Norway*). The Claimant's Memorial was filed on 11 March 2021.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Norway is party to 18 bilateral investment treaties, of which 14 are currently in force. Furthermore, Norway is party to 32 treaties with investment provisions, of which 30 are currently in force.

Domestic arbitration law

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

The Norwegian Arbitration Act 2004 provides the legal framework for arbitration in Norway. The Arbitration Act is the primary domestic source of law relating to arbitral proceedings and recognition and enforcement of awards. The Act applies when Norway is the place of arbitration, and it applies to both national and international arbitratral proceedings. Provided that Norway is the place of arbitration, the Act will apply regardless of the nationality of the parties. However, the Act contains no express definition of the terms 'national' and 'international' arbitration. As only a few of the rules are mandatory, the parties retain autonomy over the dispute resolution process.

Domestic arbitration and UNCITRAL

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

The Norwegian Arbitration Act is, to a large extent, based on the UNCITRAL Model Law. The Arbitration Act contains a few provisions that cannot be found in the Model Law. However, in commercial arbitration, the parties may agree that the relevant provisions in the Model Law shall apply. The provisions that have no parallel in the Model Law relate to confidentiality and public access (section 5), evidence (section 28), costs (sections 39–41) and consumer protection (section 11). In addition, the Arbitration Act provides that the arbitration agreement does not have to be in writing (section 10.1), that assignment of a contract is deemed to include assignment of the arbitration clause (section 10.2) and that the arbitral tribunal shall apply the Norwegian rules on conflict of laws if the parties have not agreed otherwise (section 31).

Mandatory provisions

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

The Norwegian Arbitration Act contains only a few mandatory provisions on procedure. The provisions from which the parties may not deviate relate to the fundamental principles of arbitration, such as equal treatment of the parties. According to section 20 of the Arbitration Act, the parties shall be treated equally at all stages of the arbitral proceedings, and each party shall be given full opportunity to present his or her case. If the parties were to deviate from such principles in the arbitration agreement, the Act will have overriding effect to secure fairness and justice in the proceedings.

Substantive law

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

In contractual disputes, the parties normally indicate the law applicable to the substance in the agreement, and this law shall be applied by the arbitral tribunal. Accordingly, the Norwegian Arbitration Act states that the arbitral tribunal shall apply the rules of law that have been chosen by the parties as applicable to the material issues of the case. A reference in the arbitration agreement to the law or legal system of a country shall, unless otherwise indicated, be construed as a reference to the substantive law of that country and not to its rules on choice of law.

The most common choice of law rule in Norwegian law is that the parties are free to determine which law is to be applied. In the absence of such an agreement, Norwegian law contains certain more specific

default rules, but there is no general set of choice of law rules that are applicable to all disputes.

If the parties have not chosen a law in the arbitration agreement, the arbitral tribunal shall apply the rules of law as designated by applying Norwegian choice of law rules. The arbitral tribunal shall only decide a case on the basis of fairness if the parties have expressly authorised it to do so.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

A particular feature of arbitration in Norway is the extensive use of ad hoc arbitration, rather than institutional arbitration. One institution, which is used from time to time, is the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (OCC). The OCC adopted new rules for arbitration and mediation in 2016, and the new rules came into force on 1 January 2017. The new rules include updated procedures for fast-track arbitration and a remuneration schedule that caps the remuneration payable to the arbitral tribunal.

The Nordic Offshore and Maritime Arbitration Association (NOMA) is not an arbitral institution in the strict sense, but an independent body having made a set of arbitration rules based on the UNCITRAL Arbitration Rules. These arbitration rules may be used in ad hoc arbitrations, and they are useful in cases where the parties have not agreed upon particular terms of reference. NOMA has also drafted a set of Best Practice Guidelines, in line with what is generally regarded as best practice in international commercial arbitration.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

A dispute is considered non-arbitrable if the subject matter is not capable of being settled by agreement between the parties. A dispute may also be non-arbitrable if the claim cannot succeed without a third party's consent, and in some aspects as far as it concerns rights in rem. Furthermore, a claim is non-arbitrable if the relief sought may only be granted by a state authority or the ordinary courts. Such cases include declaration of bankruptcy, taxation, the existence and validity of patents, certain competition law disputes such as imposition of fines, ordering a company to cease and desist activities harmful to competition, and granting clearance for acquisitions of businesses.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

An agreement to arbitrate may be made in nearly any commercial matter. The agreement may concern a dispute that has already arisen, or the parties may agree in advance that all potential disputes in a particular relationship, typically a contract, shall be resolved by arbitration. Provided that the intention to submit a certain dispute to arbitration is sufficiently clear, there is no requirement as to form or specific choice of words (Rt. 2010 s. 748). Today, most high-value commercial contracts contain an arbitration clause. As there are no formal requirements to such agreements, even an oral agreement to arbitrate is, in principle, enforceable. However, the importance normally attached to an agreement to arbitrate will inevitably lead the courts to look for clear evidence that an arbitration agreement has in fact been entered into.

In consumer disputes, arbitration agreements may only be entered into after the dispute has arisen. If a consumer has entered into an arbitration agreement before the dispute has arisen, the agreement will not be binding on the consumer. There is also a strict formal requirement: an arbitration agreement to which a consumer is a party must be made in a separate document and signed by both parties. If an adequate method for authenticating the formation of the agreement and the contents of the agreement exists, such agreement may, however, be concluded electronically.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement will not be enforceable to the extent that it is invalid or voidable under the ordinary contract law rules. This will be the case, inter alia, if the arbitration agreement has been entered into by a minor or a person without legal capacity, or by a person without the necessary authority to bind the corporate entity in question. Invalidity or rescission of the underlying contract will not in itself mean that the arbitration agreement is no longer enforceable.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The Norwegian Arbitration Act is based on the principle of separability. An arbitration clause or agreement that is included in and forms part of a contract is treated as an agreement independent of the other terms of the main contract. Thus, a decision by the arbitral tribunal that the contract is invalid does not in itself entail that the arbitration agreement is invalid.

Third parties – bound by arbitration agreement

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

As a rule, third parties or non-signatories will not be bound by an arbitration agreement. However, there are some exceptions. In the event of assignment of the legal relationship to which the arbitration agreement applies, the arbitration agreement is deemed to be assigned unless the parties have agreed otherwise in the arbitration agreement (Norwegian Arbitration Act, section 10 second paragraph).

Third parties – participation

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

The Norwegian Arbitration Act does not contain any provisions with respect to third-party participation in arbitration. A third party is not a party to the arbitration agreement and, therefore, has no right to participate. However, if the parties consent, there is nothing to prevent a third party from acceding to the arbitration agreement and thereby join the proceedings.

Groups of companies

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

The group of companies doctrine is not recognised in Norway. An arbitration agreement will, therefore, not extend to non-signatory parent or

subsidiary companies of a signatory company. It is not sufficient that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute. However, a non-signatory company may, with the consent of the parties to the arbitration agreement, accept the agreement and thereby take part in the proceedings.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

There are no particular requirements for a valid multiparty arbitration agreement. Multiparty arbitration agreements are frequently entered into, especially in disputes relating to company law and construction disputes.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The arbitral tribunal may only consolidate separate arbitral proceedings if the parties to both proceedings expressly consent. In the absence of such consent, it is not sufficient that consolidation is expedient.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

According to section 13.1 of the Norwegian Arbitration Act, the arbitrators shall be impartial and independent of the parties, and they shall be qualified. Apart from this, there are no restrictions as to who may act as an arbitrator. Both active and retired judges may accept appointment. Contractually stipulated requirements for arbitrators based on nationality, religion or gender are rarely seen, and there has so far been no case in which such requirements have been discussed.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Tribunals usually consist of three arbitrators with legal background. Most frequently the parties appoint three practising lawyers; sometimes a combination of an academic, a judge and a practising lawyer is preferred. In certain cases specialist knowledge is called for, such as an engineer in construction law disputes or a chartered accountant in a company law dispute. In the selection of arbitrators, Norwegian parties tend to prefer arbitration experience, rather than formal background. As most arbitration in Norway is ad hoc, there is no firm basis to conclude that diversity in appointments plays a more important role now than before. However, our general impression is that larger and more professional parties often require that diversity is a consideration in the appointment process.

Default appointment of arbitrators

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

If possible, the parties shall appoint the arbitrator or panel of arbitrators jointly. The parties will normally agree on a sole arbitrator or a panel of three arbitrators, so as to secure that the necessary competence is in place. If the parties are not able to agree, the Norwegian Arbitration Act contains a default mechanism for the appointment of arbitrators.

If the arbitral tribunal comprises three arbitrators, each party shall appoint one arbitrator within one month after a request to make such appointment was received. The two arbitrators shall then, within one month, appoint a third arbitrator, who will be the presiding arbitrator. If a party fails to make his or her appointment, the other party may request that the local court nominate the missing arbitrator or arbitrators.

Challenge and replacement of arbitrators

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

According to section 14 of the Norwegian Arbitration Act, an arbitrator may be challenged and replaced only if there are circumstances that give rise to justifiable grounds as to his or her impartiality or independence, or if the arbitrator does not possess the qualifications agreed by the parties. If a party has participated in the appointment, that party may only challenge the arbitrator for reasons of which he or she became aware after the appointment was made. The IBA Guidelines on Conflict of Interest in International Arbitration are frequently used as a standard in the determination of impartiality and independence.

When the mandate of an arbitrator terminates, for instance due to lack of impartiality or independence, a substitute arbitrator shall be appointed according to the rules that were applied when appointing the arbitrator who is being replaced. If a substitute arbitrator is appointed, all previous arbitral proceedings shall be repeated, in so far as they form part of the basis upon which the case shall be decided.

Relationship between parties and arbitrators

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

The arbitrator who accepts an appointment agrees to resolve the dispute between the parties, and the parties agree to remunerate the arbitrator for this. It may, therefore, be argued that there is a contractual relationship between the arbitrators and the parties. The arbitrators are normally under a general duty to conduct the arbitration in accordance with the parties' agreement. This duty may be compared to the obligation to comply with the specifications in an ordinary contract for services. The parties' obligation to comply with the tribunal's directions may also be regarded from a contractual point of view. Although the relationship in many ways is contractual, there are a number of special features that indicate that the relationship is not purely contractual. The relationship between parties and arbitrators is to some extent overlaid with a special adjudicatory function of public nature. It is, therefore, suggested that the contractual relationship is a sui generis contract.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

According to section 14 of the Norwegian Arbitration Act, a person who is approached in connection with a possible appointment as an arbitrator shall disclose all circumstances that may give rise to justifiable doubts as to his or her impartiality or independence. From the time of appointment and throughout the arbitral proceedings, the arbitrator is under a duty to disclose immediately any new circumstances of such

nature to the parties. A recent trend is that the parties request potential arbitrators to respond to a questionnaire to promote transparency in the arbitrator selection process.

Immunity of arbitrators from liability

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

The Norwegian Arbitration Act contains no express provision to the effect that arbitrators are immune from liability. However, there is a general consensus that an action based upon error in fact or in law will not succeed. Some commentators seem to suggest that there may be basis for a claim against an arbitrator in the event of serious misconduct or breach of the criminal law, such as corruption. There have been no such cases in Norway.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

If court proceedings are initiated despite an existing arbitration agreement, the court shall dismiss the case provided that a party makes a request for dismissal no later than at the time when the first submissions on the merits of the case are made. If a party has made submissions on the merits, without objecting to the court's jurisdiction, the arbitration agreement is deemed to have been set aside.

Jurisdiction of arbitral tribunal

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

Once arbitral proceedings have been initiated, the arbitral tribunal shall rule on its own jurisdiction. This includes any objections as to the existence or validity of the arbitration agreement. An objection to the effect that the arbitral tribunal does not have jurisdiction shall be made no later than at the time when the objecting party makes his or her first submission on the merits of the case. However, the arbitral tribunal may permit such objection being made later if the party is not significantly to blame for the delay. A party's participation in the appointment of the arbitral tribunal is not in itself sufficient to preclude that party from making an objection to the jurisdiction of the tribunal at a later stage.

The arbitral tribunal may rule on an objection to its jurisdiction either during the arbitral proceedings or in the arbitral award determining the dispute. If the arbitral tribunal makes a decision as to its jurisdiction during the arbitral proceedings, any party may, within one month after having received that ruling, bring the issue before the courts. When the court's decision is pending, the arbitral tribunal may continue the arbitral proceedings and determine the dispute.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

The default mechanism for the place of arbitration is described in section 22 of the Norwegian Arbitration Act. Failing agreement on the place of arbitration, it shall be determined by the arbitral tribunal. The tribunal shall take into account all the practical requirements, including the possibility of the parties' participation in the oral hearing. Irrespective of the place of arbitration, the arbitral tribunal may, unless otherwise agreed by the parties, meet wherever it considers appropriate. Such meeting may be held for the purposes of deliberations, examination of witnesses, experts or parties, or to assess evidence.

The default mechanism for the language of the arbitral proceedings is described in section 24 of the Norwegian Arbitration Act. Failing agreement on the language of the arbitral proceedings, the arbitral tribunal shall determine the language. The language of arbitral proceedings shall apply to all written statements by a party, oral hearings and any decision or other communication by the arbitral tribunal. The arbitral tribunal may order that any documentary evidence be translated into the language agreed upon by the parties or determined by the arbitral tribunal. If the language of the arbitration is Norwegian, Swedish or Danish may also be used.

According to section 31 of the Norwegian Arbitration Act, the substantive law of the dispute shall be the law chosen by the parties. Any designation of the law or legal system of a given state shall be taken to mean the substantive law of that state and not its conflict of law rules. Failing any designation by the parties, the arbitral tribunal shall apply Norwegian conflict of law rules.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Arbitral proceedings are normally initiated by the issuance of a notice of arbitration. This is a formal letter from one of the parties to the other where particulars of the dispute are given, together with a request to resolve the dispute by arbitration. A particular point to note is that such notice will interrupt the limitation period of the claim comprised by the notice.

Hearing

28 | Is a hearing required and what rules apply?

According to section 26 of the Norwegian Arbitration Act, the arbitral tribunal shall decide whether a hearing is required, or whether the case shall be decided on the basis of written submissions. A party may request an oral hearing. The parties shall be given reasonable notice in advance of any oral hearing and of any other meeting to which the parties are entitled to attend. In practice it is very rare to have arbitral proceedings without an oral hearing.

Evidence

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

It is for the parties to establish the facts of the case. The parties may present any evidence that is relevant for the dispute in question. The main types of evidence are documentary evidence and witnesses.

Parties and party officers may also testify. In many domestic arbitrations witnesses testify during the hearing. In international arbitrations witness statements are frequently used, with the right of the other party to cross-examine. Where expert evidence is needed, there is a tendency towards party-appointed experts. Tribunal-appointed experts are still relatively rare. In some instances the parties will agree on a jointly appointed expert. The IBA Rules on the Taking of Evidence in International Arbitration are only used if the parties agree.

According to section 28 of the Norwegian Arbitration Act, the arbitral tribunal may refuse presentation of evidence that is not relevant to the dispute. When the parties are in disagreement as to the relevance of the evidence in question, the arbitral tribunal will often be hesitant to refuse. Moreover, the arbitral tribunal has an inherent power to limit the presentation of evidence if the extent of the evidence offered is disproportionate to the significance of the evidence and the case.

Court involvement

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

The arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the courts to obtain statements from parties and witnesses, as well as other evidence.

Confidentiality

31 | Is confidentiality ensured?

According to section 5 of the Norwegian Arbitration Act, the parties may agree that the arbitral proceedings and the arbitral award shall be confidential. Such agreement may also encompass the dispute itself and subsequent enforcement proceedings. Third parties may only attend the oral hearing with the consent of both parties. If arbitration-related proceedings are initiated before the ordinary courts, confidentiality is no longer ensured, as these proceedings are public.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Unless otherwise agreed between the parties, an arbitral tribunal has the power to order the parties to undertake certain measures, such as preserving assets or the production of evidence. An order to this effect, however, is not enforceable. Failure to comply with an order made by the tribunal may influence on the assessment of the evidence. The parties may ask the ordinary courts to issue an order for interim relief. Such a court order will be enforceable.

The arbitral tribunal may request the ordinary courts to take depositions from witnesses and to make an order for the production of documentary evidence. The arbitrators have the right to attend the court hearing when the witnesses are examined, and they may ask questions.

Interim measures by an emergency arbitrator

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

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

Interim measures by the arbitral tribunal

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

According to section 19 of the Norwegian Arbitration Act, the arbitral tribunal may, at the request of a party, order any party to take such interim measures as the arbitral tribunal shall consider necessary based on the subject matter of the dispute. The arbitral tribunal may order the requesting party to provide security within a specified time limit. Such security may be a condition for the interim measure. The arbitral tribunal has inherent powers to reduce or reverse an order for interim measures.

Sanctioning powers of the arbitral tribunal

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

The Norwegian Arbitration Act contains no express rules on the powers of the arbitral tribunal to order sanctions against parties or their counsel. Use of guerrilla tactics and other forms of gross violations of the integrity of the arbitral proceedings will be a matter for the disciplinary authorities.

AWARDS

Decisions by the arbitral tribunal

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

It is sufficient that decisions by the arbitral tribunal are made by a majority of all its members. If a majority cannot be reached, the presiding arbitrator shall have the casting vote. If there is no majority when a sum of money or other quantity is to be determined, the votes in favour of higher amounts or quantities shall be added to the votes in favour of the closest amounts or quantity until a majority has been reached. If a minority of the arbitrators refuse to take part in the voting, the remaining arbitrators may make the decision.

Procedural issues may be decided solely by the presiding arbitrator if he or she has been authorised to do so by the parties or by the full arbitral tribunal. Normally, such authorisation will be discussed and agreed in the first case management meeting and recorded in Procedural Order No. 1.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

A dissenting opinion will not have any impact on the validity or enforceability of the award.

Form and content requirements

38 | What form and content requirements exist for an award?

The arbitral award shall be in writing and signed by all the arbitrators. In arbitral proceedings with more than one arbitrator, it is sufficient that

a majority signs the award, provided that the reason for any omitted signature is stated in the award.

The arbitral award shall state the reasons upon which it is based. It shall be stated whether the decision is unanimous; if not, the dissenting arbitrator shall be named, and the points on which there is dissent shall be specified.

The arbitral award shall state the date and place of the award.

Time limit for award

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

There is no statutory time limit. However, the parties may agree with the tribunal that the award shall be rendered within a certain time limit.

An additional award must be made within two months of the party's request for such award.

Date of award

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

The date of delivery of the award is decisive for a request for correction of the award (one month), for a request for an additional award (one month) and for challenge of the award (three months). The date of delivery is the date on which a party has received the award.

Types of awards

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

The arbitral tribunal may render a final award (section 36), a partial award (section 33), an interim order (section 19) or a consent order (section 35).

Termination of proceedings

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

The arbitral proceedings may be terminated without an award if:

- the claimant withdraws the claim;
- the parties agree that the proceedings be terminated; or
- the arbitral tribunal finds that the continuation of the proceedings has become unnecessary or impossible.

If a settlement is made by the parties, they may request the arbitral tribunal to confirm the settlement by way of a consent order. A consent order shall have the same legal effect as an arbitral award.

Cost allocation and recovery

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

At the request of a party, the arbitral tribunal shall allocate the costs of the arbitral tribunal between the parties as the arbitral tribunal sees fit.

At the request of a party, the arbitral tribunal may order the other party to cover all or part of the requesting party's costs. All necessary costs are recoverable. These normally include attorneys' fees, travel expenses and expert witnesses, but may also comprise in-house costs. Normally, the winning party will recover his or her costs, unless there are some special circumstances.

Interest

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

Tribunals often award post-award interest in addition to the amount specified in the award. Post-award interest is added until the award is actually paid. The starting point for post-award interest is normally 14 days after the receipt of the award. Post-award interest is often applied at the same rate as late payments. This reflects the view that a higher interest rate will generally discourage late payment.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

The arbitral tribunal may correct an award if the award, due to spelling, arithmetic, typographical or similar obvious errors, has been formulated in a way that does not accurately reflect the intention of the arbitral tribunal. The arbitral tribunal may also make an additional award for claims that were presented in the arbitral proceedings and should have been decided on, but which were omitted from the award.

Corrections may be made at the request of a party or at the arbitral tribunal's own initiative. An additional award may only be rendered at the request of a party. The request must be made within one month of the delivery of the award.

Challenge of awards

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

Arbitration awards may not be appealed to the local courts unless otherwise agreed by the parties. The award may only be challenged on the grounds that it is invalid. An exhaustive list of grounds for invalidity is provided in section 43 of the Norwegian Arbitration Act. The list is in accordance with article V of the New York Convention. Examples of reasons for invalidity are that the award falls outside the scope of the tribunal's jurisdiction, or that the composition of the tribunal was incorrect.

A claim that an arbitration award is invalid must be made in the form of a lawsuit before the courts, and the lawsuit must be filed within three months from the day the party received the arbitral award.

Levels of appeal

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

If an arbitral award is challenged, there are three court levels: local court, appellate court and Supreme Court. The Supreme Court will only hear cases of general importance. It will normally take between two and three years to have a case heard in the local court and the appellate court. The costs will be apportioned according to the ordinary principles in civil cases (ie, costs follow the event).

Recognition and enforcement

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

The party seeking recognition or enforcement of a foreign award must produce the original award or a certified copy. Unless the award has been made in the Norwegian, Swedish, Danish or English language, a certified copy must be produced. The authorities may request documentary proof for the existence of an arbitration agreement or for other bases for the arbitration proceedings. The domestic courts are generally favourable to the enforcement of foreign awards.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The limitation period for the enforcement of arbitral awards is 10 years. The limitation period is calculated from the date of the award.

Enforcement of foreign awards

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

The domestic courts will not recognise or enforce a foreign award that has been set aside by the courts at the place of arbitration.

Enforcement of orders by emergency arbitrators

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

There are no specific provisions for the enforcement of orders by emergency arbitrators.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Unless the enforcement is opposed, the procedure will only incur a small court fee.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

As arbitral proceedings in Norway are mainly ad hoc, the arbitrators have developed a rather practical approach to arbitration. The arbitrators tend to be pragmatic, with a main focus on resolving the dispute in an efficient and expedient manner. Written witness statements are welcome, always provided that the other party be given the opportunity of cross-examination. Procedural differences tend to be resolved by agreement between the parties, rather than by numerous procedural orders.

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Professional or ethical rules

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

There are no specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in Norway. Counsel and arbitrators are bound by the regulatory framework that applies to the legal profession as such. Some attempts have been made to formulate a set of best practice rules. To a large extent these reflect the IBA Guidelines on Party Representation in International Arbitration.

Third-party funding

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

The question of whether Norway's financial services regulatory regime applies to third-party funders remains unresolved. In general, any financing activity (including purchasing claims that have not become due) in Norway is subject to the Norwegian Financial Supervisory Authority (FSA) granting a licence or a cross-border passport under the Capital Requirements Directive (known as CRD IV) (for credit institutions within the EEA). In a recent decision, the FSA confirmed its view that professional third-party funding constitutes a financing activity and, thus, is subject to the requirement for an FSA licence. The funder's appeal has been referred to the Norwegian Ministry of Finance, and the FSA has (on certain conditions) allowed the funder to continue funding cases while the appeal is pending.

Regulation of activities

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

There are no particularities to be aware of. However, one should always check any visa requirements and the need for a work permit. Arbitrators should ask local counsel to take care of the formalities relating to tax reporting. Ex parte communication is strictly forbidden.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Aside from the Nordic Offshore and Maritime Arbitration Association (NOMA) updating its rules in 2021, no legislative reform or other significant rule revisions are being discussed at present. However, there is an ongoing debate as to whether arbitration in Norway should be institutionalised. Some commentators have questioned the widespread use of ad hoc arbitration and call for a move in the direction of a more formalised arbitration procedure. Whereas ad hoc arbitration allows for a flexible and pragmatic approach, arbitration within the established framework of an institute is often perceived to provide a higher degree of certainty and predictability. The latter is all the more important in international arbitration, where the parties are not necessarily familiar with the local traditions. Furthermore, there is a trend to bring Norway more in line with the current best practice in international arbitration. The establishment of NOMA and its guidelines may be regarded as a step in this direction. It remains to be seen what impact this association will have on the development.

No bilateral investment treaty has recently been terminated. Norway is currently party to one investment arbitration case.

* *The authors would like to thank Erlend Haaskjold for authoring previous versions of this chapter.*

Pakistan

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Pakistan is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention), currently enacted in domestic legislation through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (the New York Convention Act). It has been in force since 12 October 2005. Pakistan declared that it would apply the NY Convention only to awards made in another contracting state.

Pakistan is also a party to the International Centre for Settlement of Investment Disputes Convention 1966 (the ICSID Convention). The Arbitration (International Investment Disputes) Act 2011 (the ICSID Convention Act) is the implementing legislation. Pakistan is also a signatory to the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (the Geneva Conventions), and party to the Agreement for Establishment of SAARC Arbitration Council (SAARC stands for the South Asian Association for Regional Cooperation).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

There are a total of 53 bilateral investment treaties out of which 32 are in force, 16 have been signed but not yet ratified, while five have been terminated.

Domestic arbitration law

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

Domestic arbitration is governed by the Arbitration Act 1940 (the 1940 Act), whereas the recognition and enforcement of foreign arbitral awards is governed by the New York Convention Act, and in the case of investor-state disputes, the ICSID Convention Act. Under the New York Convention Act an arbitral award is considered to be a foreign award if it is made in a contracting state under the NY Convention and such other states as the federal government may notify from time to time.

The Arbitration (Protocol and Convention) Act 1937 (the 1937 Act) has been repealed by the New York Convention Act. However, in relation to foreign arbitral awards made before the New York Convention Act and awards that are not foreign arbitral awards for the purposes of the New York Convention Act but are foreign arbitral awards for the purposes of the 1937 Act, the 1937 Act shall continue to apply.

Domestic arbitration and UNCITRAL

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

The Arbitration Act 1940 (the 1940 Act) is not based on the UNCITRAL Model Law (UML). Some key differences are given below.

- Failing agreement between the parties, the 1940 Act provides that a sole arbitrator shall be appointed, while the UML envisages three arbitrators.
- Under the 1940 Act, where an agreement envisages three arbitrators with one to be appointed by each party and the third to be appointed by the two arbitrators, the third is an umpire. Under the UML, this is the default appointment mechanism and the third is not an umpire.
- The 1940 Act gives broad powers to the court to remit the matter in dispute back to the tribunal for reconsideration while under the UML the court has a limited power to suspend proceedings to allow the tribunal to resume hearings or take such other actions as may eliminate the grounds for setting aside.
- Where court proceedings have been initiated in a matter that is subject to an arbitration agreement, the party seeking arbitration has a higher threshold to satisfy the court under the 1940 Act as compared to the UML.
- The 1940 Act allows for an award to be set aside if an arbitrator or umpire misconducts himself, herself or the proceedings, or if the award was improperly procured or otherwise invalid. Courts have construed these grounds broadly to include serious errors of law by the arbitral tribunal and, as a result, awards are routinely set aside. By contrast, the UML contains a narrow and exhaustive list that largely precludes substantive review.
- The 1940 Act allows arbitrators to state a special case for the opinion of the court on a question of law while the UML does not.
- The UML contains more detailed provisions regarding the procedure of the arbitration while the 1940 Act contains limited provisions in this regard.

Mandatory provisions

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

The parties are generally free to agree the arbitration procedure to be applied in resolving their dispute, subject to the provisions of the

Arbitration Act 1940 (the 1940 Act). However, the mandatory procedural domestic law provisions are as follows.

- The principles of natural justice, namely the rule against bias and right to a fair hearing (article 10A of the Constitution).
- An arbitration agreement must be in writing (section 2(a)).
- An arbitration agreement shall not be discharged, nor shall the authority of an arbitrator be revoked by the death of any party, and the arbitration agreement remains enforceable by or against the legal representative of the deceased (section 6).
- The provisions pertaining to the appointment of three or more arbitrators and an umpire (section 10).
- The award must be signed by the arbitrators, notice given to the parties, and the award must be filed in the competent court (section 14).
- There must be a review of the award by the court to see whether it requires modification, correction, beremitted for reconsideration, setting aside, or in the absence thereof to pronounce judgment in terms of the award.
- There are provisions allowing an application to seek the intervention of the court in enforcing the arbitration agreement (section 20).
- The award must set out reasons in sufficient detail to enable the court to consider any question of law arising out of it (section 26-A).
- The parties may not authorise a tribunal to enlarge the time for an arbitration without their consent.
- Limitation periods apply as prescribed in the Limitation Act 1908 (section 37).
- There are categories of orders of a court against which appeals may lie (section 39).

Substantive law

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

There is no express guidance in the Arbitration Act 1940 (the 1940 Act) relating to the applicable substantive law to the merits in the absence of an express agreement between the parties. Various judgments have enunciated the considerations that the tribunal must apply, such as the intentions of the parties contained in the agreement, the law with the closest connection to the matter or the place of performance, private international law, and rules of equity and natural justice.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

There really are not any prominent arbitral institutions located in Pakistan. SAARC (South Asian Association for Regional Cooperation) Arbitration Council and the Centre for International Investment and Commercial Arbitration exist but are not known to be actively used by parties thus far.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Generally, all civil matters that can form the subject matter of a civil suit can be referred to arbitration. However, court decisions in various contexts suggest that matters governed by a special law that provides for exclusive jurisdiction of a specific court or tribunal are considered to not be arbitrable. Certain disputes falling within the jurisdiction of the rent tribunals, liquidations, certain banking matters, and guardianship and custody are considered to be non-arbitrable (*Ch. Naseer Ahmed v Rent Controller*, 2018 YLR 29; *Orix v Colony Thal,* PLD 1997 Lahore 443; *First Dawood v Anjum Saleem*, 2016 CLD 920; *Nosheeba Nazeer v Sajjad Ahmed,* 2021 CLC 704). Under the Muslim Family Laws Ordinance 1961, a special arbitration council is constituted to aid in reconciliation between a married couple when one spouse files for divorce. This suggests that matters that have been designated to it may not be arbitrated either.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must be in writing and qualify the test of a valid contract under Pakistani law (*Karachi Dock v Quality Builders Ltd,* PLD 2016 SC 121). Therefore, principles of contract law regarding capacity, coercion and soundness of mind would apply. The intention of the parties to refer disputes to arbitration can be inferred through the language used in documents and correspondence, and does not need to contain precise language, or even an express reference to 'arbitration' (*Imperial Electric Company (Pvt.) Limited v Zhongxing*, 2019 CLD 609). In certain situations, an arbitration agreement contained in one contract may be incorporated by reference into another contract, such as where an explicit reference to the arbitration agreement is made or where the two agreements are so interconnected that clearly the parties could not have intended that it would be commercially sensible or realistic that disputes be decided by different forums (*Orient v SNGPL,* 2021 SCMR 1728).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement can become unenforceable in generally the same manner as a contract under contract law, such as where the agreement has been made without capacity, has an unlawful object, is for unlawful consideration, would defeat a provision of law, or has been procured through force, coercion, fraud or misrepresentation, or is opposed to public policy. Where a party becomes incapacitated, the agreement becomes incapable of being performed or inoperative (as in article II of the NY Convention), or where a party waives right to arbitration, the arbitration agreement becomes unenforceable. The parties may agree to terminate the arbitration agreement. An arbitration agreement that is not in writing is not enforceable.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The doctrine of separability has been recognised through judicial precedent for both domestic and international arbitrations (*The Pan Islamic Ltd v General Importers* PLD 1959 Karachi 750; *Lakhra Power v Karadeniz,* 2014 CLD 337).

Third parties – bound by arbitration agreement

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

A tribunal cannot bind a third-party or non-signatory to an award. Where the award impacts the interests of a 'stranger' to the proceedings, it would be considered as being void (*Azizud dun Ahmed v Aziz Ahmad*, PLD 1959 Karachi 497). However, a third party may be bound by an arbitration agreement under the agency principle. The instrument of agency is to be strictly construed and general powers given to an agent would not include the authority to enter into an arbitration agreement.

An arbitration agreement is enforceable by or against the legal representative of a deceased person. In cases of insolvency, unless provided for by the arbitration agreement, the agreement may be enforceable against the receiver (including the official assignee) if he or she adopts the underlying contact and so far as it relates to any differences arising thereout.

Third parties – participation

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

While the Arbitration Act 1940 (the 1940 Act) does not specify circumstances in which third parties may participate, if all parties consent there should be no reason to prevent third parties from participating. Third parties whose rights are impacted by the award may challenge the enforcement of such an award.

Groups of companies

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

The 'group of companies' doctrine is not a recognised principle under Pakistani arbitration law, and courts or tribunals are not empowered to extend an arbitration agreement to non-signatory parent or subsidiary companies.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Act 1940 (the 1940 Act) does not contain any express provisions for multiparty arbitration agreements. However, section 21 of the 1940 Act provides that where all parties in a pending suit agree that a matter in dispute should be referred to arbitration, they can apply to the court for an order to this effect. Section 24 further allows that some parties to a suit may agree to arbitration, where the award would be binding on only such parties. Thus, one can infer that the law permits multiparty arbitrations.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Arbitration Act 1940 (the 1940 Act) does not empower tribunals to consolidate separate arbitral proceedings, though there is nothing to prevent parties from doing so by consent.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

There are no statutory restrictions relating to the eligibility of arbitrators. Contractually stipulated requirements based on nationality, religion or gender would likely be recognised although there is no reported precedent on the point.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Typically, lawyers and (retired) judges sit as arbitrators. Subject-matter experts (for example, engineers in construction related issues) are also routinely appointed.

Default appointment of arbitrators

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

The default position is for a sole arbitrator to be appointed. A party may apply to the court for appointment of the arbitrator after giving 15 days' notice to the other party. Alternatively, any party may apply to the court that the arbitration agreement be filed in court, which then forms the basis for the court (after hearing the parties) to refer the matter to the arbitrators.

Challenge and replacement of arbitrators

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

The grounds for removal by court include a failure to use all reasonable dispatch in entering upon the reference, proceeding with it or making an award; and an arbitrator misconducting himself, herself or the proceeding. Courts exercise the power in exceptional cases – where reasonable grounds exist for removal – and not as a rule, after a proper hearing (*M A Aziz & Sons v Lt Col M Daud Khan etc,* PLD 1968 Lahore 847; *National Refinery v Anaud Power,* 1999 YLR 1673).

A challenge to an arbitrator can only be allowed when the court is satisfied that continued appointment of the arbitrator would result in substantial miscarriage of justice. Misconduct includes a failure to maintain equal treatment, failure to act with impartiality and failure to conduct a just and proper evaluation of all issues. Courts have found misconduct where the arbitrator has failed to act judiciously, acted negligently and recklessly and failed to conduct the proceedings in a proper manner.

An arbitrator's authority can be revoked in accordance with the arbitration agreement. Where the court removes an arbitrator, it may appoint an arbitrator of its choice (section 12). Under section 9, a party may also request the court to replace its nominated arbitrator when he or she is incapacitated, refuses to act or has died. Currently, there is no widespread practice to consult the IBA Guidelines.

Relationship between parties and arbitrators

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

An arbitrator is the judge of facts and law between parties. He or she must do so according to the law and not act as a conciliator. An arbitrator (including a party appointed arbitrator) is duty-bound to act impartially and failure to do so can result in the award being set aside (*DHA Islamabad v Multinational Venture,* 2019 CLD 566). Parties – either jointly or separately – are required to pay the arbitrator's fees. It is routine for the nominating party to pay the fees of its nominee or for the fees of a sole arbitrator to be shared.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Though the Arbitration Act 1940 (the 1940 Act) is silent on arbitrators' obligation regarding disclosure of any conflict, since there is a duty of impartiality on arbitrators, a failure to disclose a conflict of interest leading to concerns of partiality may amount to misconduct.

Immunity of arbitrators from liability

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

The Arbitration Act 1940 (the 1940 Act) is silent on the immunity from liability of arbitrators. There is also no precedent holding an arbitrator liable for damages to a party. In light of the extensive remedies available to parties in the 1940 Act against actions of the arbitrator, it is unlikely that courts will hold arbitrators liable. The Peshawar High Court has suggested that actions against an arbitrator can only be brought if they act beyond the arbitrators' powers given under the 1940 Act (*Haq Nawaz Khan v the State,* 2005 YLR 1850). In the case of removal under section 11 of the 1940 Act, an arbitrator is not entitled to remuneration for his or her service.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

For domestic arbitrations, section 34 of the Arbitration Act 1940 (the 1940 Act) provides that where legal proceedings are initiated against a party in respect of which an arbitration agreement exists, such party may apply to the court where proceedings are initiated to stay the proceedings. The party must do so before filing a written statement or taking any other steps in the proceeding. It must satisfy the court of its willingness to take necessary steps for the proper conduct of the arbitration, and that there is no other reason why the matter should not be referred to arbitration. Taking steps in the proceedings without raising objections to jurisdiction may amount to waiving its right to invoke arbitration.

For foreign arbitral agreements, section 4 of the New York Convention Act states that where legal proceedings have been initiated against a party who is signatory to an arbitration agreement, it may, after sending a notice to the other party, apply to the High Court to stay the proceedings. It is mandatory upon the court to refer the parties to arbitration unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

Jurisdiction of arbitral tribunal

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

A tribunal decides its own jurisdiction. However, under the Arbitration Act 1940 (the 1940 Act), this may still be subject to review of the courts. Jurisdiction cannot be assumed by the tribunal or conferred by the parties against the 1940 Act through consent, waiver, estoppel, etc (*Karachi Dock v Quality Builders Ltd*., PLD 2016 Supreme Court 121). Under section 33 of the 1940 Act, a party may also apply to the court challenging the existence or validity of an arbitration agreement.

For foreign arbitration proceedings, Pakistani courts recognise the principle of competence-competence under the New York Convention Act (which implements the NY Convention).

Objections regarding the jurisdiction of the tribunal must generally be raised at the earliest stage. Where parties submit to the jurisdiction and take part in the proceedings, they may be disallowed from contesting jurisdiction at a later stage as the principles of waiver and estoppel may apply. However, objections regarding inherent jurisdiction of an arbitrator are a point of law and an incurable defect, and thus can be raised at any stage.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

The Arbitration Act 1940 (the 1940 Act) does not specify any default mechanism for determining the place or language of arbitration. In practice, tribunals determine such questions. For the substantive law of the dispute, tribunals apply principles of contractual interpretation to determine the intention of the parties, and, failing that, the choice of law that has the closest real connection to the underlying agreement.

Commencement of arbitration

27 How are arbitral proceedings initiated?

Arbitration proceedings are initiated by service of notice to commence arbitration on the other party. Alternatively, a party may commence arbitration with the court's intervention under section 20 of the 1940 Act by applying in writing for the arbitration agreement to be filed in court and for the dispute to be referred to arbitration. During the pendency of any suit, the parties may jointly apply to the court to order reference to arbitration (section 21).

Hearing

28 Is a hearing required and what rules apply?

A hearing is generally required to satisfy the requirements of natural justice. However, given that parties are allowed to formulate their own procedure, it remains to be seen whether such a rule would be enforced where parties agree not to have a hearing.

Evidence

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

The tribunal is not bound by any specific rules to establish the facts of the case. Unless otherwise agreed by the parties, the tribunal may follow any reasonable procedure so long as it provides a fair opportunity to each party to lead evidence, addresses all their contentions, and issues a reasoned award in writing. In practice, guidance from the IBA Rules on the Taking of Evidence in International Arbitration is not sought.

Tribunals may issue summons (either if empowered in the agreement or under clause 6 of the first schedule of the Arbitration Act 1940 (the 1940 Act). The tribunal can also request the court to summon any witness or document. Unless otherwise agreed, the tribunal is also

empowered to administer oath to the parties and witnesses. Parties and party officers routinely testify before arbitral tribunals.

Court involvement

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

Tribunals may seek court assistance to summon witnesses or order production of documents. A tribunal may state a special case for the opinion of the court on a question of law.

Confidentiality

31 | Is confidentiality ensured?

The Arbitration Act 1940 (the 1940 Act) does not contain any provision regarding confidentiality. The tribunal is required to file the award in court and, in some cases, all depositions and documents relating to the dispute as well. Documents filed in court become a part of the public record.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Courts are empowered to order interim measures. Courts may make orders regarding:

- the preservation, interim custody or sale of goods that are the subject-matter of the dispute;
- the preservation, detention or inspection of any property or thing that may arise as an issue during the proceedings;
- interim injunctions;
- appointment of a receiver or guardian; and
- securing the sum of difference in the dispute.

The court's power to grant interim measures is without prejudice to any power vesting in the tribunal.

After the award is filed, the court may pass any interim orders that are necessary to prevent defeat, delay or obstruction of the execution of the decree or if circumstances necessitate expediting the execution of the award.

Interim measures by an emergency arbitrator

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

There is no such provision in the Arbitration Act 1940 (the 1940 Act).

Interim measures by the arbitral tribunal

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

The Arbitration Act 1940 (the 1940 Act) does not expressly confer power on the arbitral tribunal to issue interim orders. However, the tribunal may exercise any powers granted by the parties by agreement. In practice, parties approach the court for interim relief.

Sanctioning powers of the arbitral tribunal

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

The Arbitration Act 1940 (the 1940 Act) does not contain any such provisions. Parties and counsel may approach the courts in such regard. Party representatives who are qualified advocates are regulated under the Legal Practitioners and Bar Councils Act 1973 and may be reported to the relevant bodies for professional misconduct.

AWARDS

Decisions by the arbitral tribunal

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

Where the parties appoint an arbitrator and the nominated arbitrators appoint a third, the third appointee is considered an umpire. In this case, the tribunal (minus the umpire) is required to render a unanimous award. If they fail, then areas of disagreement are decided by the umpire. If all three (or more) arbitrators are party appointed then the tribunal may decide by majority.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

A dissenting note does not impact the enforceability of the award.

Form and content requirements

38 | What form and content requirements exist for an award?

An award must be in writing and signed by the tribunal. It must also specify the reasons for the decision in sufficient detail so that the court can consider any question of law arising out of it.

Time limit for award

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

Parties or, where applicable, the court can specify (and extend) the time within which an award must be rendered in their arbitration agreement. Absent agreement or stipulation, a limit of four months is implied. However, the tribunal cannot extend the time of its own accord without party consent.

Date of award

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

An application under the Arbitration Act 1940 (the 1940 Act) to set aside or remit an award must be made within 30 days of the date of service of the notice that the award has been filed in court by the tribunal. An application for filing the award in court must be made within 90 days of the date of service of notice that the award has been made. Applications for modification of the award must be made within three years, although

it is unclear if time shall run from the date of the award or date of delivery of the award.

Types of awards

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

Under the Arbitration Act 1940 (the 1940 Act), arbitration awards in Pakistan can be in the form of a final award, an interim award, a partial award, a consent award, a default award and a conditional award or award in the alternative.

Absent agreement, a tribunal can make 'interim awards', which are binding and enforceable as a final award (*Burjorjee v New Hampshire Insurance*, 1992 CLC 1269). Therefore, such interim awards have been construed as partial awards by some courts. The tribunal is also empowered to issue a consent award (*Muhammad Yousaf v Abdur Rashid*, PLD 1967 Karachi 508), and proceed ex parte where a party does not join proceedings and render a default award (*Progressive Methods v Shaheen Airport Services,* 1998 CLC 1638). A tribunal can also issue awards conditionally or in the alterative.

Termination of proceedings

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

The proceedings can be terminated if there is a settlement between the parties. Where the tribunal fails to resubmit a remitted award to the court within the fixed time, it becomes void. Proceedings can also be terminated where the parties agree to resume court proceedings and give such notice to the tribunal.

Cost allocation and recovery

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

At the time of making the award, the tribunal informs the parties of the fees and charges payable. The tribunal may order that the costs relating to the arbitration (including the arbitrator's fee, reasonable administrative costs incurred, any special expenses arising in connection with the arbitration and charges incurred during filing of the award in court) may be made by the party or parties. There is one judgment of the Lahore High Court that suggests that fees of counsel are not within the scope of arbitration costs; however, it is not clear if this will be followed.

Further, where a question arises as to the costs of the arbitration and the award is not clear, the court may make such orders as it thinks fit.

Interest

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

Post-award interest may be granted by a court at a reasonable rate, but not a tribunal (*Gerry's International v Aeroflot,* 2017 CLC 291).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

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

Absent agreement, a tribunal can correct any clerical mistakes or accidental errors or omissions in the award. The court also has the power to modify or correct the award. Parties may apply for modification within three years, although it is unclear if time shall run from the date of the award or date of delivery of the award.

Challenge of awards

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

A domestic award can be challenged on the grounds that:

- the tribunal misconducted itself or the proceedings;
- the award was made after the issuance of an order by the court superseding the arbitration;
- the award was made after the arbitration proceedings had become invalid under section 35 of the Arbitration Act 1940 (the 1940 Act);
- the award was improperly procured; or
- the award was otherwise invalid.

A party seeking to challenge an award may apply to the court within 30 days of the service of notice that the award has been filed. Further, the court must be satisfied that no cause existed to set aside the award.

Levels of appeal

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

There may be two or three levels of appeal depending on the value of the claim. While timelines vary, it is typical that appellate proceedings may take two to three years. There are minimal court charges or fees associated with arbitration appeals, with legal fees constituting a majority of the expenditure. Costs are typically not apportioned among the parties.

Recognition and enforcement

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

A domestic award must be signed and filed in court. The court must be satisfied that no grounds exist to remit or set aside the award. If so satisfied, the award is made a rule of court and enforced as a decree of the court. Grounds for refusal to recognise and enforce include (but are not limited to) misconduct, illegality apparent on the face of the award, the determination of issues that were not subject to arbitration, or a failure to determine an issue that was subject to arbitration, and an award being incapable of execution.

For foreign awards made in a NY Convention contracting state, the award creditor applies to a high court under the New York Convention Act. The award is also enforced in the same manner as a judgment of the court. With the application, the party must furnish documents specified in article IV of the NY Convention and the grounds for refusing recognition and enforcement are the ones specified in article V of the NY Convention. Courts recognise the pro-enforcement policy underlying the NY Convention.

Time limits for enforcement of arbitral awards

49 Is there a limitation period for the enforcement of arbitral awards?

Limitation for an application to the court to direct the tribunal to file the award is within 90 days of the service of notice by the tribunal that the award has been made.

As no specific limit for an application for enforcement of a foreign award is provided, the default period of three years from the date the right accrues will likely apply.

Enforcement of foreign awards

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

It is likely that an award set aside at the place of arbitration will not be enforced owing to article V(1)(e) of the NY Convention.

Enforcement of orders by emergency arbitrators

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

No.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Legal fees, court fees and the requisite stamp duty payable under the Stamp Act 1899.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Although the Civil Procedure Code 1908 and Qanun-e-Shahadat Order 1984 (the law of evidence) do not apply to arbitration proceedings, there is a tendency to adopt procedures from these statutes. Thus, there is generally focused document production and not US-style discovery. Witness statements and oral testimony are common.

Professional or ethical rules

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

There are no specific rules or guidelines that apply to counsel and arbitrators in international arbitrations. Advocates in the country are required to follow the Legal Practitioners and Bar Councils Act 1973.

Third-party funding

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

Although there is no express prohibition on third-party funding, the general perception is that it would be impermissible on grounds of being contrary to public policy. However, in one judgment, the Lahore High Court observed that agreements to finance litigation may not be per se illegal and that such a determination would need to be made on a case-by-case basis (*Muhammad Ramzan v Shamas–ud-din*, 2012 CLC 1541).

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Regulation of activities

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

Foreign practitioners should seek advice on whether income received in relation to work done in Pakistan could be subject to income tax or sales tax on services.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Recent decisions by Pakistani courts indicate an improving climate for international arbitration in Pakistan. The *Orient Power* decisions of the Lahore High Court and the Supreme Court have clarified the scope of the New York Convention Act and excluded the application of the Arbitration Act 1940 to foreign awards under the NY Convention. There is also greater clarity over a number of matters such as the applicability of the principle of competence-competence, enforceability of multi-contract arbitration clauses and the limited scope of the public policy defence, which may be used to refuse enforcement of foreign arbitral awards.

Pakistan's recent experiences in investor-state arbitrations continue to receive news coverage, notably proceedings related to *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, in which Tethyan secured an award worth US$5.9 billion (inclusive of pre-award interest and costs) for claims regarding the denial of a mining lease by a provincial government. Pakistan has challenged the award in annulment proceedings, which are pending.

The other major case reported in the news – *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 – was settled successfully. According to news reports, under the terms of the confidential settlement Pakistan did not have to pay the approximately US$1.2 billion damages determined by the tribunal.

Romania

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STOICA & Asociații

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

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

Romania is a jurisdiction that promotes domestic and international arbitration, and to this end it is a signatory party to the most important international instruments dealing with arbitration. In 1961, by Decree No. 186, Romania became a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As of the date of that adherence (24 July 1961), a declaration was made by Romania specifying that the Convention applies only to contractual or non-contractual disputes that are deemed commercial by Romanian legislation, and that it shall apply to arbitral awards issued in non-contracting states based only on reciprocity established by the state parties' agreement.

Romania is also a state party to the European Convention on International Commercial Arbitration adopted by the United Nations in Geneva, on 21 April 1961, subsequently ratified by Decree No. 281 of 25 June 1963; also, Romania is party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States dated 18 March 1965, which was ratified by Decree No. 62, of 30 May 1975.

In conformity with article 11(2) of the Romanian Constitution, the treaties ratified by the Romanian parliament are part of domestic law.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

As at 2021, Romania is party to 98 bilateral investment treaties (BITs), of which 74 are still in force (https://investmentpolicy.unctad.org/international-investment-agreements/countries/174/romania?type=bits). Twenty-two BITs concluded in the past by Romania with EU member states were declared terminated by mutual agreement or by unilateral termination by the Romanian parliament, which approved such cease or termination through Law No. 18/2017, entered into force on 24 March 2017. The date when these BITs are to be ceased or terminated will be published in the Official Gazette by the Ministry of Foreign Affairs of Romania. On 5 May 2020, Romania and 22 other EU member states executed the Agreement on the Termination of Bilateral Investment Treaties concluded between EU member states. Article 4 of the Agreement confirms that member states do not have recourse to arbitration for intra-EU disputes, regardless of the arbitration rules governing arbitration. As a consequence, bilateral investment treaties listed under Annex A of the Agreement are terminated according to the terms set out in the Agreement. For greater certainty, Sunset Clauses of Bilateral Investment Treaties listed under Annex A are terminated and shall not produce legal effects (article 2). Subsequently, the Official Journal of the European Union Series L 281 (28 August 2020) published information concerning the entry into force of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, specifying that the Agreement, signed in Brussels on 5 May 2020, would enter into force on 29 August 2020, in accordance with article 16(1) of the Agreement.

Domestic arbitration law

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

The primary domestic sources of law related to domestic and foreign arbitral proceedings are contained in the New Civil Procedure Code (NCPC), in force since 15 February 2013, in Book IV entitled 'About Arbitration' (articles 541 to 621), dealing with domestic arbitration, and in Book VII about 'The International Civil Proceedings', Title IV, regarding 'The International Arbitration and the Effects of Foreign Awards' (articles 1111 to 1133). The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Romania is a state party signatory, is also part of Romanian law applying to the recognition and enforcement of foreign awards.

At the arbitration institutional level, the Court of International Commercial Arbitration attached to the National Chamber of Commerce and Industry of Romania (the Court of Arbitration) – the leading Romanian arbitration institution – has adopted and subsequently modified its own rules on arbitral proceedings (the Rules of the Court of Arbitration). The most recent version, in force since 1 January 2018, is aligned with the arbitration rules adopted by the most reputable international arbitration institutions worldwide.

Domestic arbitration and UNCITRAL

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

Domestic law on arbitration is contained in Book IV of the NCPC, articles 541 to 621, whereas international arbitration is regulated under articles 1111 to 1133 of the same NCPC (Book VII, Title IV). These are modern and flexible provisions, reflecting attractive arbitration rules for both domestic and international arbitration. To a quite large extent, the provisions of the NCPC bear some resemblance to the UNCITRAL Model Law (eg, in the case of international arbitration, the arbitral tribunal can issue partial awards as long as a contrary provision is not included in the

arbitration agreement; the recognition of the equal treatment of parties principle; and the scope of the written form of an arbitration agreement). A difference from the UNCITRAL Model Law exists regarding the regime of interim measures and preliminary orders, namely that Romanian provisions do not contest the existence of the right to apply for such measures and orders. However, a detailed regime in this respect is not provided by the NCPC. At the institutional level, the current version in force of the Rules of the Court of Arbitration have more emphasis on this issue. Thus, they regulate the requests for the application of interim measures prior to the commencement of the arbitration procedure or before the case file is referred to the arbitral tribunal, where such requests are settled by an emergency arbitrator, as per article 40 of the mentioned institutional rules.

However, there is nothing that prevents the parties from referring in their arbitration agreement to any of the provisions contained in the UNCITRAL Model Law applying to their arbitration.

Mandatory provisions

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

The parties may not derogate from the rules regarding public policy or from the mandatory provisions of the law. Mandatory provisions from which the parties cannot deviate are, inter alia, the following:

- The clause by which a party nominates an arbitrator in lieu of the other party or by which it appoints a higher number of arbitrators than the other party is null and void.
- The parties are not entitled to waive their right to challenge the arbitral award by inserting a clause in respect thereof in the arbitration agreement.
- The arbitration proceedings must ensure the equality of treatment, the right to defence and the *audiatur et altera pars* principle. Conversely, the award is subject to annulment.

Substantive law

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

Romania is an EU member state, and as such the EU sources of law in connection with conflict of laws are to be scrutinised before referring to domestic provisions. The main EU sources of law are Regulation No. 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), and Regulation No. 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (Rome II). Where EU law is not applicable, the conflict of laws rules is mainly provided under articles 2557 to 2663 of the Romanian Civil Code, which entered into force on 1 October 2011. Both EU law and the Romanian Civil Code allow the parties to elect the governing law as the substantive law applying to the merits of an arbitral dispute. The same applies in international arbitration under the Rules of the Court of Arbitration. Where the parties fail to agree on the law governing the merits of a dispute, both EU law and the Romanian Civil Code provide the rules for determining the applicable substantive law.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

As per Law No. 335 of 3 December 2007, the most prominent permanent non-corporate arbitration institution is the Court of International Commercial Arbitration attached to Chamber of Commerce and Industry of Romania.

Court of International Commercial Arbitration
The Chamber of Commerce and Industry of Romania
2, Octavian Goga Blvd
3rd district
Bucharest
Romania
http://arbitration.ccir.ro/en

As the court of arbitration system is organised on a cameral basis, it follows that in each of the 41 administrative counties of Romania there is a chamber of commerce attached to which there is a court of arbitration. The rules of arbitration of these courts are almost identical to the NCPC (Book IV) rules of arbitration, which represent Romanian arbitration law. However, in practice, the activity of these arbitration institutions is very limited, both as to registered cases and case law.

During the past decade, various bilateral private chambers of commerce were created in Romania by the business community that have established their own courts of arbitration, but their activity is still very limited as to registered cases.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

As regards international arbitration, the New Civil Procedure Code (NCPC) states that any dispute of an economic nature can be submitted to arbitration if it concerns rights in relation to which the parties can freely dispose, and provided that the law of the state where the arbitral tribunal has its seat does not reserve exclusive jurisdiction for the national courts. In principle, only monetary claims can be referred to either domestic or international arbitration. However, there are some monetary claims that are excluded from arbitration. For instance:

- intellectual property disputes concerning the annulment of a trademark, a patent or industrial design, or those related to the author of a creation subject to copyright, where such disputes are given in the exclusive competence of the courts of law;
- regarding antitrust and competition laws matters, the disputes on the lawfulness of the Competition Council's decisions are reserved to the court of law. However, the parties may refer to an arbitration dispute with claims on damages arising from a breach of competition law; or, in the case of a contractual dispute, one party may raise competition issues in connection with the validity of some clauses and the arbitral tribunal will retain jurisdiction to assess such matter;
- intracompany (corporate law) disputes are reserved to the courts of law as per the provisions of Law No. 31/1990 on Companies; and
- family matters, inheritance disputes and any matters related to the civil status are also given to the jurisdiction of courts of law.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

As a rule, the arbitration agreement must be concluded in writing. The criteria for determining whether the arbitration agreement was executed in writing are very generous, being considered to be fulfilled if the parties agreed to arbitration by means of an exchange of correspondence, irrespective of its form, or by an exchange of procedural acts, as well as if the defendant expressly accepts the jurisdiction of the arbitral tribunal, either by written statement or by express statement recorded by the arbitral tribunal. As an exception, the NCPC (article 548(2)) compels the parties to conclude the arbitration agreement in

an authentic form, under the sanction of absolute nullity, if it refers to disputes related to the transfer of an ownership right or to the creation of another property right over an immovable property.

Under the NCPC (article 550(1)), the arbitration agreement must include a reference regarding the procedure to appoint the arbitrators, under the express sanction of nullity as to ad hoc arbitrations. In the case of institutional arbitration, such references are not mandatory, considering that the law allows a reference to the procedural norms of the institution that administers the arbitration. Arbitration agreements must be concluded with the observance of the conditions provided for the validity of agreements in general, namely the existence of the capacity of the parties to conclude the agreement, the parties' consent and a valid object and a valid cause of the main contract. Local or state entities can conclude an arbitration agreement to the extent that a special provision, either domestic or international, allows them to do so.

The Court of Arbitration recommended a model clause for the arbitration agreement to be used by any concerned parties. This model clause only refers to disputes that arise from the agreement containing an arbitration clause or by a separate agreement (in the form of a compromise). The Rules of the Court of Arbitration provide for the principle of separability of an arbitration agreement from the main contract and its full effects regarding the competence given to the arbitral tribunal to arbitrate (except for the cases when the matter in dispute is not arbitrable).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

According to Romanian law – NCPC (article 554) – and to article 6 of the European Convention on Human Rights, an arbitration agreement is no longer enforceable for one or another of the following reasons:

- The institution organising the arbitration fails to comply with the minimum requirements of article 6 of the European Convention on Human Rights.
- The arbitral tribunal cannot be constituted because of the defendant's obvious default.
- The proceedings before courts of law were initiated and the defendant raised no objection on jurisdiction.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Provisions on the separability of arbitration agreements from the main agreement are found in the Romanian arbitration law in the case of domestic arbitration – article 550 (2) NCPC ('The validity of the arbitration clause is independent of the validity of the contract that was entered') and in the case of international arbitration – article 1113 (3) NCPC ('The validity of the arbitration agreement cannot be challenged on the grounds of the invalidity of the main contract or because it would concern a dispute that does not yet exist').

Third parties – bound by arbitration agreement

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

A third party can be bound by an arbitration agreement only to the extent that it becomes a party to that arbitration agreement. In several exceptional cases, parties different from the signatories may be bound by an arbitration agreement if:

- the underlying contract was assigned to a third party in accordance with the rules set out in the NCPC;
- the assignee of a claim is bound by the arbitration agreement by virtue of the *accessorium sequitur principale* rule; or
- in the case of inheritance, the heirs and legatees of a party contracting to an arbitration agreement are bound by such a clause.

Third parties – participation

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

According to the NCPC, if third parties are to participate in arbitration, this must be based both on the consent of the third parties and of all the parties to arbitration, with the observance of the general rules governing third-party participation in disputes. According to these general rules, any person who has a substantive interest can intervene in a dispute pending between other parties. Where a third party intends to intervene for the benefit of one of the original parties, such intervention is allowed without the existence of the consent of the original parties.

The Rules of the Court of Arbitration have a different perspective on third-party participation in arbitration, regulated in article 16. First, if the third party intends to intervene solely for the benefit of one of the original parties, it must prove the existence of an arbitration agreement with all the original parties or obtain their consent. Second, where a third party that may have the same claims as the original claimant intends to intervene in an ongoing proceeding or one of the original parties requests for the joinder of the third party, this implies the authorisation of the arbitral tribunal or, where such tribunal is yet to be appointed, by the board of the Court of Arbitration.

When deciding on whether to authorise such intervention, the arbitral tribunal or the Court of Arbitration board shall also consider, inter alia, the fulfilment of the following conditions:

- all parties, including the intervenor, agree, even before the arbitral tribunal, that the disputes between them are subject to arbitration conducted in accordance with the Rules of the Court of Arbitration and also on the method of choosing the arbitral tribunal;
- the intervention from the third party or the request for joinder have been filed in a timely fashion, at the latest at the first hearing date; and
- the intervening third party or the request for joinder party pays the arbitration fee in the amount established by the Schedules of Arbitral Fees and Expenses part of the Rules of the Court of Arbitration, as well as any additional arbitration costs.

Groups of companies

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

Arbitral tribunals are not often confronted with the group of companies doctrine in view of extending an arbitration agreement to non-signatory companies', and therefore, to the best of our knowledge, the group of companies doctrine is not recognised yet in the Romanian jurisdiction with respect to arbitration. Law No. 85/2014 regarding insolvency proceedings refers under article 5(35) to the group of companies involving two or more companies interconnected by control or holding of qualified participations, and under article 5(6) refers to the 'parent company', that is, the company that exercises control or dominant influence over the other companies in the group. At the same time, articles

183 et seq. of the same law govern the special provisions on insolvency proceedings of a group of companies. Also, article 43(1) of the Company Law No. 31/1990 stipulates that the branches do not enjoy legal personality as a company. No particular provision contained in the national law (NCPC) refers to the group of companies, but this does not mean that no interpretations can be made under the other existing provisions, which support the concept of economic and legal reality at the conclusion of contracts.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Romanian arbitration law is silent as far as this specific matter is concerned. Some scholars are of the opinion that the requirements for executing an arbitration agreement remain applicable for such cases as well.

The Rules of the Court of Arbitration provide on this matter in connection with the nomination of arbitrators by ruling that if there are more claimants or defendants, the parties having mutual interests will designate one arbitrator. If the parties fail to agree on this appointment, the arbitrator will be designated by the president of the Court of Arbitration.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The NCPC is silent in connection with the consolidation of separate arbitral proceedings. The Rules of the Court of Arbitration attached to the Chamber of Commerce and Industry of Romania deal with this matter under article 17, which provides for three circumstances in which the Arbitral Tribunal may decide to consolidate separate arbitral proceedings:

- all the parties agree to consolidation;
- all the claims are made under the same arbitration agreement; or
- where the claims are made under more than one arbitration agreement, the relief sought arises from the same transaction or series of transactions and the arbitral tribunal considers the arbitration agreement to be compatible.

In deciding on consolidation, the arbitral tribunal shall consult with the parties and may have regard to, inter alia, the stage of the pending arbitration, whether the arbitrations raise common legal or factual issues, and the efficiency and expeditiousness of the proceedings.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

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

The general rules set out in article 555 of the New Civil Procedure Code (NCPC) provide that any natural person who has an unrestricted exercise of its rights can be an arbitrator. The Rules on the Organization and Operation of the Court of Arbitration provide that any person – whether a Romanian or a foreign national – can be an arbitrator if he or she has an unrestricted exercise of his or her rights, enjoys an excellent reputation and is highly qualified in the field of international private law, internal and international economic relations and commercial arbitration. The Court of Arbitration provides a non-mandatory list of selected arbitrators considered to have such qualifications.

To be included in the list of arbitrators, a person must, among other things, have a solid legal background and at least eight years' experience in the legal field. In case of arbitrations organised by the Court of Arbitration, persons who are not included on the list of arbitrators can act as arbitrators if the parties in dispute nominate these persons by their arbitration agreement, regarding a specific dispute, under the condition that these persons meet the requirements set forth by the arbitration Rules of the Court of Arbitration. A restriction to act as arbitrator exists for acting judges.

The NCPC, as well as the Rules of the Court of Arbitration, provide that an arbitrator cannot solve a specified arbitral dispute if he or she does not observe the qualification requirements or other conditions regarding arbitrators, which are set forth in the arbitration agreement. The law is silent on what concerns the possibility of accepting contractual requirements for arbitrators based on nationality, religion, or gender.

Article 4(2) of the Romanian Constitution prohibits discrimination based on race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin. Further, article 11 of the Romanian Civil Code stipulates that it cannot be derogated by conventions or by unilateral legal acts from the laws that concern public policy or from good morals. In other words, Romanian legislation prohibits the conclusion of agreements having as object the appointment of arbitrators exclusively on the basis of criteria related to nationality, religion or gender.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

As a rule, any person enjoying the full capacity of his or her rights may act as an arbitrator. The Rules on the Organization and Operation of the Court of Arbitration provide under article 4(4) that any Romanian or foreign citizen may act as an arbitrator where he or she enjoys the full capacity of rights, does not have a bad reputation, and has considerable skills and experience in the field of private law, domestic and international economic relations, and commercial arbitration.

Persons holding certain official positions in Romania are prevented from sitting as arbitrators. For example, acting judges or prosecutors cannot act as arbitrators.

Practising lawyers and law professors are regularly appointed as arbitrators in the Romanian jurisdiction. Retired judges may also be found on the panels of arbitral tribunals.

As far as gender diversity in institutional appointments is concerned, we do not know of any initiatives to promote gender diversity. In practice, most arbitrators are male.

Default appointment of arbitrators

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

Under the rules of the NCPC, the names, number and appointment mechanism of arbitrators must be indicated in the arbitration agreement. The parties are free to agree on these aspects after the execution of the arbitration agreement. The powers of the domestic court or of the president of the Court of Arbitration to make the nomination are subsidiary to the freedom of the parties to make an agreement.

The domestic courts may intervene in the mechanism for the appointment of arbitrators if a party fails to propose the arbitrators; the parties disagree on the appointments of the sole arbitrator; or the arbitrators disagree on the nomination of the chair.

In the case of arbitration under the Rules of the Court of Arbitration, the default mechanism is different as the president of the Court is empowered in case of default to appoint the arbitrators, the sole arbitrator or the chair.

The president of the Court, when making the appointment in case of default, shall consider the nature and the circumstances of the dispute, the substantial applicable law, and the seat and language of the arbitration, as well as the nationality of the parties.

Not least, the filing of an ancillary claim or incidental request shall not result in the modification of the composition of an already constituted arbitral tribunal.

Challenge and replacement of arbitrators

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

The NCPC provides that arbitrators can be challenged both for the same grounds as judges and, additionally, for specific grounds such as:

- failure to meet the professional requirements or other requirements set out in the arbitration agreement;
- a legal person having an interest in the arbitration dispute, where the legal person has the arbitrator as shareholder or involved in its management;
- where the arbitrator is working for or in direct commercial relations with one of the parties, a company controlled by one of the parties or under joint control; and
- where they provided consultancy to one of the parties, assisted one of the parties or testified in the previous stages of the dispute.

Domestic courts have jurisdiction in hearing the merits of the challenge request with the attendance of the parties and of the challenged arbitrator.

In arbitrations organised under the Rules of the Court of Arbitration, an arbitrator can be challenged on grounds that question his or her independence and impartiality, and that qualify the arbitrators as incompatible. The grounds for challenge are like those provided in the NCPC. The challenge request is settled by an arbitral tribunal appointed by the president of the Court of Arbitration or, in case of a sole arbitrator, by the president of Court of Arbitration or by another arbitrator appointed by the president of the Court of Arbitration.

In the case of bias or an appearance of bias, an arbitrator can be challenged by the concerned party. The standard of bias or appearance of bias that might give grounds for challenging an arbitrator is the same as in the case of judges as developed by the case law of the courts of law, which takes guidance from the judgments of the European Court of Human Rights. In some disputes, guidance is also sought from the IBA Guidelines on Conflicts of Interest in International Arbitration.

The replacement of an arbitrator may occur in the case of challenge, withdrawal, resignation (because of illness, for example), death or other impediments.

Relationship between parties and arbitrators

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

Arbitrators are, as a rule, appointed by the parties. Failing the nomination by the parties, the arbitrators are to be appointed by the court of law or by the president of the Court of Arbitration.

Arbitrators are entitled to receive fees for their duties. Under the Rules of the Court of Arbitration the fees of the arbitrators are included in the arbitration tax, calculated by the secretariat of the Court of Arbitration. Any arbitrators' expenses occurring during the pending dispute are borne by the parties.

In the case of ad hoc arbitration, the arbitral tribunal shall determine the due fees and may compel the parties to pay them in advance and, with regard to the expenses occurred during the dispute, the arbitral tribunal shall assess whether all parties will bear those expenses.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The person nominated or appointed as arbitrator is compelled under the provisions of article 562(3) NCPC to disclose to the parties and to the other arbitrators, before any acceptance of the mission or, if after, as soon as he or she becomes aware of, any grounds substantiating a potential challenge against his or her impartiality or independence.

Under the Rules of the Court of Arbitration (article 21) the person nominated as arbitrator is under a duty to provide, within five days as of the date of receiving the nomination, a statement on their independence, impartiality and availability, simultaneously disclosing any circumstances that may cast any reasonable doubts on his or her independence or impartiality. Where such circumstances occur after the acceptance of his or her nomination, the arbitrator is under a duty to immediately disclose them to the parties and to the other arbitrators.

Immunity of arbitrators from liability

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

The NCPC provides for cases where the arbitrators are to be held liable to the parties, such as:

- after acceptance, the arbitrator waives the appointment in an unjustified manner;
- for groundless reasons, the arbitrator fails to attend the arbitral dispute proceedings, performs other actions that are of such a nature as to unjustifiably delay the proceedings or fails to deliver the award by the deadline as set out in the arbitration agreement or by the law; and
- the arbitrators fail to observe the confidentiality of the arbitration by publishing or disclosing information known in the capacity as arbitrators, without the parties' prior authorisation.

Under the Rules of the Court of Arbitration, the arbitrators shall not be liable to any of the parties for any action or omission in connection with the arbitration, unless such action or omission is owing to their wilful misconduct or gross negligence.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

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

There might be situations where, despite an existing arbitration agreement, a party initiates the court proceedings. In such a case, only the parties may challenge the court's jurisdiction on grounds of the existing arbitration agreement. Where the jurisdiction is challenged on grounds of an existing arbitration agreement, the court shall retain jurisdiction if the defendant's arguments on the merits of the dispute have no reservation on grounds of the arbitration agreement; the arbitration agreement

is affected by nullity or is not inoperative; and the arbitral tribunal cannot be constituted for reasons utterly determined by the defendant. In international proceedings, any challenge of jurisdiction based on the existing arbitration agreement needs to be raised by the defendant until at the first hearing, provided that the subpoena was duly served.

Jurisdiction of arbitral tribunal

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

As per the national arbitration law, represented by the New Civil Procedure Code (NCPC) (Book IV), the arbitral tribunal verifies its jurisdiction either ex officio or at a party's request and delivers a decision in this respect (based on the competence-competence principle). In domestic arbitration, at the first hearing, provided that the subpoena was duly served, the arbitral tribunal verifies its jurisdiction. Where jurisdiction is retained, the concerned party may challenge such a decision only by means of a motion to set aside the award itself. If the arbitral tribunal declares that it does not have jurisdiction, its competence is declined in favour of the court of law and such decision of the tribunal cannot be challenged with a motion for setting aside the award.

In international arbitration (NCPC, Book VII), any objection of jurisdiction must be raised prior to any defence on the merits of the dispute. The arbitral tribunal decides on its own jurisdiction without considering other pending claims before another arbitral tribunal or court, between the same parties and having the same object, except when grounded reasons require the stay of the proceedings.

Under the Rules of the Court of Arbitration, at the first hearing, the parties are called to answer to the arbitral tribunal the extent to which they have objections to its jurisdiction.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

In domestic and international arbitration, the New Civil Procedure Code (NCPC) standard provides that, if the parties fail to reach an agreement, the arbitral tribunal has residual jurisdiction in determining the place of arbitration. In the case of institutional arbitration, under the Rules of the Court of Arbitration, the place of arbitration is at the Court's headquarters, unless the parties have agreed otherwise.

As far as the language of arbitration proceedings is concerned, where no agreement is reached, the language of the substantive contract is considered to apply or any international language as to be determined by the arbitral tribunal. In an institutional arbitration under the Rules of the Court of Arbitration, unless the parties agreed on the contrary, the language of arbitration is Romanian. Upon request by a party, the arbitral tribunal, taking into consideration the circumstances of the case, may decide to conduct the proceedings in another language.

In international arbitration, article 1120 NCPC provides that the Arbitral Tribunal applies the substantive law chosen by the parties and, failing such choice, the law the Arbitral Tribunal deems to be adequate, taking always into account customs and any professional rules.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Arbitral proceedings are initiated by the claimant by submitting a request for arbitration. The request must be made in writing and must contain the identification data of the parties and of their representatives, the reliefs sought and the monetary value of the claim, the factual and legal merits of the case, the supporting evidence, the arbitration agreement with a copy of the corresponding contract, the signature and the stamp of the parties, as the case may be.

The request must be submitted in several copies sufficient to be communicated to each party and for each of the members of the arbitral tribunal.

Under the Rules of the Court of Arbitration, the request for arbitration must be submitted in paper and electronic format, in as many counterparts as the number of defendants, for each of the arbitrators and an additional one for the arbitration file. The request for arbitration should also contain the claimant's proposal concerning the number of arbitrators, the name of the proposed arbitrator, the place of arbitration and its option with respect to the incidence of the expedited arbitration procedure. The term of arbitration starts from the date when the arbitrator accepted his or her appointment (or as of the date when the chair accepted his or her appointment) by giving a written statement of acceptance.

Hearing

28 | Is a hearing required and what rules apply?

According to the rules of the NCPC, the arbitral tribunal at least organises a hearing for the parties' debates, based on the general principle of procedural law, which states that disputes shall be debated orally. The parties can attend hearings personally, represented by their attorneys or assisted by any person who enjoys of a proper representation proof. Nonetheless, any of the parties can require in writing that the settlement of the dispute be made in its absence, based on the evidence in the file.

The Rules of the Court of Arbitration contain provisions about hearings, article 35 regulating that hearings shall be organised if requested by a party or if the arbitral tribunal finds it appropriate. The parties can attend such a hearing personally or be represented by their attorneys, counsel or by any other person and be assisted by interpreters. Where the Special Rules for Expedited Procedure are applicable, according to article 3(4) thereof, the hearings may be conducted by video conference, telephone or by any similar means of communication.

Evidence

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

First, each party must prove the facts in connection with its claims or defences. The evidence the parties may provide in connection with their claims or defences is prescribed by the general law, namely the NCPC (witnesses, experts, documents, inspection by the arbitral tribunal and cross-examination). In addition, the parties and their representatives may be subject to examination. Before the arbitral tribunal, the experts and the witnesses are not cross-examined under oath.

Domestic law does not prevent the parties from agreeing upon the evidence and upon their administration before the arbitral tribunal.

In institutional arbitration under the Rules of the Court of Arbitration, there are some peculiarities. First, according to article 31 of the Rules of the Court of Arbitration, which regulates the case

management conference, after the referral of the case to the arbitral tribunal, it shall make an order giving notice to the parties for the case management conference, aimed to organise, schedule and establish the applicable procedural rules, including with respect to evidence, and the stages for filing the written submissions, subject to the application of article 26(5). Second, the parties may submit written statements from the witnesses and, in what concerns the experts, prior to or at the latest during the case management conference, the parties have the obligation to inform the arbitral tribunal whether they choose the appointment of an independent expert or intend to file expert reports prepared by party-appointed experts. After consulting the parties, the arbitral tribunal may appoint one or several experts who shall submit their reports in the case file, accompanied by proof of communication to the parties. In such a situation, each party has the right to appoint a side expert to attend the work of the appointed experts.

Upon the parties' agreement, the arbitral tribunal, on grounds of article 34(5) of the Rules of the Court of Arbitration, may apply IBA Rules on the Taking of Evidence.

Court involvement

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

Domestic courts may intervene, upon the request of a party, to remove obstacles to commencing or deploying arbitration proceedings, or to perform other powers that fall under the court's competence. For instance, the court can intervene in the following situations:

- the arbitral tribunal cannot be constituted, in the case of ad hoc arbitration;
- before or during arbitration proceedings, the court, by request, is asked to take interim or provisional measures;
- a party opposes the interim measures taken by the arbitral tribunal during arbitration proceedings; and
- to apply sanctions to the expert or to the witnesses, or if a public authority fails to respond to an information request received from the arbitral tribunal.

The referral to the court shall be settled in an emergency procedure and the judgment is not subject to any appeal.

Confidentiality

31 | Is confidentiality ensured?

The NPCP does not contain express references to confidentiality, since the Rules of the Court provide that as an obligation towards all the participants to the arbitration proceedings. The arbitral file and the proceedings are considered confidential, and the arbitrators and all the staff of the Court of Arbitration are bound by the obligation of confidentiality. The complete award can only be published with the parties' approval. The enforcement file is also confidential, but certain proceedings must be made publicly.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Article 585 of the New Civil Procedure Code (NCPC) provides that, before or during the arbitration, either party may request the tribunal to take interim measures and provisional measures on the subject matter of the dispute or to ascertain certain factual circumstances. The approval of these measures will be brought to the knowledge of the arbitral tribunal by the party requesting them. During the arbitration, interim or provisional measures, as well as the observance of certain factual circumstances, may also be approved by the arbitral tribunal. In the case of opposition, the enforcement of these measures is ordered by the court.

As to international arbitration, the NCPC provides that the arbitral tribunal may order provisional or interim measures at the request of one of the parties, unless stated otherwise in the arbitration agreement. In addition, if the party concerned does not voluntarily execute the ordered measures, the arbitral tribunal may request the intervention of the competent court, which applies its own law. The judge or arbitrator may request the payment of an appropriate bail for the provision of interim or conservative measures.

Regarding the Rules of the Court of Arbitration, article 40 provides that before the initiation of the arbitration proceedings the arbitral tribunal may, upon request by a party and by means of a procedural order rendered under an expedited regime, grant any interim or conservatory measures that it deems appropriate. The arbitral tribunal may order the party requesting an interim or conservatory measure to provide the necessary security (deposit) in connection with the measure requested. Any requests for interim or conservatory measures filed before the initiation of the arbitration or before the case file was referred to the arbitral tribunal shall be decided by an emergency arbitrator.

During the arbitral proceedings, such measures can be ordered by either the arbitral tribunal or by the court of law. If a party opposes the measures taken by the arbitral tribunal, the enforcement shall be conducted by the court of law.

Interim measures by an emergency arbitrator

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

As at the time of writing, the Rules of the Court of Arbitration provide that requests for interim or conservatory measures filed before the initiation of the arbitration or before the case file was referred to the arbitral tribunal shall be decided by an emergency arbitrator in accordance with the procedure set forth in Annex II of the these rules. Nothing similar is contained in the NCPC about arbitration proceedings.

Interim measures by the arbitral tribunal

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

A constituted arbitral tribunal may order conservatory and interim measures related to the dispute matter, or measures regarding the finding of the facts. The enforcement of such measures can be assured with the assistance of the courts of law.

The arbitral tribunal may decide on measures regarding the conservation of evidence, seizure over opposing parties' assets or over the assets in dispute. In domestic arbitration and in certain situations, such measures are conditioned upon presenting a bail by the requesting party.

In international arbitration, as per the NCPC, it is stated that the arbitral tribunal may order interim measures, unless the contrary is stated in the arbitration agreement. If not, the arbitrator may condition the measure upon presenting a bail by the requesting party. The purpose of the bail is to secure the possible damages the party might incur from ordering the interim measures.

Sanctioning powers of the arbitral tribunal

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

Under both the NCPC and the Rules of the Court of Arbitration, there are no particular provisions on an arbitral tribunal enjoying power to order sanctions against the parties or their counsel where it deems that guerrilla tactics were used. Nevertheless, nothing prevents the arbitral tribunal from recording into the minutes the guerrilla tactics used by the parties or their counsel and for the concerned party to follow and rely on the provisions set forth by article 547 of the NCPC, to eliminate the procedural difficulties created in such circumstances with the court support. As far as the second question is concerned, under no circumstances may the arbitral tribunal or domestic arbitral institution sanction the counsel. If the procedural rules or the professional ethics were violated, the party concerned may resort to the provision of article 547 and ask the ordinary courts to eliminate the difficulties created in such circumstances, or they may refer the situation to the professional organisation to which the counsel belongs, which may trigger the disciplinary liability of the counsel.

AWARDS

Decisions by the arbitral tribunal

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

Under both the rules of the New Civil Procedure Code (NCPC) – primarily article 602(3) – and the Rules of the Court of Arbitration, article 45(4), awards can be issued by the majority of the arbitral tribunal members. Unanimity is not required. Dissenting opinions are accepted.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

The arbitrator that has a dissenting opinion must prepare and sign a separate opinion, attached to the arbitration award (as per article 603(2) of the NCPC and per article 45(5) of the Rules of the Court of Arbitration). Concurrent opinions are also provided by the same rules.

Form and content requirements

38 | What form and content requirements exist for an award?

The award is issued in writing and, pursuant to article 603 of NCPC, must contain the:

- names of the arbitrators and of the arbitral assistant (if applicable), and the place and the delivery date of the award;
- names of the parties, their domicile or residence or, as the case may be, their denomination and headquarters, the name of the representatives, as well as other parties attending the debates;
- arbitration agreement;
- dispute and the parties' arguments;
- de facto and de jure reasons of the award, and in the case of *ex aequo et bono* arbitration, the reasons that support the conclusion of the arbitral tribunal;
- court decision (disposition); and
- signatures of all arbitrators, with the observance of article 602(3) of the NCPC regarding the majority rule, and, if applicable, the signature of the arbitral assistant.

Time limit for award

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

As far as the NCPC is concerned, article 605 provides that the arbitral award, setting out its reasoning, shall be served to the parties within one month from when it was delivered.

Under the Rules of the Arbitration Court, unless the parties have agreed otherwise, the award shall be issued no later than six months from the date on which the arbitral tribunal has been constituted. Also, the award shall be made in writing within a term of maximum one month as of the date of closing of the proceedings or, as the case may be, as of the date of filing of the post-hearing submissions or, as the case may be, within the time limit agreed upon with the parties. The parties may agree at any time during the arbitration to extend the term of the arbitration, by either written or oral statement, made before the arbitral tribunal and recorded in a procedural order. The arbitral tribunal may order, by way of a procedural order, the extension of the term of the arbitration, if it finds that a party obstructs the conduct of the arbitration or for other justified reasons. The term shall be automatically extended by three months where the legal personality of a party ceases to exist or in the case of the death of one of the parties.

The award shall be made in writing within a term of a maximum of one month from the date of closing of the proceedings or, upon circumstances of the case, from the date of the filing of the post-hearing submissions or, where applicable, within the time limit agreed upon with the parties. The president of the Court of Arbitration may extend the time limit for making and drafting the award based on a reasoned request from the arbitral tribunal. Caducity (time-bar effect) can be claimed if requested in due time in conformity with the Rules of the Court of Arbitration.

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the award is the date when the arbitral tribunal delivers the award, and such date is decisive for the following:

- the time limit under which the arbitral tribunal must render the award; and
- whether the award was delivered with the observance of the deadline set out by the NCPC or of the Rules of the Court of Arbitration.

The date of the service of the award stating the reasons is decisive for the following:

- one or three months, as the case may be, for the motion to set aside the arbitral award;
- the referral for the correction of clerical errors or for the interpretation or completion of the award. The time limit is 15 days under the NCPC and 15 days under the Rules of the Court of Arbitration; and
- the award is to be deemed final and binding as of the date of its service.

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may issue final, interim or partial awards based solely upon the relief sought by the parties in dispute. In domestic arbitration, partial awards may be delivered to the extent that a party acquiesces to the other party's claims. In international arbitration based on the Romanian law of arbitration, article 1.121(4) of the NCPC provides that the arbitral tribunal may issue partial awards, unless the arbitration agreement states the contrary. If not, the arbitrator may condition the measure upon granting bail to the requesting party. The purpose of bail is to secure damages the party might incur by ordering the interim measures.

The arbitral tribunal may only grant the reliefs sought by the parties in dispute, provided that such relief is lawful, possible, and at least determinable.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

Under the provisions of the NCPC, arbitral proceedings can be terminated by:

- the settlement of the parties, formalised in writing;
- the caducity of the arbitration (time-bared) raised in due time by the concerned party; and
- waiver of the parties to the disputed claims, which must be formalised in a written statement or recorded by the arbitral tribunal.

In addition, for arbitration under the Rules of the Court of Arbitration, arbitration proceedings can be terminated in the case of lapse of proceedings or in the case of claimants' default to comply with the duties indicated by the arbitral tribunal.

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The costs of arbitral proceedings are allocated according to the parties' agreement or, failing this, the losing party will bear its own costs and will be compelled to pay the costs of the winning party in as much as the latter's claims were admitted.

The costs of arbitral proceedings include the registration fee, the administrative fee, costs for the taking of evidence, translation costs, hearing costs, and fees of the arbitrators, attorneys, counsels, parties, arbitrators and witnesses, as well as experts' costs with travelling expenses and other expenses in connection with the arbitration proceedings. In turn, the latter costs are divided into two categories – on the one hand, the statement of claims registration costs, the arbitration fee, the arbitrators' fees and any other costs associated with the proceedings due to the arbitral institution and, on the other hand, costs incurred by the parties with legal assistance, experts' fees, translations fees, etc.

Unless otherwise established by the parties, the arbitral tribunal, upon request by a party, shall order in the award the payment by one of the parties of any reasonable costs incurred by the other party, including the costs related to representation before the arbitral tribunal, taking into consideration the result of arbitration, the manner in which each party contributed to ensuring the efficiency and expeditiousness of the proceedings and any other relevant circumstances.

In international arbitration, pursuant to article 1122 of the NCPC, unless stated to the contrary, the arbitrator's fees and his or her travelling costs are incurred by the parties who appointed him or her. In the case of a sole arbitrator or of the chair, the costs are allocated equally between the parties.

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

The arbitral tribunal may award interest for principal claims and for costs. The interest rate shall be that established by the parties or, failing that, pursuant to the government's Ordinance No. 13/2011 on the return and default interest rate. The interest rate for monetary obligations payable in Romanian currency is established based on the monetary policy interest rate published by the National Bank of Romania. On 10 November 2021, the monetary policy interest rate was 1.75 per cent.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The award can be corrected ex officio or upon the request of the parties, whereas the interpretation may be decided only based on parties' request. In the case of arbitration under the New Civil Procedure Code (NCPC), article 604 provides that the concerned party may submit a claim for the correction of clerical errors, for interpretation or for completion within 10 days of the service date.

In the case of arbitration under the Rules of the Court of Arbitration, errors or omissions with respect to the name, capacity and arguments of the parties or calculation errors or omissions, as well as any other clerical errors in the award or in the procedural orders can be corrected by the motion of the tribunal or following a request by a party, to be filed within 15 days from the date of communication of the award. Within 15 days from the service date, the parties may submit a motion for interpretation or for the completion of an arbitral award.

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

Pursuant to article 608 of the NCPC, an award can be challenged only by means of a motion for setting aside on the following grounds:

- the dispute was not subject to arbitration;
- the arbitral tribunal settled the dispute without any arbitration agreement or the arbitration agreement was null and void or not enforceable;
- the arbitral tribunal was constituted with the non-observance of the arbitration agreement;
- the party was not present at the debate hearing and the service was unlawfully made;
- at least one party announced its interest in raising the caducity, the award was delivered after the expiry of the caducity term set out in article 567 of the NCPC and the parties did not agree on continuing the proceeding pursuant to article 568(1) and (2) of the NCPC;
- the arbitral tribunal settled the dispute *extra petita* or *ultra petita*;
- the award does not contain the operative part (the court decision) and its reasoning, indicate the date and the place of delivering, or contain the signatures of the arbitrators;
- the award infringes public policy, morals and the mandatory provisions of the law; and

- if, after delivering the award, the Constitutional Court issued a judgment on the plea raised in the file, stating the non-constitutionality of the law, the ordinance or the provision from a law or an ordinance that forms the object of the plea or of other provisions from the contested enactment is not to be dissociated from the provisions indicated in the referral to send the plea to the Constitutional Court.

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The decision on a motion to set aside an arbitral award can only be challenged by an appeal on points of law. For the motion to set aside the judgment, the judicial stamp tax is established based on the value of claims. The appeal on points of law is subject to judicial stamp tax evaluated depending on the indicated ground of appeal, pursuant to Government Emergency Ordinance No. 80/2013 on the judicial stamp tax.

The period for deciding on a motion to set aside the judgment may vary between six months and two years for each level.

Costs are generally represented by the judicial stamp tax, and by the fees of the attorney.

According to the NCPC, the costs are borne by the losing party, but the court retains the liberty to decide whether the costs are to be entirely reimbursed to the winning party.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

First, to have the awards enforced, leave by the court must be provided based on an application by the concerned party pursuant to article 1126 of the NCPC. The party may follow the provisions of either the New York Convention or the NCPC.

Second, the principle enshrined in article 1125 of the NCPC is that any foreign arbitral award may be recognised and enforced in Romania insofar as the dispute may be subject to arbitration in Romania, and as long as the award has no provision inconsistent with Romanian public policy. Failure to comply with the two requirements implies a refusal to enforce the award.

Third, as far as other impediments to enforcement are concerned, the NCPC of Romania provides under article 1129 for the following cases when the enforcement of a foreign arbitral award may be hindered:

- the parties were unable to conclude the arbitration agreement, according to their own law, established pursuant to the law of the state where the award was rendered;
- the arbitration agreement was void pursuant to the law elected by the parties or, failing such election, pursuant to the law of the state where the award was rendered;
- the party against which the award is enforced was not duly informed on the appointment of the arbitrators or on the arbitration proceedings, or it was unable to defend in arbitral dispute;
- the appointment of the arbitral tribunal or the arbitration proceedings violated the convention of the parties or, failing such convention, the law of the place of arbitration;
- the award deals with a dispute not provided by the arbitration convention or outside the limit set out by such convention or comprises provisions exceeding the terms of the arbitral convention. However, as the provisions from the award dealing with the aspects subject to arbitration may be separated from those regarding aspects not subject to arbitration, the former are to be recognised and enforced; or
- the award is not yet binding on the parties, or it was set aside or stayed by a competent authority from the state where or pursuant to which it was rendered.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The first principle under Romanian law is that arbitral awards are voluntarily enforced by the parties. The second principle is that arbitral awards are to be enforced in the same manner as a court of law judgment where the party in default fails to comply with the award. The third principle is that under the article 706 of the NCPC, the right to ask and obtain the enforcement of an award is subject to a statute of limitation. The statute of limitation is of three years in case of obligations and of 10 years in case of property rights.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

An award set aside by a court at the place of arbitration cannot be enforced on Romanian territory.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There are no provisions contained in the NCPC in connection with the appointment of an emergency arbitrator.

In accordance with Annex II of the Rules of the Court of Arbitration, a party may apply for the appointment of an emergency arbitrator for interim or conservatory measures requested, and the powers of such arbitrator terminate on the date when the arbitral tribunal is constituted. Within two days from its appointment, the emergency arbitrator shall establish an interim procedural timetable and decide with respect to the need to provide a security deposit, as well as with respect to the period in which the party against which the interim or conservatory measure is sought may submit its answer to the request. Any procedural order with respect to the interim or conservatory measures shall be issued no later than 10 days from the date when the appointment was communicated to the emergency arbitrator. The president of the Court of Arbitration may extend this period upon a reasoned request of the emergency arbitrator. A procedural order shall be binding upon the parties when rendered. Upon a reasoned request of a party, the emergency arbitrator may amend or revoke the procedural order. By agreeing to arbitration under the Rules, the parties undertake to immediately comply with any procedural orders regarding the interim or conservatory measures ordered by the emergency arbitrator. Where a party fails to comply with the procedural order regarding the interim or conservatory measures, the concerned party may resort to the domestic courts to obtain a judgment enforceable with the aid of a bailiff.

Article 9(5) of Annex II of the Rules of the Court of Arbitration provides that the arbitral tribunal is not bound by the procedural order or by the reasons held by an emergency arbitrator, and may amend or cancel the interim or conservatory measures taken by such arbitrator.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

In enforcing awards, the concerned party may incur, inter alia, the following costs:

- costs of the attorneys;
- fees of the bailiff;
- judicial stamp tax for enforcing the award provided by Government Emergency Ordinance No. 80/2013; and
- other costs that might occur in the case of challenging the enforcement procedure.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Generally, in the Romanian judicial system proceedings are conducted either by a judge, in front of courts of law or by an arbitrator in arbitration proceedings. In practice, the judges strongly emphasise the procedural rules, with the result that written witness statements are not common practice in proceedings and that a party in dispute may be subject to examination, but without the possibility of testifying as witness. As far as the arbitration under the Rules of the Court of Arbitration is concerned, the procedural rules are more flexible and allow the parties to bring written witness statements in their support.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

A counsel is subject to the rules enacted by the bar to which it adheres. In Romania, counsels are members of one of the bars composing the National Union of Lawyers. The rules for counsel are comprised in the statute on the lawyer profession issued by this union. The National Union of Lawyers is a full member of the Council of Bars and Law Societies of Europe and has adopted the Code of Conduct as its own code of professional conduct. Such rules are not specific professional or ethical rules applicable only in the case of international arbitration, but rather general rules on the relationship of the counsel to the client, to the magistrate and to other counsel. The rules on relations to the magistrates also apply in the relations to the arbitrators.

In the section of the New Civil Procedure Code (NCPC) dealing with international arbitration, there are no references to any professional or ethical rules applicable to the arbitrators.

On 17 June 2017, the Romanian Bar Association adopted Decision of its Council No. 268 approving the Code of Ethics applying to Romanian lawyers that includes the fundamental principles of the legal profession: independence, dignity, integrity, loyalty, professional secrecy and freedom of defence.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Arbitration costs are regulated under articles 595–600 of the NCPC, where there is no reference related to third-party funding of arbitral or non-arbitral claims. Nevertheless, this should not be translated into *a de plano* prohibition of third-party funding of arbitral claims (eg, there is nothing preventing the parties from including into the arbitration agreement clauses related to third-party funding). Also, as per article 620 of the NCPC, in institutional arbitration, the arbitration costs are awarded according to the rules of the arbitration institution. As at the time of writing, the Rules of the Court of Arbitration list some of the most usual arbitration costs incurred by the parties, such as arbitration and arbitrators' fees and counsels and experts' fees, but they also make reference to any legal costs incurred by the parties. In the authors' opinion, the extent to which third-party funding costs fall under the ambit of other legal costs is a matter to be decided by the arbitral tribunal on a case-by-case basis.

Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Romania is a member state of the European Union and, accordingly, the provisions related to visas and work permits are those indicated by the European legislation transposed into Romanian national law. Attorneys from EU member states are also subject to the special regulations enacted in this respect. Attorneys from EU member states may represent and assist the parties in arbitration.

Lawyers or consultants from third-party states may require residence permits and must adhere to visa requirements, following the formalities of the National Bar Association or other relevant professional bodies, and are subject to taxes imposed by the National Bar Association and by the tax authority for the performed activity. Activities of the lawyers and arbitrators undertaken on Romanian territory are subject to value added tax rules.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Disputes between a third-state operator and a third state. Article 1(6) of the Energy Charter treaty – concept of 'investment'

The Micula brothers

In March 2020, an arbitral tribunal established under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) rejected the claims of brothers Viorel and Ioan Micula, who demanded more than 9 billion Romanian lei in damages from the Romanian state. The applicants alleged that, especially after accession to the European Union in 2007:

- Romania has allowed and facilitated the existence and development of important black markets in the field of alcohol production;
- did not apply tax legislation allowing the collection of taxes in the field of alcohol production; and
- unilateral changes were imposed on the contracts for the exploitation of mineral water by the National Mineral Water Company that led to increased costs for its extraction.

Following defences made by Romania's lawyers, the arbitral tribunal found that Romania had not breached its obligation to ensure fair and equitable treatment and the obligation to fully protect and secure the applicants' investment.

This was the Micula brothers' second arbitration with the Romanian state. On 11 December 2013, they won an arbitral litigation against Romania in ICSID Case ARB/05/20 *Micula and Others v Romania,* and were awarded more than US$300 million in compensation by the ICSID arbitral tribunal.

In both cases, the brothers had based their claims on a bilateral investment treaty (BIT) concluded on 29 May 2002 between the governments of Sweden and Romania. But the subject matter of the brothers' 2020 litigation was different from that of the 2013 dispute. The main complaint in the 2013 dispute concerned tax facilities granted by the Romanian state that were subsequently eliminated or reduced, while the 2020 dispute alleged that Romania had breached its international obligations under the BIT by failing to properly enforce laws on taxation of beverages and by adopting a new price regime for mineral water.

The Ministry of Public Finances announced that, following the Romanian state's victory against the Micula brothers in the 2020 case, they will have to pay about €4.5 million to the state – 75 per cent of the court costs. Penalties will be added to the amount in the case of delays. The Ministry of Public Finances said that the Micula brothers had demanded €2.36 billion in compensation, which was rejected.

The 2020 judgment ends a dispute initiated by the plaintiffs in 2014, based on the Sweden–Romania BIT. According to the arbitral tribunal, Romania has shown that it has a complex mechanism for the application of its laws, a strategy that ensures efficient application from a cost perspective, and an execution structure both at the level of individual household and at the level of industrial producers, involving the National Agency for Fiscal Administration, Customs and the General Anti-Fraud Directorate.

Local construction market

The local construction market contracted by 14.2 per cent in the first nine months of 2021 compared to the corresponding period in 2020 – the most pronounced of all the member states, according to the latest data published by Eurostat. On a monthly reporting basis, in September 2021 activity in the sector decreased by 4.9 per cent, registering the third consecutive month of decrease. The local construction market thus continues its downward trend and remains in recession. According to the latest data of the National Commission for Strategy and Forecast (CNSP), included in the Autumn 2021 Forecast, the construction sector will register, for 2021, a minimal evolution (+0.3 per cent), and will resume the most pronounced upward trend starting from 2022 and doubling its gross added value until 2025.

The category of infrastructure investments includes works on railways, parks, pedestrian areas, bridges, passages, road projects, shipyards, etc.

Regarding the construction industry, the Romanian government adopted Decision No. 1/2018 (HG No. 1/2018) approving the general and specific conditions for certain categories of procurement contracts related to investment objectives financed from public funds. The delegated legislator referred a model contractual agreement, for public or sectoral works contracts that have as their exclusive object the execution of works that are related to investment objectives financed from public funds, including non-reimbursable or reimbursable funds, whose total estimated value is equal to or higher than the value of 25 million lei.

For disputes arising from the contractual agreements forming its objective, HG No. 1/2018 has provided as an exclusive option the arbitration at the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania following the rules of this arbitral institution.

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The state and companies continue to be parties to several international arbitration cases, either in commercial or in other sectors (eg, energy or construction, before several international arbitration institutions).

Further, there are registered and pending investment arbitration cases under the UNCITRAL Rules to which Romania is a party.

Russia

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Russia is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) as a successor to the USSR (which joined on 22 November 1960). The USSR made a single declaration that in respect of the decisions rendered on the territories of non-contracting states the Convention would be applied on a reciprocal basis only.

Russia is also a party to a number of multilateral conventions on international commercial and investment arbitration, including:

- European Convention on International Commercial Arbitration of 1961 (ratified on 7 January 1964);
- Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation of 1972 (ratified on 20 April 1973);
- Kiev Convention on Settling Disputes Related to Commercial Activities of 1992 (ratified on 19 December 1992); and
- Minsk Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases of 1993 (ratified on 10 December 1994).

In 1992, Russia signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, but to date has taken no steps for its ratification. Russia also signed the Energy Charter Treaty, but later decided not to become a contracting party.

Most recently, in November 2021, Russia signed the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2019, which has not yet entered into force.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

To date, Russia is a party to 88 bilateral treatieson legal assistance, including 79 bilateral investment treaties of which 16 treaties have been signed but have not entered into force, and 63 are currently effective. Most of those treaties contain dispute resolution provisions providing for either institutional (the most common option is either the Stockholm Arbitration Institute or the International Centre for Settlement of Investment Disputes) or for ad hoc (under the UNCITRAL Arbitration Rules) arbitration.

A full list of the bilateral treaties is available on the website of the Ministry of Justice.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Russia has dual arbitration legislation, with one law for domestic arbitration and another one on international arbitration. A major arbitration law reform in 2015 included a new law on domestic arbitration being adopted (which replaced a 2002 law) as well as in substantial amendments to the law on international commercial arbitration. There is also some overlap between them (ie, certain procedural provisions of the domestic-focused also apply to some aspects of international arbitrations in Russia as well).

The principal laws on arbitration in Russia are:

- Law No. 5338-1 On International Commercial Arbitration of 7 July 1993 (the ICA Law). It regulates international arbitration having its seat in Russia, except for certain provisions that also apply to cases when an arbitration is seated abroad; and
- Federal Law No. 382-FZ On Arbitration (Arbitral Proceedings) in the Russian Federation of 29 December 2015 (the Arbitration Law). It relates to domestic arbitration and, to some extent, international arbitration seated in Russia (for example, requirements applicable to arbitrators, liability of arbitrators and arbitral institutions and others).

Certain parts of the Arbitrazh (Commercial) Procedure Code of 24 July 2002 (these are the rules governing proceedings in Russia's state court system for commercial disputes – but have some direct and indirect application to commercial arbitration) and Civil Procedure Code of 14 November 2002 also apply to arbitration.

For arbitration to qualify as foreign (international commercial arbitration), one of the following conditions should be met:

- the place of business of at least one of the parties is abroad;
- the place where a substantial part of the obligations out of the relationship of the parties is to be performed is abroad;
- the place with which the subject matter of the dispute is most closely connected are located abroad; and
- disputes that have arisen in connection with making foreign investments in the territory of the Russian Federation or Russian investments abroad.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The ICA Law declares in the preamble that it takes into account the provisions of the UNCITRAL Model Law of 1985 and therefore mirrors it. Though directly provided in the text, the ICA Law does not reflect the 2006 amendments to the UNCITRAL Model Law.

The Arbitration Law, being structured almost in the same manner as the ICA Law, also follows the UNCITRAL Model Law with certain deviations and additions.

Mandatory provisions

5 What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Mandatory provisions are not generally characteristic of the national arbitration legislation, which supports party autonomy, but certain rules are still mandatory:

- the arbitration agreement must be made in writing;
- the parties have equal rights, with each party having the opportunity to provide its arguments in the arbitration (this rule may affect the validity of certain 'hybrid' arbitration clauses);
- the parties may not appoint an arbitrator who fails to meet certain criteria provided by law (for instance, being under 25 years old or a person with a criminal record); and
- the arbitration institution or rules must be correctly and unambiguously stated. (In 2018, Russian courts denied enforcement of an ICC award due to the ICC arbitration clause not referring to the 'arbitration institution', but only to the ICC rules – see more on Case A40-176466/2017. Although later the Supreme Court confirmed the validity of a standard ICC clause in a 26 December 2018 review of arbitration-related cases). Since its practice overview of 10 December 2019, the Supreme Court has repeatedly emphasised a pro-arbitration approach, though with some caveats, expressly supporting the choice of model clauses of institutions.

Substantive law

6 Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In relation to domestic arbitration, the Arbitration Law provides that the arbitral tribunal shall resolve the dispute in accordance with the rules of Russian law or, in cases where under Russian law, the parties may choose foreign law, in accordance with the rules of law that the parties have chosen.

For international arbitration, the ICA Law provides that the arbitral tribunal is to be guided by the rules of law that the parties indicated as applicable to the merits of the dispute. (Note also that Russian Civil Code and some other laws mandate application of Russian substantive law for certain types of disputes where no foreign parties or interests or contracts are involved, etc.)

In the absence of parties' choice of law, the arbitral tribunal will (under both laws) itself decide on the applicable law in accordance with the conflict of laws rules it considers applicable.

The Supreme Court practice overview of 10 December 2019 reminded that the applicable substantive law may be different from the law applicable to the arbitration agreement or clause. In the absence of explicit choice, the law of the seat will govern the arbitration agreement or clause.

Arbitral institutions

7 What are the most prominent arbitral institutions situated in your jurisdiction?

Pursuant to the arbitration reform in December 2015, an institutional arbitration organisation may now be established only by a non-commercial organisation, upon receipt of an accreditation, a permit from the Russian government granting rights to perform functions of an institutional arbitration. A foreign arbitral institution is also required to have such permit to hold proceedings seated in Russia. Arbitral awards with seat in Russia rendered by an arbitral institution not having permit will be regarded as ad hoc awards.

Ad hoc tribunals are prohibited from administering 'corporate disputes' (including most disputes between shareholders of a Russian-incorporated company, some M&A/share purchase type disputes involving a Russian company, etc) and have a more limited capacity than institutional arbitrations (eg, the parties cannot request assistance from state courts in obtaining evidence, and cannot agree on finality of the award).

Institutional arbitration organisations must have the recommended lists of arbitrators, which is often used by parties to choose arbitrators. However, parties may choose any arbitrator, including those who are not included in the recommended lists.

The transitional period of the arbitration reform ended on 1 November 2017.

Currently, only the seven Russian institutions below have been accredited so far (the first two being automatically given permits by the Arbitration Law, as the oldest institutions in Russia):

- The International Commercial Arbitration Court at the Chamber of Commerce and Industry (CCI) of the Russian Federation (ICAC) (6/1 Ilyinka street, Moscow, 109012; http://mkas.tpprf.ru/en/). In late January 2017, new rules and regulations of the ICAC were adopted, which expanded its jurisdiction to cover domestic arbitrations as well. Fees and costs in ICAC are relatively modest, with registration fee of US$1,000 and arbitration fee depending on the amount of claim, the minimum being US$2,600.
- The Maritime Arbitration Commission at the CCI of the Russian Federation (MAC) (6 Ilyinka street, Moscow, 109012; http://mac.tpprf.ru/en/). MAC is the oldest Russian arbitration institution that resolves maritime disputes including vessel chartering, maritime transportation, collisions between marine vessels, etc. Fees and costs at MAC are more or less compatible with those at ICAC.
- The Arbitration Center at the Russian Union of Industrialists and Entrepreneurs (RUIE Arbitration Centre) (17 Kotel'nicheskaya naberezhnaya, Moscow, Russia 109240; https://arbitration-rspp.ru/). The RUIE Arbitration Center administers both domestic and international commercial arbitration, but had a good historic track record in Russia for resolving domestic arbitrations. Fees and costs are on average lower than those of ICAC and are also based on the amount of dispute.
- The Arbitration Center at the Institute of Modern Arbitration (Russian Arbitration Center) (14, bldg 3 Kadashevskaya embankment, Moscow, Russian Federation; https://centerarbitr.ru/en/main-page/). It is a newly established institution that can administer both domestic arbitration (including corporate disputes) and international commercial arbitration. The arbitration fee is calculated as a percent of the amount in dispute, but the parties may agree that the arbitration fee shall be based on hourly rates.
- The Sports Arbitration Chamber, which is an industry-specialist arbitration centre established by the Russian Olympic Committee, specialising in sports disputes.
- The Arbitration Center of the Union of Russian Machinery Constructors.
- The Arbitration Center of the National Union of Arbitration Development in the Fuel and Energy Complex.

Two foreign arbitration institutions were accredited in 2019 by the Russian Ministry of Justice – the Hong Kong International Arbitration Centre (HKIAC) and Vienna International Arbitration Center (VIAC), while another two were admitted in 2021 – the Singapore International Arbitration Centre (SIAC) and the ICC International Court of Arbitration

(ICC) – making those an eligible choice of institutional international arbitration for a number of disputes.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Over time, different types of disputes have evolved from being arbitrable to non-arbitrable and vice versa, as courts took diverging positions.

As an overarching principle, Russian law allows submission to arbitration only disputes arising from civil law relations; disputes of public (administrative) nature are non-arbitrable. The below specific types of disputes are non-arbitrable:

- antitrust disputes;
- insolvency or bankruptcy disputes;
- disputes involving state registration matters (disputes on immovable property located in Russia, disputes concerning establishment or liquidation of legal entities and individual entrepreneurs, disputes involving IP (trademarks, patents, etc) registration);
- family and inheritance law matters.

As a result of the 2015 arbitration reform, corporate disputes became arbitrable (but only by permanent arbitration institutions, and some types only by a tribunal having its seat in Russia and still with a few exceptions, including the following, that are non-arbitrable):

- on convening a general meeting of a company's shareholders;
- arising out of activities of notaries on certification of transactions with participation interests in limited liability companies;
- almost all disputes with respect to strategic importance companies (as defined by Russian law), with minor exceptions;
- related to buy-back and redemption of outstanding shares of a joint stock company; and
- related to the expulsion of a shareholder from a company.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The arbitration agreement must be in writing (or any other form that is deemed equal to written form, that is, by exchange of emails, by inclusion in relevant clearing or trading rules, etc). The Arbitration Law specifically allows conclusion of an arbitration agreement by exchange of procedural documents (including a statement of claim and a statement of defence), whereby one party declares an arbitration agreement and the other party does not object.

An arbitration agreement with regard to corporate disputes can be inserted into the charter of a Russian company, as long as it is adopted unanimously by the shareholders (providing there are fewer than 1,000 in total), but not in the charter of a public joint-stock company.

The arbitration agreement can be made by reference to a general terms and conditions document containing an arbitration clause. Such reference should be made in such a way that makes it a part of the agreement.

Also note some Russian court decisions to the effect that a lawyer's power of authority to represent a client in arbitration must expressly specify such authority, for failure of which an award may be declared invalid upon court challenge. This footnote line of cases seems to have been defused by the most recent Supreme Court clarification, but caution suggests including such specificity in the relevant powers of attorney.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

The most common defects rendering an arbitration clause unenforceable are lack of written form of arbitration agreement, non-arbitrability of a particular type of dispute, or defects of the party's intent (mistake, coercion, fraud, etc).

Avoidance, rescission or termination of the underlying contract in general does not entail unenforceability of an arbitration agreement. Russian courts in a number of cases have confirmed the principle of arbitration clause autonomy (see, for example, Resolution of the Supreme Court dated 2 November 2016 No. 306-ES16-4741 in case No. 65-19616/2015, Resolution of the Supreme Arbitrazh (Commercial) Court dated 17 December 2010 No. VAS-14379/10 in case No. A40-112301/09-7-886).

The Supreme Court Plenum of 10 December 2019 provided for some grounds when an arbitration agreement could be at risk. For example, an arbitration agreement will be unenforceable if the parties failed to correctly name the arbitration institute, or named a non-existing institute or rules. The Supreme Court stressed that incapable of being performed agreements differ from invalid agreements, although a practical outcome would be unenforceability in both cases.

Also, a split-jurisdiction arbitration clause, granting only one party a right to refer disputes in arbitration or the state courts, or both, shall be interpreted as granting mirror rights to both parties.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Russian legislation has a general principle of separability of the arbitration agreement from the main contract. In addition, the Supreme Court Plenum of 10 December 2019 provided that the severability of the arbitration agreement should be governed in accordance with applicable law to such arbitration agreement. In the absence of such choice of law, the *lex arbitri* would apply to this question.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

Third parties that are not signatories to the arbitration agreement cannot be bound by it. This follows from the general Civil Code rule that no obligation can impose duties on non-parties thereto (third parties).

In cases of assignment or cession the arbitration clause binds the new parties, as explicitly stated in the Arbitration Law and supported by the Supreme Court. (Previously, reliance was placed on Resolution of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. 9094/11 dated 29 March 2012.) Some doctrine attempts are made to expand the scope of the agreement on non-signatories, but to date remain in the minority among the community.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Neither the Arbitration Law nor the ICA Law contains relevant provisions on third-party participation in arbitration. The rules of some arbitration institutions (eg, ICAC, MAC, Russian Arbitration Center) provide for admittance of a third party to arbitration, which may join the arbitration

provided that all parties to the dispute and such party are parties to an arbitration agreement or have all given written consent for this.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is not well elaborated in Russian law (at least, in relation to procedural questions). The arbitration agreement may only extend to and be effective for the signatories of such (and for legal successors of parties, etc).

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Russian law applies the same principles and criteria for validity of the arbitration agreement regardless of the number of parties involved, although it does not directly cover multiparty situations. Some arbitration rules (ICAC rules, for instance) provide for a case where there are multiple parties on the claimant's or respondent's side. In such cases those parties will act as claimant and respondent, with the right to nominate one arbitrator (failing such, the arbitration institute will appoint the arbitrator). Very complex procedures are provided now by law for multiple parties in relation to arbitrations of corporate disputes.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Russian law does not regulate the question of consolidation of arbitration proceedings. Some arbitration rules provide for such an option. For instance, ICAC rules provide for a possibility for ICAC to consolidate the arbitration proceedings provided that either the claims are covered by the same arbitration agreement, or the claims are governed by arbitration clauses providingfor the same choice of arbitration institution and the claims are materially interconnected.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Arbitration Law sets a list of restrictions for any potential arbitrator, which cannot be altered by the parties' agreement:

- must be at least 25 years old;
- must have full legal capacity;
- must have no criminal record;
- if applicable, former special powers (as a judge, public notary, prosecutor, etc) have not been terminated as a result of an offence; and
- must be fully independent and unbiased.

The sole or presiding arbitrator of a tribunal must be qualified in law, but this may be waived by the parties' agreement.

Some further restrictions are stipulated by laws: for example, active judges are prohibited from acting as arbitrators. Retired judges can now serve as arbitrators.

It is also stated in law that no one can be deprived of the right to act as an arbitrator on the ground of his or her nationality, but the parties may agree otherwise.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

The most commonly appointed arbitrators could be seen in the recommended arbitrator lists of the most reputable arbitration institutions in Russia. These lists feature outstanding scholars and practitioners, including retired judges, law professors, in-house counsel and lawyers in private practice (including partners and counsels at international law firms). The Russian arbitration community has recently published its guide on new generation of Russian arbitrators (http://russianarbitratorsguide.ru).

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Both the Arbitration Law and the ICA Law provide for the same default appointment procedure. If the parties have not agreed on the procedure of appointment of the arbitrators the procedure is as follows (unless otherwise provided by the relevant arbitration rules).

In an arbitration with three arbitrators, each party appoints one arbitrator and the two selected arbitrators appoint the third arbitrator. In case a party fails to appoint an arbitrator within 30 days of receiving a request from the other party or in case the two selected arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made upon request of any party by a competent state court.

In an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator the appointment is made upon a request of any party by a competent state court. A panel of three arbitrators is appointed in the absence of the parties' agreement.

Further, state courts may (upon a request of any party) assist in appointing arbitrators in the following cases:

- one of the parties violates the procedure of appointment; or
- a third party (including relevant arbitration institute) fails to perform certain functions in connection with such procedure.

Parties to institutional arbitration may exclude intervention by state court in the appointment of arbitrators (and in such cases, if the institution fails to form the tribunal, the arbitration agreement would become inoperative).

Challenge and replacement of arbitrators

20 | On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator can be challenged either if there are circumstances that give rise to justifiable doubts as to his or her impartiality or independence or if an arbitrator fails to meet the eligibility criteria provided by law or by the parties' agreement. If the parties fail to agree otherwise, a requesting party should within 15 days of becoming aware of the formation of the arbitration tribunal (or of any of the above circumstances)

file a written notice specifying the grounds for challenging an arbitrator. Unless an arbitrator withdraws voluntarily or the other party consents to the challenge, the question of challenge will be resolved by the arbitration institution.

Replacement of an arbitrator takes place when:

- an arbitrator is successfully challenged or withdraws voluntarily;
- an arbitrator is unable to perform his or her functions or fails to participate in the arbitration proceedings for an unreasonable time; or
- the parties agree to terminate an arbitrator's functions.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The procedural relationship and communications between the parties and arbitrators are usually addressed in the rules of the relevant arbitration institution. Russian law does not recognise any kind of contractual relations between parties and the arbitration tribunal. The Arbitration Law and the ICA Law provide only for the requirements of impartiality and independence of the arbitrators, which applies to any kind of arbitration universally.

The determination of arbitration fees depends on the type of arbitration: in ad hoc arbitration the arbitrators' fees are determined either by the parties' agreement or, in the absence of such agreement, by the arbitration tribunal. For institutional arbitration the amount of fees is provided by the rules of the relevant institution.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The Arbitration Law, as well as the rules of arbitration institutions (ICAC rules, for instance) do not provide for specific examples of what the duty of impartiality and independence would mean in practice. In practice this gives relatively wide discretion for potential challenges in court.

The Russian Chamber of Commerce and Industry in 2010 adopted a set of Rules on the Impartiality and Independence of Arbitrators, which generally follow the IBA Guidelines on Conflicts of Interest in International Arbitration. Both are taken into account by reputable practising arbitrators, but are rarely referred to in the court practice. Some institutional arbitration institutions (for example, the RUIE Arbitration Centre) have adopted their own regulations in this area.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Arbitration Law expressly regulates this subject. An arbitrator shall not be liable for civil wrongdoing to either party to the arbitration or to the institutional arbitration for misconduct. In the case of an arbitrator's misconduct, rules of the relevant arbitration institution can provide for the reduction of an arbitrator's fee.

An arbitrator may be held liable only by civil claim filed in criminal proceedings for recovery of damage incurred as a result of a crime, if the arbitrator was found guilty. As a matter of Russian criminal law, an arbitrator may be liable only for deliberate action, not negligence.

In October 2020, the Russian Criminal Code was amended to include a new article (200.7) 'Bribery of an arbitrator', including liability for both giving and accepting anything of value by an arbitrator. The implementation of this article is yet to be seen, but legal professionals are not unanimous in their views on the benefits of addition of this new article.

State court judges have better immunity guarantees. A judge cannot be liable for a disciplinary offence in case of a judicial error, whereas an arbitrator could be held liable for that. (Russian law also provides for a special procedure by which administrative and criminal prosecution of a judge could be pursued.)

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

According to Russian law, when a claim is brought before a court despite an existing arbitration agreement, the court must dismiss the claim and refer the parties to arbitration if any party raises an objection on this basis. The party must raise the objection no later than at the moment of making its first statement on the merits of the dispute, otherwise it is precluded from raising such objection. Unless the court finds that the arbitration agreement is null and void, inoperative, or incapable of being performed the court must terminate the proceedings and remand the parties to arbitration.

In June 2020, the Arbitrazh Procedure Code was supplemented by new articles 248.1 and 248.2, which included the possibility for sanctioned entitities to refer their disputes to Russian arbitrazh courts, regardless of the arbitration agreements, provided such sanctioned entities will be precluded from effective legal protection under those agreements. The Russian Supreme Court recently ruled on a case involving sanctioned entities, suggesting that the fact that a Russian entity, a party to the agreement, is sanctioned by a foreign state would suffice for a Russian court to assert the jurisdiction regardless of the parties' agreement to the contrary (see the ruling dated 9 December 2021 on Case No. A60-36897/2020). However, this topic has not yet been resolved and raises a lot of questions and debates.

Jurisdiction of arbitral tribunal

25 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

The arbitral tribunal may rule on its own jurisdiction, including on any objections with respect to the existence or validity of the arbitration agreement. A jurisdictional objection must be raised by any party no later than when it makes its first statement on the merits. A statement that the arbitral tribunal is exceeding the scope of its authority must be made as soon as the alleged beyond-scope matter is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later objection if it considers the delay justified.

The arbitral tribunal may rule on a jurisdictional objection either as a preliminary matter or in an award on the merits. If the arbitral tribunal as a preliminary matter rules in favour of its own jurisdiction, any party within one month from receipt of that ruling may apply to the state court with an argument that the arbitral tribunal has no jurisdiction. If the agreement provides for arbitration by a permanent arbitration institution, the parties can contract out of this option.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Failing prior agreement of the parties, the arbitral tribunal determines the place of arbitration, taking into account the circumstances of the case and the parties' convenience. Unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate to hold hearings, to hear witnesses, experts or the parties, or to inspect goods, other property or documents. Rules of institutional arbitration provide by default the place of arbitration (Moscow for ICAC, for instance).

Under the Arbitration Law, failing prior agreement of the parties, the arbitration proceedings are to be conducted in Russian. Under the ICA Law, if the parties fail to agree on the language(s) of arbitration, this shall be determined by the arbitral tribunal. The arbitral tribunal may request to provide any written evidence with translation into the languages agreed by the parties or determined by the tribunal.

The substantive law of the dispute is determined on the basis of the parties' choice in the agreement. If no choice is made by the parties, the arbitral tribunal would make the choice of applicable law, subject to the lex arbitri conflict of laws rules. In the case of Russia as a seat of arbitration, the relevant conflict of laws provision is provided in article 1211 of the Civil Code and is based on the principle of the closest connection. However, if the legal relationship is most closely connected to one country, the choice of law may not affect the mandatory rules of such country's law.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

According to the Arbitration Law and the ICA Law, the arbitration is commenced when the statement claim is received by the respondent, unless otherwise agreed by the parties. The laws indicate the content of a request for arbitration that should be part of the statement of claim.

The rules of arbitration institutions provide for specific procedures to follow while launching arbitrations in Russia (including on mandatory annexes and service of process). Generally, the arbitration proceedings will not proceed unless the advance arbitration fee is paid by the claimant.

Hearing

28 | Is a hearing required and what rules apply?

If the parties have not agreed otherwise, the arbitral tribunal decides whether to hold a hearing or to proceed on a documents-only basis. However, unless the parties have expressly agreed to forego a hearing, the arbitral tribunal must hold it (could be held via videoconference) if either of the parties so requests.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Each party must prove the facts relied on in support of its claim of defence. Each party may submit the documents it considers relevant to the case, together with its statements on the merits of the dispute, or to make reference to the documents or other evidence that it will present in future. If the arbitral tribunal finds the presented evidence insufficient, it may invite the parties to present additional evidence. If either party fails to present documentary evidence without reasonable excuse, the arbitral tribunal may continue the proceedings and render an award based on the evidence that has already been produced. The arbitral tribunal determines the admissibility, relevance, materiality and importance of the evidence as it considers appropriate. Documents, witness statements, expert reports and inspections are generally admitted as evidence, though neither the Arbitration Law nor the ICA Law contain any specific provisions on witnesses.

The arbitral tribunal may appoint one or more experts on specific issues determined by the tribunal and requiring special knowledge.

The parties and the tribunal normally refer to traditional Russian state courts' principles of evidence production and assessment. Parties rarely include reference to the IBA Rules on the Taking of Evidence in International Arbitration in their arbitration clauses, and Russian arbitrators rarely use them in the conduct of cases, except in some unusually complex matters. The newly adopted Prague Rules remain largely untested in practice.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Russian state courts have the following powers to provide assistance and supervision to arbitral tribunals:

1 granting interim relief;
2 assisting the arbitral tribunal in taking evidence (available only for institutional (not ad hoc) arbitration);
3 appointment and challenge of arbitrators, or termination of an arbitrator's mandate;
4 challenge an interim arbitration ruling on competence of the arbitral tribunal;
5 setting aside arbitral awards; and
6 enforcing arbitral awards.

The powers (3), (4) and (5) listed above may be contracted out by express agreement of the parties to an institutional arbitration (ie, which is administered by an accredited permanent arbitration institution only).

Confidentiality

31 | Is confidentiality ensured?

Arbitration is confidential, and hearings are closed to the public. Without the consent of the parties the arbitrators and the staff of permanent arbitration institution are not entitled to disclose the information that has become known to them during the arbitration. An arbitrator cannot be examined as a witness about the information that became known to him or her during the arbitration.

During enforcement or challenging of the arbitral award in state courts, confidentiality would be partially undercut, as proceedings in state courts are public. A party may request the state court to hold proceedings closed to the public to protect confidentiality.

Rules of corporate disputes involving the company and its shareholders have further mandatory disclosure obligations vested with the arbitration institution.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

A Russian state court at the place of the arbitral tribunal or at the location (residence) of debtor or its property is empowered to grant interim

measures at the request of a party to arbitration before or after arbitration proceedings have been initiated, including, but not limited to:

- freezing the respondent's money and other assets;
- prohibiting the respondent and other persons from performing certain actions relating to the subject matter of the dispute;
- ordering the respondent to take specific actions to prevent deterioration of the property in dispute; or
- ordering the respondent to hand over the property in dispute, to be held in custody by the claimant or a third party.

An application for interim measures must be accompanied by a certified copy of the statement of claim and properly certified copy of the arbitration agreement. An application for interim measures must be considered by a judge ex parte, within a day.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Arbitration Law and the ICA Law do not provide for general provisions on an emergency arbitrator procedure. However, a similar concept is reflected in these laws: if provided by the parties' agreement, prior to the constitution of the arbitral tribunal a permanent arbitration institution, per request of a party, may order interim measures that it considers necessary. Moreover, certain emergency powers are granted to presidents of several arbitration institutions in Russia or their boards. The ICAC Regulation provides that the chairman of ICAC is entitled to grant interim relief upon a party's request.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

According to the Arbitration Law and the ICA Law, unless the parties agree otherwise, the arbitral tribunal may at the request of a party grant interim measures that it considers appropriate. The laws do not provide any specific measures that might be imposed by the tribunal. The arbitral tribunal may require either party to provide counter-security in connection with such measures.

Orders of domestic and foreign arbitral tribunals on interim measures remain non-enforceable in Russia (for example, Ruling of the Supreme Court of the Russian Federation dated 19 January 2015 in case No. 307-ES14-3604, 21-9806/2013), unless such order is part of a partial arbitral award. Another possible approach could be to apply to the state court for the same measures and to refer to the relevant interim order issued by the tribunal.

Neither Arbitration Law nor the ICA Law provides for any rule on security for costs. Although this may be ordered by the tribunal based on its general powers to grant interim measures as it considers necessary, practice in this area has been quite limited to date.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Neither the Arbitration Law, the ICA Law nor the rules of arbitration institutions in Russia provide for special rules allowing arbitral tribunals to order sanctions against parties or their counsel who attempt to undermine the arbitration proceedings using such tactics. However, the arbitral tribunal could take such tactics into account when deciding on the distribution of arbitration costs between the parties. Thus a party that used such could be ordered to pay the arbitration costs regardless of the outcome of the case.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Decisions by the arbitral tribunal are made by majority vote, unless the parties to the arbitration agree otherwise. Procedural issues could be resolved by the presiding arbitrator alone, if he or she has the necessary authorisation from the parties and other arbitrators.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Most applicable rules and the Arbitration Law contain a general statement that an arbitrator who is in disagreement with the tribunal's decision is allowed to issue a dissenting opinion in writing. Such opinion is attached to the award. The ICA Law is silent on dissenting opinions.

Form and content requirements

38 | What form and content requirements exist for an award?

Awards must be in writing and signed by all arbitrators (including dissenting arbitrator), or majority of the arbitrators, with explanation for missing signatures.

The ICA Law and Arbitration Law set forth similar yet somewhat different requirements for the content of an award, as follows: under the ICA Law, an award should contain (1) the reasoning on which it is based; (2) the conclusion on granting or dismissing claims; and (3) the amount of the arbitration fee and costs and their distribution between the parties. The award should also indicate the date and seat of the arbitration.

In addition to the above requirements, under the Arbitration Law the award should also contain (unless the parties agree otherwise): (1) the composition of the tribunal and the procedure of arbitrators' appointment; (2) the names and addresses of the parties; (3) explanation of the jurisdiction of the tribunal over the dispute; and (4) the substance of the claims.

Time limit for award

39 Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Arbitration Law does not contain any time limitations for rendering of the final award.

Under ICAC rules, ICAC should take measures to finalise the proceedings within 180 days following the composition of the arbitral tribunal. This term can be extended by the ICAC Presidium, on its own initiative or by request of the tribunal.

Date of award

40 For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Unless the parties agree otherwise, under the ICA Law and the Arbitration Law the date of delivery of the award is decisive for:

- filing a request for correction of mistakes, typographical errors and similar deficiencies in the award or explanation of the award (30 days); the tribunal itself could also correct mistakes in the award within the same period; and
- filing a request for issuing a separate award for claims filed during the proceedings but not addressed in the award (30 days).

Types of awards

41 What types of awards are possible and what types of relief may the arbitral tribunal grant?

Although the ICA Law and the Arbitration Law do not provide for an explicit classification of awards, these laws directly mention final awards and awards on agreed terms. Interim awards and partial awards are also possible, although enforceability of those is questionable. In addition, the law does not provide for the types of relief the tribunal may grant, but those are generally decided on the basis of the subject matter of the claims made. Monetary awards are most common reliefs sought by parties, although specific performance is randomly sought by claimants as well.

Termination of proceedings

42 By what other means than an award can proceedings be terminated?

Under the Arbitration Law and the ICA Law, in addition to an award, the proceedings could be terminated either by decision of the tribunal or in certain cases automatically.

The tribunal could decide on termination of the proceedings, if:

- the claimant withdraws its claim (provided that the respondent does not object and the tribunal does not find a legitimate interest of the respondent in final settlement of the dispute);
- the parties agree on termination of the proceedings; and
- the tribunal for some other reason believes that continuing the proceedings has become unnecessary or impossible.

Cost allocation and recovery

43 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

As a general principle, the costs in domestic arbitration under the Arbitration Law are distributed in accordance with the agreement of the parties; in the absence of such agreement the costs are in proportion to the granted and dismissed claims. At the request of a winning party, the tribunal could allocate counsel fees of such party and other proceedings-related costs on the other party. In-house counsel fees are not common.

Interest

44 May interest be awarded for principal claims and for costs, and at what rate?

Interest is not treated as a procedural issue by the Arbitration Law and the ICA Law. It is to be resolved under the substantive rules of law applicable to the dispute when rendering the award. If the dispute is resolved under Russian law, default interest is to be awarded at the key rate of the Bank of Russia (as at 17 December 2021 this is 8.5 per cent per annum for claims in roubles).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The tribunal is entitled to correct or interpret the award – both on its own initiative or at a party's request.

The Supreme Court also clarified that parties faced with the arguments on the defects of the form of the award during the enforcement stage may stay the enforcement proceedings and apply to the arbitration tribunal to open and resume the arbitration to correct such defects in the award.

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

If under the arbitration agreement between the parties the dispute is assigned to a permanent arbitration institution, the parties could agree that such award is final and not subject to further challenge. In other cases, awards could be challenged within three months from the date of the award. An award could be set aside by a state court on the same grounds as provided by the New York Convention, such as:

- a party to the arbitration agreement was not fully legally capable, or the arbitration agreement was invalid under the applicable law;
- the award is granted in a dispute not covered by the arbitration agreement or contains statements outside the scope of the arbitration agreement;
- the composition of the tribunal or procedure contradicts the parties' agreement or applicable law; or
- the party was not notified on appointment of the arbitrators or was unable to provide its arguments.

A state court could also set aside the award if:

- the dispute in question could not be resolved by arbitration under applicable Russian law; or
- the award contradicts public policy.

Levels of appeal

47 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Once a commercial (arbitrazh) court considers a case on challenging an arbitration award, its judgment enters into force immediately. The parties could appeal that judgment to the cassation instance (the

commercial (arbitrazh) court of the relevant circuit) and then to the Supreme Court.

Depending on the workload of the court and complexity of the case, the first appeal takes from three to five months, and appeal to the Supreme Court could take from four to six months at least.

The state duty is 3,000 roubles for each appeal, which could be recovered from the losing party. Legal fees and other costs could also be recovered, but to a 'reasonable extent' determined by the court.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Russian courts are generally favourable on enforcing both domestic and international arbitral awards – unlike decisions of foreign state courts, which are rarely enforced. (There still may be practical difficulties for a foreign party in enforcing foreign, or Russian awards, against a large or otherwise influential Russian state-owned company.)

An award itself cannot be used automatically in Russia without a writ of execution issued by a state court. The award is enforced by the court at the location of the respondent: the court issues a writ of execution, which is subsequently presented to the banks or the bailiffs for forced execution.

And application for issuance of a writ of execution should be accompanied most importantly by copies of the award and arbitration agreement.

The court is supposed to review the application on enforcement of the award within one month of the application being received by the court, although there are delays in practice.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The overall limitation period in relation to the enforcement of arbitral awards in Russia, combined with local enforcement, can be a maximum of six years. A limitation period of three years is established for voluntary performance of an award or application to the court for execution writ (article 246 APC RF). Once the writ is rendered, another three years are given for its enforcement (article 321 APC RF). This approach to the limitation periods for the enforcement of arbitral awards (combined with the relevant court ruling's enforcement) was confirmed by Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 13211/09 dated 9 March 2011.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

If the award has been set aside by the courts at the place of arbitration, the Russian courts will most likely not enforce it.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Although the ICA Law and the Arbitration Law do not explicitly provide for emergency arbitrators, the laws allow the parties to agree on the right of the arbitration institution to grant interim measures prior to composition of the tribunal.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The amount of state duty for reviewing an application on enforcement of the award is the same as for challenging the award – 3,000 roubles. Legal fees could be recovered from the losing side in a reasonable amount.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Domestic arbitration proceedings are very much influenced by the rules and norms of state court proceedings in Russia. Thus, typical arbitration would largely follow the logic of the state court process. There are also no statutory provisions governing discovery. Unlike in common-law influenced jurisdictions or proceedings, in Russia arbitrators tend to consider only the documents provided by each party and work more with written evidence than list witnesses or witness statements. Generally, in most cases, it is difficult to have flexibility in the proceedings.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no country-specific professional or ethical rules applicable to counsel in international arbitration. If counsel in such arbitration has Russian attorney (advokat) status, he or she is bound by that ethical and professional code of conduct and any violations of such could be reported to the local bar.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding is not widespread in Russia, nor is it specifically regulated; therefore, it is not currently subject to restrictions. This is an ongoing area of business for funders, who appear to have accelerated in past years. The recent Supreme Court's position and amendments to the law have made it possible for attorneys to agree on a success fee (in certain circumstances), which will likely drive more third-party funders.

Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

A foreign practitioner should be aware of the visa requirements when travelling to Russia: an appropriate visa type should be arranged in advance (the minimum timing is around one to two weeks for applications from most countries, although expedited processing may be available for an extra fee) and also comply with the migration registration formalities. There are no specific ethical rules for foreign practitioners, nor any restrictions on foreign attorneys appearing as counsel, although representation in Russian courts is now limited to Russian law qualified attorneys only (with a few minor exceptions). Under the amendments to the procedural codes, only advocates or Russian qualified lawyers may be representatives in state courts (with few minor exceptions for bankruptcy trustees and patent attorneys).

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The most recent court practice has demonstrated that the legal arbitration environment in Russia remains developing and is unstable to a certain extent. We have seen several quite alarming court judgments that have not been overruled, which became a matter of a concern for the arbitration community.

There have been a number of cases where courts made surprising rulings invoking, for instance, a public policy ground and challenging the arbitration clause's wording – which were inconsistent with established court practice.

The Russian arbitration system has been heavily affected by the arbitration reform of 2015. The purpose of the reform was to promote domestic arbitration, to make arbitration more transparent and friendly, to stop the spread of the biased domestic arbitration courts, which affected the reputation of arbitration in Russia and made it practically impossible to challenge apparent unfair awards on the merits. The interim results of the reform have shown that it did not result in the promotion of arbitration, as few institutions received the status of permanent arbitration institutions in Russia since 2017, and statistics show a drastic reduction of arbitration-related disputes in Russia.

The approval of foreign institutions (HKIAC and VIAC in 2019 and SIAC and ICC in 2021) as accredited arbitration centres in Russia now allows for an option for foreign parties to refer disputes seated in Russia (including certain corporate disputes) to these foreign institutions.

The Supreme Court demonstrates generally an arbitration-friendly approach and trend in its 10 December 2019 Plenum ruling, as well as in many cases that were considered. The message is aimed to reconfirm an arbitration-friendly approach of the court practice. Unfortunately, this message is not always consistent with some cases considered recently, especially by the local courts.

Nonetheless, Russia remains interested in the active role of foreign investors. In recent years, no bilateral investment treaty has been terminated or renounced and, while the current political situation may affect the foreign investment landscape in the country, Russia has not to date manifested any inclination to reduce investment protections or otherwise introduce any barriers to arbitration or enforcement.

In June 2020, amendments to the Arbitrazh Procedure Code were introduced (articles 248.1 and 248.2), allowing the sanctioned parties to disregard their arbitration agreements and revert disputes to Russian courts. Those were designed to apply in limited situations where the sanctioned party is unable to pursue its claims or is otherwise precluded from getting effective legal protection in arbitration or foreign courts. However, in December 2021, the Supreme Court ruled that a mere fact that a Russian entity, which is party to agreement, is sanctioned by a foreign state suffices as evidence of its inability to effectively pursues protection of its rights abroad and a Russian court could assert jurisdiction. Although this conclusion was made in a particular case, further use of those rules is yet to be seen in court practice.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Singapore became a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on 21 August 1986. The New York Convention has been in force in Singapore since 19 November 1986, with the reservation that the Convention will only be applied to the recognition and enforcement of awards made in the territory of another contracting state.

Singapore is a party to the International Convention for the Settlement of Investment Disputes between States and Nationals of other States, Washington 1965 (the ICSID Convention). The Arbitration (International Investment Disputes) Act was enacted to provide for the recognition and enforcement of arbitral awards under the ICSID Convention.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Singapore is a party to no fewer than 50 bilateral investment treaties (BITs) and over 30 other international investment-related agreements (including free trade agreements (FTAs)) with other countries, which generally provide for disputes between the investors and host states to be referred to binding international arbitration, including ICSID arbitration.

Singapore is also a party to multilateral investment treaties, including the Association of South East Asian Nations Comprehensive Investment Agreement signed on 29 February 2009, which entered into force on 29 March 2012. Singapore has also signed at least 10 FTAs. Most of these FTAs contain chapters providing for investment protections typically found in BITs. The FTAs generally provide for disputes between investors and the host state to be resolved through binding international arbitration under the ICSID Arbitration Rules, UNCITRAL Arbitration Rules or rules of leading international arbitration centres.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Singapore has two principal arbitration statutes: the International Arbitration Act (IAA), which governs international arbitrations, and the Arbitration Act (AA), which governs non-international arbitrations.

Pursuant to IAA, section 5(2), an arbitration is 'international' if:

- at least one of the parties has its place of business outside Singapore at the time of the conclusion of the arbitration agreement;
- the agreed place of arbitration is situated outside the state in which the parties have their place of business;
- any place where a substantial part of the obligations of the commercial relationship is to be performed or the place to which the subject matter of the dispute is most closely connected is situated outside the state in which the parties have their place of business; or
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Parties may also agree to opt into the IAA regime, notwithstanding absence of the elements above (IAA, section 5(1)).

The IAA essentially enacts (and incorporates as its First Schedule) the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law) with some statutory modifications. Various elements of the 2006 UNCITRAL Model Law have since also been incorporated into the IAA. IAA, section 3 states that 'the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore'.

The greatest difference between the AA and IAA is the level of judicial intervention permitted. For instance, a stay of judicial proceedings is mandatory in an international arbitration (IAA, section 6 and Model Law, article 8) but discretionary in a domestic arbitration (AA, section 6). An appeal to the courts may be made against a domestic award on a question of law (AA, section 49) but an international award cannot be challenged on that basis. Such appeals on a 'question of law' should not challenge the tribunal's findings of fact or introduce arguments on points that had not been raised before the tribunal - see *Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd* [2021] 2 SLR 782.

The IAA also gives effect to the New York Convention (reproduced in its Second Schedule) and provides for the recognition and enforcement of foreign arbitral awards in Singapore.

Apart from the IAA, the Arbitration (International Investment Disputes) Act provides for the recognition and enforcement of ICSID Convention arbitral awards.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The AA does not expressly incorporate the UNCITRAL Model Law. That said, it has undergone various modifications in line with many principles contained in the Model Law.

The greatest difference between the AA and the IAA is the level of judicial intervention permitted. For instance, a stay of judicial proceedings is mandatory in an international arbitration (IAA, section 6 and Model Law, article 8) but discretionary in a domestic arbitration (AA,

section 6). An appeal to the courts may be made against a domestic award for an error of law (AA, section 49) but an international award under the IAA cannot be challenged on that basis. The court also has the power to extend contractual time limits for the commencement of a domestic arbitration (AA, section 10), but there is no equivalent power under the IAA or the UNCITRAL Model Law.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The AA and IAA do not set forth a specific list of mandatory provisions from which parties may not contractually deviate.

They do, however, provide, inter alia, for the following:

- the immunity of arbitrators (AA, section 20 and IAA, section 25);
- a tribunal's competence to rule on its own jurisdiction (AA, section 21, and Model Law, article 16 (see IAA, First Schedule));
- a tribunal's duty to act fairly and impartially and allow the parties to present their case (AA, section 22 and Model Law, article 18 (see IAA, First Schedule)); and
- the parties' rights to challenge an award on grounds such as breach of natural justice, fraud and public policy (AA, section 48 and IAA, section 24).

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Section 32(1) of the AA provides that the arbitral tribunal shall decide the dispute in accordance with the substantive law chosen by the parties. If the parties have not chosen a substantive law, the arbitral tribunal will apply the law as determined by the application of conflict of laws rules (AA, section 32(2)). The tribunal may also decide the dispute, if the parties so agree, in accordance with 'such other considerations as are agreed by them or determined by the tribunal' (AA, section 32(3)). This allows the tribunal to disregard strict rules of law.

These provisions closely follow article 28 of the Model Law as enacted in Singapore through the IAA. Under article 28(1), the arbitral tribunal shall decide the dispute in accordance with the application of a substantive law or rules of law (eg, lex mercatoria) chosen by the parties. However, if the parties have not designated any such applicable law or rules of law, then the arbitral tribunal shall apply a substantive law determined by conflict of laws rules that the arbitral tribunal considers applicable.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitral institution in Singapore is the Singapore International Arbitration Centre (SIAC):

Singapore International Arbitration Centre
28 Maxwell Road #03-01
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6713 9777
Fax: +65 6713 9778
www.siac.org.sg
corpcomms@siac.org.sg

The SIAC Rules 2016 (sixth edition) (the SIAC Rules) – the primary rules of arbitration at the SIAC – took effect on 1 August 2016, superseding previous versions, and including new provisions, inter alia, on the consolidation of arbitrations and the joinder of additional parties, as well as the early dismissal of claims and defences.

The SIAC also has specialised rules:

- the SGX-DT Arbitration Rules (first edition, 1 July 2005) and the SIAC SGX-DC Arbitration Rules (first edition, 27 March 2006). These are designed for the conduct of expedited arbitrations for disputes arising from derivative trading and derivative clearing respectively; and
- the SIAC Investment Arbitration Rules (the SIAC IA Rules), which came into effect on 1 January 2017. The SIAC IA Rules are a specialised set of rules to address the unique issues present in the conduct of international investment arbitration.

Parties arbitrating at the SIAC also have the option of adopting the UNCITRAL Arbitration Rules (as revised in 2010) (UNCITRAL Rules). Although the UNCITRAL Rules were designed for use in ad hoc arbitrations, parties can, with special provision, enjoy the benefit of institutional administration of the arbitration by the SIAC. The SIAC Practice Note for UNCITRAL cases provides an explanation as to how this may be achieved: https://www.siac.org.sg/our-rules/practice-notes/practice-note-for-uncitral-cases/uncitral-rules-1976.

Other prominent arbitral institutions include the International Chamber of Commerce, which opened a Singapore case-management office in April 2018, the Singapore Chamber of Maritime Arbitration, the World Intellectual Property Organization Arbitration and Mediation Center and the International Centre for Dispute Resolution (Singapore Office).

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

All disputes may be resolved by arbitration in Singapore unless it would be contrary to public policy to do so (International Arbitration Act (IAA), section 11, and Arbitration Act (AA), section 48(1)(b)). Examples of disputes that are not regarded as arbitrable include child custody disputes, grant of statutory licences, validity of registration of trademarks or patents, and some anti-competition matters (eg, matters regulated under Singapore's Competition Act).

The Singapore Court of Appeal has held that claims involving an insolvent company may not be arbitrable when the substantive rights of other creditors are affected (see *Larsen Oil and Gas Limited v Petroprod Ltd* [2011] 3 SLR 414).

In *Tomolugen Holdings v Silica Investors Ltd* [2015] SGCA 57, the Singapore Court of Appeal held that the arbitrability of a dispute would be presumed so long as it fell within the scope of an arbitration clause, subject to that presumption being rebutted if it could be shown that Parliament intended to exclude a particular type of dispute from being arbitrated, or if permitting the arbitration of a type of dispute would be contrary to public policy. Such non-arbitrable matters included claims arising upon insolvency or the liquidation of an insolvent company because they impinge on third-party rights. The Court of Appeal, however, noted that disputes involving section 216 of the Companies Act do not, generally, engage public policy considerations, as they are essentially contractual in nature. Consequently, in *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312, the Singapore Court of Appeal held that even minority oppression claims in corporate disputes are arbitrable.

The Singapore High Court in *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028, has also held that actions on bills of exchange (eg, claims on dishonoured cheques), are arbitrable if the reason for the cheques being dishonoured (in this instance, the alleged breach of a

distributorship agreement) arose from a dispute falling within the scope of the arbitration agreement.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must be in writing. An agreement concluded orally or by conduct or any other means may also be a valid arbitration agreement provided that the contents of such an agreement are recorded in any form (IAA, section 2A).

For instance, in *R1 International Pte Ltd v Lonstroff AG* [2014] SGCA 56, the Singapore Court of Appeal had to consider whether a set of terms (which included an agreement to arbitrate in Singapore) set out in a contract note that was sent by R1 International to Lonstroff shortly after the deal had apparently been agreed, was incorporated as part of the contract between the parties and, if so, whether an antisuit injunction ought to be made against Lonstroff AG from pursuing a case in the Swiss courts. The Court of Appeal held that the contract note was part of the contract between the parties – it was improbable that the parties expected to contract purely on the bare bones of the prior email confirmations – and as such, those terms (including the agreement to arbitrate) would have, as regards the industry practice and size and scope of the subject matter of the supply contracts in question, probably expected terms such as the agreement to arbitrate in Singapore to be incorporated into the more detailed contract note.

Parties are also increasingly including in their arbitration agreements a specific statement as to their express choice of law to govern the arbitration agreement. In the absence of an express choice of law to govern the arbitration agreement, the Singapore High Court (see *BCY v BCZ* [2016] SGHC 249 and *BNA v BNB and anor* [2020] 1 SLR 456) has endorsed the approach of the English Court of Appeal in *SulAmérica Cia Nacional De Seguros SA and others v Enesa Engenharia SA* [2012] 1 Lloyd's Rep 671, holding that where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend for the same system of law to govern both the arbitration agreement and the main contract. It, however, remains to be seen whether the Singapore courts will continue to adopt this approach subsequent to the decision of the English Court of Appeal in *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration clause or agreement contained in a contract will continue to be enforceable under the doctrine of separability, even if the contract is avoided, rescinded or terminated (Model Law, article 16, IAA, First Schedule and AA, section 21).

An arbitration agreement is not discharged by the death of any party to the agreement but continues to be enforceable by or against the personal representative of the deceased party (AA, section 5).

The Singapore courts are extremely pro-arbitration. Where arbitration agreements are ambiguous, the Singapore High Court has expressed a willingness to 'engage in some verbal manipulation or adjustment to resolve a gap in the arbitration agreement . . . [t]he court will give effect to the meaning of the parties' agreement reasonably discerned from the written agreement itself and the background even though it involves departing from or qualifying particular words used' – see *BNP v BNR* [2018] 3 SLR 889.

In contrast to some other jurisdictions, the Singapore Court of Appeal also held – in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 – that an arbitration clause that was asymmetric in nature (ie, that provided the claiming party with the right to choose whether to refer its dispute to arbitration or to the courts) could still give rise to a valid and enforceable arbitration agreement once that party elected to arbitrate, provided that no prior inconsistent step had been taken. On the facts of that case, however, the arbitration clause – although valid as an arbitration agreement – was not enforceable given that the claiming party had decided against arbitration, having chosen to litigate the dispute in court.

An arbitration agreement will no longer be enforceable by a party who has waived it or has repudiated it (with the other party's acceptance of the repudiation). For example, in *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207, the Singapore Court of Appeal held that Hualon had repudiated the arbitration agreement as it had commenced and maintained court proceedings in the BVI for 10 months without reserving its right to arbitration. As a result, Hualon was disentitled from subsequently relying on the arbitration agreement to bring a SIAC arbitration against Marty.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Arbitration clauses that form part of a contract shall be treated as an agreement independent of the other terms of the contract (AA, section 21 and Model Law, article 16(1), IAA, First Schedule). The Singapore High Court has held that '[s]eparability serves the narrow though vital purpose of ensuring that any challenge that the main contract is invalid does not, in itself, affect the validity of the arbitration agreement. This is necessary because the challenge to the validity of the arbitration agreement often takes the form of a challenge to the validity of the main contract' – see *BCY v BCZ* [2017] 3 SLR 357.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

Third parties, namely non-signatories to the arbitration agreement, are generally not bound by an arbitration agreement, subject to exceptions (see those listed below).

In *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832, the Singapore High Court stated that to permit enforcement of arbitral awards against a non-party to the arbitration agreement (who was also a non-party to the arbitration reference) would be anathema to the 'internal logic of the consensual basis of an agreement to arbitrate' as stated by the Singapore Court of Appeal in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372. It expressly rejected the 'single economic entity' concept that it said was conceptually difficult to reconcile with the established doctrine of separate legal personality and the narrow exceptions recognised at law for the piercing of the corporate veil. It also noted that the single economic entity concept has not been recognised in the case law from Singapore and other common law jurisdictions, and that it was not even a clearly established concept in international arbitration.

The exceptions to the above general rule include the following:

- section 9 of Singapore's Contracts (Rights of Third Parties) Act allows a third party to rely on an arbitration clause or agreement to enforce a term in a contract if the contract expressly provides that he or she may enforce that term in his or her own right or if that term purports to confer a benefit on him or her;
- the legal assignee of a contract may also, upon giving notice of assignment to the other party, be entitled to the rights of a party under the arbitration agreement;

- a principal, whether disclosed or undisclosed, of a party who acted as agent in the agreement, has rights as a party to the arbitration agreement; and
- the legal representatives of the estate of a deceased, and trustees in bankruptcy, are also entitled to that party's rights under the arbitration agreement. An insurer claiming through a subrogated action is also bound by the terms of an arbitration clause by which the insured was bound.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Third parties who are not parties to the arbitration agreement are not permitted to participate in the arbitration through joinder, third-party notice or otherwise, without the consent of all the parties to the arbitration. In line with this principle, Rule 7.1 of the SIAC Rules provides that a party or non-party to the arbitration may file an application for one or more additional parties to be joined as a claimant or a respondent, only if the additional party to be joined is prima facie bound by the arbitration agreement, or all parties, including the additional party to be joined, have consented to the joinder of the additional party.

In *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372), the Singapore Court of Appeal held that the tribunal's joinder of the sixth to eighth claimants to the arbitration was wrong, namely, it was 'predicated on a mistaken construction of the 2007 SIAC Rules' (ie, that Rule 24(b), as it then stood, allowed the joinder of consenting third parties to the arbitration against the wishes of the respondents, even where those third parties were not privy to the arbitration agreement). The Court of Appeal, therefore, found that the awards made by the tribunal in favour of the sixth to eighth claimants 'suffer[ed] from a deficit in jurisdiction' and refused to enforce those awards in Singapore pursuant to its discretion under section 19, International Arbitration Act, Cap. 143A (2002 Rev. Edition).

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The Singapore courts have not accepted the group of companies doctrine. That said, non-signatories could be considered a party to the arbitration agreement through a piercing of the corporate veil, for example, based on the alter ego principle, fraud or abuse of the corporate vehicle. However, there does not appear to be any Singapore case law on these areas in an arbitration context.

Further, in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832, the Singapore High Court expressly rejected the single economic entity concept. Third parties who are not parties to the arbitration agreement are not permitted to participate in the arbitration through joinder, third-party notice or otherwise, without the consent of all the parties to the arbitration.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

There are no specific provisions or restrictions relating to multiparty arbitration agreements, whether in the Arbitration Act, Cap. 10 (2002 Rev. Edition), which governs non-international arbitrations, or the International Arbitration Act, Cap. 143A (2002 Rev. Edition), which governs international arbitrations.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Section 26, AA provides that an arbitral tribunal has no power to order consolidation of arbitral proceedings or concurrent hearings unless the parties agree to confer such power on the arbitral tribunal. There is no similar provision in the IAA, although the position is presumed to be the same.

The parties may, however, themselves agree that the arbitral proceedings shall be consolidated with other arbitral proceedings; or that concurrent hearings shall be held on such terms as may be agreed. Under the SIAC Rules, Rule 8, a party may apply to the Registrar (prior to the constitution of the tribunal) or to the Tribunal to consolidate two or more arbitrations pending under the SIAC Rules into a single arbitration, provided that certain requirements are met:

- all parties have agreed to the consolidation;
- all the claims in the arbitrations are made under the same arbitration agreement, and the same tribunal (if any) has been constituted in each of the arbitrations or no tribunal has been constituted in the other arbitration(s); or
- the arbitration agreements are compatible, the same tribunal (if any) has been constituted in each of the arbitrations or no tribunal has been constituted in the other arbitration(s), and:
  - the disputes arise out of the same legal relationship(s);
  - the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or
  - the disputes arise out of the same transaction or series of transactions.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are no statutory restrictions on who may act as an arbitrator. The International Arbitration Act (IAA) and the Arbitration Act (AA) both provide that no person shall be precluded by reason of his or her nationality from acting as an arbitrator unless otherwise agreed by the parties (the Model Law, article 11(1), IAA, First Schedule and AA, section 13(1)). It is, however, not uncommon for parties to state specific requirements for their intended arbitrator, for example, a certain expertise or set of qualifications.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

In commercial arbitrations seated in Singapore, lawyers most commonly comprise the majority – if not the entirety – of the tribunal. They are usually either full-time arbitrators (having retired from private practice or the judiciary) or lawyers in active professional practice in Singapore

or international firms. Architects, engineers and accountants are also sometimes appointed to tribunals, with architects and engineers most commonly sitting in construction disputes.

On the issue of arbitrator diversity, the 143 arbitrator appointments made by Singapore's main arbitral institution (SIAC) in 2020 came from over 25 different jurisdictions with female arbitrators accounting for 32.2 per cent of the total appointed arbitrators.

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

For arbitrations involving one claimant and one respondent, where the parties cannot agree, the IAA and the SIAC Rules provide for the default appointment of a single arbitrator by the SIAC President as appointing authority (IAA, section 8(2), 8(3) and SIAC Rules, Rule 10.2). Under the SIAC Rules, the default provision is for a single arbitrator, but the SIAC Registrar has discretion to appoint three arbitrators if the dispute warrants it (SIAC Rules, Rule 9.1). Section 9A(2) of the IAA and Rule 11.3 of the SIAC Rules provide that where two out of three arbitrators have been appointed by the parties, the third arbitrator shall be appointed by the SIAC President unless the parties have agreed upon a procedure for nominating the third arbitrator and if that procedure has resulted in a nomination.

For multiparty arbitrations (three or more parties) which require three tribunal members, section 9B of the IAA (introduced by way of amendments on 1 December 2020) provides for a default appointment mechanism in situations where the parties have not agreed any procedure for appointing the tribunal. In brief:

- all claimants must jointly appoint one arbitrator. They must notify the respondents of their joint appointment when they refer the dispute to arbitration, for example, when filing their request for arbitration or notice of arbitration;
- all respondents must jointly appoint a second arbitrator and inform the claimants of their joint appointment within 30 days of the request for arbitration or notice of arbitration is received by the last respondent;
- if either of the above appointments is not made by the parties within the time limits specified, or if the claimants or respondents cannot come to a joint appointment, or if any party requests, the appointing authority must appoint all three arbitrators. If that occurs, the appointing authority may, having regard to all relevant circumstances, re-appoint or revoke the appointment of any arbitrator already appointed;
- assuming two arbitrators have been appointed, within the time limits, by the claimants and respondents respectively, they will then choose the third arbitrator (who shall be the presiding arbitrator) within 60 days of the request for arbitration or notice of arbitration is received by the last respondent; and
- if the two party-appointed arbitrators fail to agree on the appointment of the third arbitrator within the 60-day time limit, the appointing authority must, upon the request of any party and having regard to all relevant circumstances, appoint the third arbitrator.

Challenge and replacement of arbitrators

20 | On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator can be challenged where there are justifiable doubts as to the arbitrator's impartiality or independence, or the arbitrator does not possess the qualifications agreed to by the parties (AA, section 14, the Model Law, article 12; IAA, First Schedule and SIAC Rules, Rule 14.1). In the absence of any challenge procedure agreed by the parties, the procedure set out in the AA, the IAA or the agreed procedural rules, applies.

Bias can take three forms: actual, imputed or apparent (see *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] SGHC 190). The Singapore High Court held that actual bias would obviously disqualify a person from sitting in judgment; imputed bias arises where a judge or arbitrator may be said to be acting in his or her own cause (nemo judex in sua causa) and this happens if he or she has, for instance, a pecuniary or proprietary interest in the case – in that situation, disqualification is 'certain without the need to investigate whether there is likelihood or even suspicion of bias'; and finally, apparent bias, which was what the aggrieved party, in that case, accused the sole arbitrator of. The court held that the test for determining the bias of an arbitrator is whether a 'reasonable and fair minded person with knowledge of all the relevant facts would entertain a reasonable suspicion' that a fair hearing for the applicant was not possible. On the facts of the case, and applying the above 'reasonable suspicion test', the court held that the sole arbitrator was not guilty of apparent bias.

An arbitrator may also be replaced on his or her death or resignation, where the arbitrator is physically or mentally incapable of conducting the proceedings or where the arbitrator has failed to properly conduct the arbitration with reasonable despatch or in making the award or where substantial injustice has been or will be caused to a party.

Under the IAA, where the arbitrator is incapable of conducting the proceedings, or where the arbitrator has failed to act without undue delay, either party may apply to the Singapore High Court for his or her removal in the absence of voluntary resignation by the arbitrator or any agreement by the parties to terminate his or her mandate.

In international arbitrations in Singapore, counsel and arbitrators often refer to the IBA Guidelines on Conflicts of Interest in International Arbitration for guidance on arbitrator challenges even though these guidelines are not strictly binding.

Relationship between parties and arbitrators

21 | What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The arbitrator must be independent of the parties to the arbitration. He or she must be impartial and should disclose any circumstance that gives rise to justifiable doubts as to his or her impartiality and independence. This obligation continues throughout the duration of the arbitration (Model Law, article 12; IAA, First Schedule, AA, section 14(1)).

The arbitrator should treat the parties with equality and allow each party a full opportunity to present its case (Model Law, article 18, IAA, First Schedule). In this context, 'full opportunity' means 'reasonable opportunity' (see *ADG and another v ADI and another matter* [2014] 3 SLR 481). In *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768), the Singapore High Court clarified that there are two aspects to a party's reasonable opportunity to present its case: a positive and a responsive aspect. The positive aspect encompasses the opportunity to present the evidence and advance the propositions of law on which it positively relies to establish its claim or defence, as the case may be. The responsive aspect encompasses the opportunity to present the evidence and advance the propositions of law necessary to respond to the case made against it. The responsive aspect of presenting a party's case has itself two subsidiary aspects to it. The first is having notice of the case to which one is expected to respond. The other is being permitted to actually present the evidence and advance the propositions of law necessary to respond to it. A tribunal will therefore deny a party

a reasonable opportunity to respond to the case against it if it either: requires the party to respond to an element of the opposing party's case that has been advanced without reasonable prior notice; or unreasonably curtails a party's attempt to present the evidence and advance the propositions of law that are reasonably necessary to respond to an element of the opposing party's case. A third possible situation is where a tribunal denies a party a reasonable opportunity to present its responsive case, for example, when the tribunal adopts a chain of reasoning in its award, which it has not given the complaining party a reasonable opportunity to address.

The parties are jointly and severally liable to pay the arbitrator's fees and expenses, which are set forth by the arbitrator and subject to party agreement in ad hoc arbitrations. If the arbitration is administered by an arbitral institution, some form of scale fees will usually apply.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Disclosure of all circumstances likely to give rise to justifiable doubts as to an arbitrator's impartiality or independence is required of arbitrators – see AA, section 14(1) and Model Law, article 12, IAA First Schedule as well as Rule 13.1 of the SIAC Rules read with Rules 2.1 and 2.2 of the SIAC Code of Ethics for an Arbitrator. The duty to disclose is ongoing; it runs from the time of the arbitrator's appointment and continues throughout the arbitration proceedings – see AA, section 14(2) and Model Law, article 12(1), First Schedule, IAA as well as Rule 13.5 of the SIAC Rules.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are immune against claims for negligence arising from acts or omissions done in the capacity of arbitrator and for any mistake in law, fact or procedure made in the course of the arbitral proceedings or in the making of an arbitral award (AA, section 20, and IAA, section 25). However, neither the AA nor IAA provide that arbitrators will be immune from liability for intentional breaches of duty or deliberate bad faith.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The aggrieved party may apply to the court for a stay of the court proceedings; it must not take a step in the proceedings within the meaning of section 6 of the Arbitration Act (AA), or International Arbitration Act (IAA), such that it is disentitled from seeking a stay.

A stay of judicial proceedings is mandatory in an international arbitration (IAA, section 6 and Model Law, article 8) but discretionary in a domestic arbitration (AA, section 6). However, even in an application for a stay under section 6 of the AA, the burden is on the party who wishes to proceed in court to 'show sufficient reason why the matter should not be referred to arbitration'. Assuming the applicant is ready and willing to arbitrate, the court will only refuse a stay in exceptional cases because of Singapore's strong policy in favour of arbitration (see *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431).

The Singapore Court of Appeal decision in *Carona Holdings Pte Ltd v Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460, provides good guidance as to what the parties should do: the aggrieved party should file a stay application within 14 days from the service of the statement of claim (ie, the 14 days being the time allowed for the filing of the aggrieved party's defence under the Rules of Court) or within any extended time frame arising from a court order or the parties' agreement. Once this occurs, the opposing party should not press ahead to seek a judgment in default of defence, pending the hearing of the application for a stay. The aggrieved party should not file a substantive defence as this would constitute a 'step in the proceedings' disentitling it from a stay. However, the filing and serving a notice to produce documents referred to in the statement of claim, pursuant to Order 24 Rule 10 of the Rules of Court, does not amount to a step in the proceedings – see *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724.

In *Oei Hong Leong v Goldman Sachs International* [2014] 3 SLR 1217, the Singapore High Court had to consider whether to grant a stay under section 6 of the IAA where there was an arbitration clause in one contract between the parties and a (court) jurisdiction clause in another contract between them. The court held that it should ascertain which contract had the closer connection to the claims or which contract the claims arose out of, and in doing so, found that the parties' dispute was more closely connected with the contract containing the arbitration clause; it thus granted the stay.

Parties should be extremely cautious in commencing, or proceeding with, court proceedings contrary to an arbitration agreement. In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207, the Singapore Court of Appeal expressly stated that 'it is strongly arguable that the commencement of court proceedings per se by a party who is subject to an arbitration agreement is prima facie repudiatory of such party's obligations [to arbitrate] under that agreement', and that this repudiation could be accepted by the other (innocent) party, thereby terminating the arbitration agreement.

Jurisdiction of arbitral tribunal

25 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

A plea that the arbitral tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence.

The arbitral tribunal may, however, admit a later plea if it considers the delay justified (Model Law, article 16(2), IAA, First Schedule and AA, section 21(4)).

The arbitral tribunal has the power to determine its own jurisdiction based on the competence-competence principle, including issuing a ruling on whether an arbitration clause is valid (Model Law, article 16; IAA, First Schedule).

If a party is dissatisfied with the tribunal's jurisdictional ruling (whether finding that it has jurisdiction or that it does not), it may appeal to the General Division of the Singapore High Court within 30 days of receipt of the tribunal's ruling (IAA, section 10 and AA, section 21(9), Model Law, article 16(3)). However, preliminary rulings on jurisdiction can only be challenged under article 16(3) of the Model Law if they do not touch on the merits of the case. In *AQZ v ARA* [2015] 2 SLR 972, the Singapore High Court held that relief under article 16(3) was not available if the tribunal's ruling dealt in some way with the merits of the case, even though the ruling was predominantly on jurisdiction; in that case, the aggrieved party's proper recourse would be to challenge the ruling under the relevant limbs of article 34(2) of the Model Law.

A party who is thereafter dissatisfied with the decision of the General Division of the Singapore High Court on a challenge brought under IAA, section 10 and Model Law, article 16(3) may then lodge an appeal to the 'appellate court', namely, the Singapore Court of Appeal

(Supreme Court of Judicature Act (Cap. 322, section 29C read with Sixth Schedule, paragraph 1(c)), provided that leave to do so is obtained from the General Division of the High Court (IAA, section 10(4); AA, section 21A(1)). If the court subsequently decides, upon an appeal from the tribunal's decision, that the tribunal does have jurisdiction, the tribunal shall continue the arbitral proceedings and make an award. If, however, the tribunal is unable or unwilling to do so, its mandate shall terminate and a new tribunal will be appointed (IAA, section 10(6) and AA, section 21A(3)).

That said, the Singapore Court of Appeal has made it clear that where a respondent has elected not to participate in an arbitration because he or she has a valid objection to the jurisdiction of the tribunal and has validly and timeously registered that objection, he or she is not compelled to apply to the Singapore courts under IAA, section 10 or Model Law, article 16(3) after the tribunal has found against the objection and held that it has jurisdiction. The respondent may instead reserve his or her position and after the issuance of the award against him or her, validly mount a challenge against the award under article 34(2)(a)(i) or article 34(2)(a)(iii) of the Model Law – see *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2019] 2 SLR 131.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Neither the International Arbitration Act (IAA) nor the Arbitration Act (AA) provides for a default mechanism for determining the place of arbitration or the language of the arbitral proceedings in the absence of the parties' prior agreement. The procedural rules agreed to by the parties, however, often provide for such matters. In the absence of any other mechanism, the arbitral tribunal ultimately has the discretion to determine such matters.

As regards the substantive law of the dispute, section 32(1) of the AA provides that the arbitral tribunal shall decide the dispute in accordance with the substantive law chosen by the parties. If the parties have not chosen a substantive law, the arbitral tribunal will apply the law as determined by the application of conflict of laws rules (AA, section 32(2)). The tribunal may also decide the dispute, if the parties so agree, in accordance with 'such other considerations as are agreed by them or determined by the tribunal' (AA, section 32(3)). This allows the tribunal to disregard strict rules of law.

These provisions closely follow article 28 of the Model Law as enacted in Singapore through the IAA. Under article 28(1), the arbitral tribunal shall decide the dispute in accordance with the application of a substantive law or rules of law (eg, lex mercatoria) chosen by the parties. However, if the parties have not designated any such applicable law or rules of law, then the arbitral tribunal shall apply a substantive law determined by conflict of laws rules that the arbitral tribunal considers applicable.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

The IAA, which adopts and enacts the Model Law (in its First Schedule), provides that arbitration proceedings are commenced when a request to refer a dispute to arbitration is received by the respondent (Model Law, article 21). The AA also contains similar provisions.

Procedural rules usually specify what the request for arbitration (or notice of arbitration) should contain. As an example, the SIAC Rules require the claimant to file a notice of arbitration with the SIAC Registrar (SIAC Rules, Rule 3.1). The notice of arbitration should comprise:

- a demand that the dispute be referred to arbitration;
- the names, addresses, telephone numbers, facsimile numbers and electronic mail addresses, if known, of the parties to the arbitration and their representatives, if any;
- a reference to the arbitration clause or the separate arbitration agreement that is invoked and a copy of it;
- a reference to the contract out of or in relation to which the dispute arises and, where possible, a copy of it;
- a brief statement describing the nature and circumstances of the dispute, specifying the relief claimed and, where possible, an initial quantification of the claim amount;
- a statement of any matters that the parties have previously agreed as to the conduct of the arbitration or with respect to which the claimant wishes to make a proposal;
- a proposal for the number of arbitrators if this is not specified in the arbitration agreement;
- unless the parties have agreed otherwise, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator;
- any comment as to the applicable rules of law;
- any comment as to the language of the arbitration; and
- payment of the requisite filing fee.

The claimant shall also, at the same time, send a copy of the notice of arbitration to the respondent and it shall notify the SIAC Registrar that it has done so, specifying the mode of service employed and the date of service (SIAC Rules, Rule 3.4).

Hearing

28 | Is a hearing required and what rules apply?

Article 24(1) of the Model Law (which is reproduced in the First Schedule of the IAA) provides that an arbitral tribunal has discretion to decide whether to hold oral hearings, subject to the parties' agreement. In practice, oral hearings are usually held unless the parties opt to proceed with the arbitration on a documents-only basis. The arbitration agreement between the parties and the procedural rules adopted thereunder may contain express provisions as to the need for an oral hearing.

The SIAC Rules provide that the tribunal shall, unless the parties have agreed on a documents-only arbitration, hold a hearing for the presentation of evidence or the oral submissions, or both, on the merits of the dispute, including, without limitation, any issue as to jurisdiction (SIAC Rules, Rule 24.1). The tribunal may also direct the witnesses to give evidence by videoconference.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In a Singapore-seated arbitration, the tribunal is not bound to apply the Singapore law of evidence or rules of civil procedure. The tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence (Model Law, article 19, IAA, First Schedule; AA, section 23(3)). The SIAC Rules further provide that the tribunal is 'not required to apply the rules of evidence of any applicable law' (SIAC Rules, Rule 19.2).

The tribunal has the power to order the discovery (disclosure) of documents and interrogatories, and the giving of evidence by affidavit from witnesses (IAA, section 12; AA, section 28(2)). Both the IAA and

the AA provide that the arbitral tribunal has wide discretion to conduct the arbitration in such manner as it considers appropriate (Model Law, article 19(2), IAA, First Schedule and AA, section 23(2)). The IBA Rules on the Taking of Evidence in International Arbitration are frequently referred to.

In practice, evidence is frequently given in the form of witness statements (sometimes made on oath, depending on the procedure agreed by the parties), which are subsequently orally verified at the evidentiary hearing, followed by cross-examination and re-examination of the witness. Cross-examination is usually not limited to the scope of the witness statements, although the tribunal may exercise some control in preventing cross-examination from straying beyond the issues identified by the parties. Re-examination is permitted, but it is usually limited to matters raised in cross-examination. Re-cross-examination (permitted in some jurisdictions) is uncommon and does not usually occur. The tribunal may also adopt an inquisitorial process (IAA, section 12(3)). Witness conferencing (also called concurrent evidence or hot-tubbing) is becoming increasingly popular as an alternative to the traditional examination, cross-examination and re-examination approach stated above.

In addition, the tribunal may appoint one or more experts if necessary. It can also require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his or her inspection (Model Law, article 26, IAA, First Schedule and AA, section 27).

Officers or employees of the parties are not restricted from giving evidence in the arbitration. Such persons are in practice frequently called as witnesses.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

As opposed to the arbitral tribunal requesting assistance from the court to enforce its orders, the party in whose favour an order has been made may apply to the court to enforce that order. The effect of this is that subsequent non-compliance with that order would amount to contempt of court.

Orders made by an arbitral tribunal may be enforced by the Singapore High Court 'as if they were orders made by the court' (AA, section 28(4) and IAA, section 12(6)). Such orders may include an order granting security for costs, discovery of documents and interrogatories, taking evidence by way of affidavit or measures for the preservation of evidence (AA, section 28; and IAA, section 12).

The court may also grant interim relief in aid of arbitrations that are seated outside Singapore (IAA, section 12A).

The orders of an emergency arbitrator in Singapore may also be enforced in Singapore as though they were orders of an arbitral tribunal (IAA, section 12(6) read with section 2(1)).

The court will generally not interfere with the exercise of the tribunal's discretion to make interlocutory orders. It the tribunal refuses to make such orders, the court will not compel the tribunal to make them. The court will also not set aside interlocutory orders made by a tribunal (see *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] 4 SLR 1157).

The court also has the power to issue subpoenas to witnesses within the jurisdiction to testify or produce documents at arbitral proceedings (AA, section 30 and IAA, section 13). It may also intervene on various grounds, such as deciding on a challenge as to the arbitrator's impartiality, independence, hearing an appeal against a tribunal's decision on its jurisdiction and setting aside the award.

Confidentiality

31 | Is confidentiality ensured?

Neither the AA nor the IAA expressly impose a statutory duty of confidentiality on the parties or the arbitral tribunal. Singapore courts have, however, ruled that there is an implied duty on the parties and the arbitrator not to disclose confidential information obtained in arbitration proceedings or use them for any purpose other than the dispute in which they are obtained (*Myanma Yaung Chi Oo Co Limited v Win Nu* [2003] 2 SLR 547 at (15) and *International Coal Pte Ltd v Kristle Trading Ltd & Anor* [2009] 1 SLR (R) 945 at [82]). In that regard, a party may apply to the Singapore High Court to seal court documents in court proceedings to preserve the confidentiality of a related arbitration.

The implied duty of confidentiality is, however, not absolute; much turns on the specific facts of the case. For instance, confidentiality may be lifted by the express or implied consent of the parties where leave of court is obtained, disclosure is reasonably necessary for the protection of a party's legitimate interests, disclosure is in the interests of justice or public interest so requires (see *AAY v AAZ* [2011] 1 SLR 1093 at [64]).

To augment the ability of tribunals to enforce confidentiality obligations, the IAA was amended on 1 December 2020, to add section 12(1)(j) under which a tribunal may make orders to enforce any obligation of confidentiality:

- that the parties to an arbitration agreement have agreed to in writing, whether in the arbitration agreement or in any other document;
- under any written law or rule of law; or
- under the rules of arbitration (including the rules of arbitration of an institution or organisation) agreed to or adopted by the parties.

Such orders may, by leave of the General Division of the Singapore High Court, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction (IAA, section 12(6)).

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Courts have the power to grant many of the types of relief available to the tribunal under the International Arbitration Act (IAA) and the Arbitration Act (AA), whether before or after arbitration proceedings have commenced, except for the granting of security for costs and the discovery of documents.

The Singapore High Court has confirmed that it has no power to grant an order for the discovery of documents prior to the commencement of the arbitration (see *Equinox Offshore Accommodation Ltd v Richshore Marine Supplies Pte Ltd* [2010] SGHC 122).

If, however, the potential claimant is still seeking to determine whether he or she has a cause of action, the court may, in appropriate cases, still be in a position to order pre-action discovery even where there is an arbitration clause in the contract between the parties (see *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25). The Singapore Court of Appeal, however, cautioned that where an arbitration clause is prima facie applicable, absent exceptional circumstances, a court will not grant pre-action discovery or pre-action interrogatories, especially where both the parties involved as well as the issues in dispute between them were one and the same, since to do so would amount to an abuse of process.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the IAA nor the AA specifically provide for the appointment of an emergency arbitrator; they do, however, include emergency arbitrators within the definition of 'arbitral tribunal', with the result that any orders by an emergency arbitrator in Singapore can be enforced by the Singapore High Court (IAA, section 2(1)).

The SIAC Rules provide that a party in need of emergency interim relief may apply for the appointment of an emergency arbitrator prior to the constitution of the arbitral tribunal (SIAC Rules, Rule 30.2 and Schedule 1).

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The tribunal has broad powers. For instance, it has the power to order a claimant to provide security for costs under section 12(1)(a) of the IAA, although that power is restricted by section 12(4), which provides that an order cannot be made only by reason of the fact that the claimant is an individual ordinarily residing outside Singapore or a corporation incorporated or controlled outside Singapore. Similar provisions are found in the AA, section 28(2).

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

There are no specific provisions in the IAA or the AA that allow the tribunal to issue sanctions against the parties or their counsel for such tactics. That said, various provisions may be used to provide some sanctions against a party adopting such tactics: for example, an appropriate order for costs (SIAC Rules, Rule 35) or ordering some form of interim relief (IAA, section 12 and AA, section 28(2)). Where the guerrilla tactics amount to professional misconduct, an aggrieved party or the tribunal may consider making a professional complaint against the counsel in question, such as if he or she is registered with the Singapore Legal Services Regulatory Authority.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Where the tribunal consists of more than one arbitrator, any decision shall be made by a majority of all its members, unless otherwise agreed by the parties (Model Law, article 29, International Arbitration Act (IAA), First Schedule). Questions of procedure, however, may be decided by the chair or presiding arbitrator, if he or she is so authorised by the parties or all members of the arbitral tribunal. The SIAC Rules also provide that if there is no majority decision, the presiding arbitrator alone shall make the award for the tribunal (SIAC Rules, Rule 32.7).

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

There is no prohibition on dissenting opinions, whether in the Arbitration Act, Cap. 10 (2002 Rev. Edition), which governs non-international arbitrations, or the International Arbitration Act, Cap. 143A (2002 Rev. Edition), which governs international arbitrations.

Tribunal members who do not agree with the majority view in an award may therefore issue dissenting opinions.

Form and content requirements

38 | What form and content requirements exist for an award?

The Arbitration Act (AA) and IAA prescribe that the award must fulfil the following requirements (Model Law, article 31, IAA, First Schedule and AA, section 38):

- be made in writing and signed by the arbitrators (in the case of two or more arbitrators, by all the arbitrators or the majority of the arbitrators provided that the reason for any omitted signature of any arbitrator is stated);
- state the reasons for the award, unless the parties have agreed that no reasons are to be given or the award is one on agreed terms;
- state the date of the award and the place of arbitration; and
- a copy of the award shall be delivered to each party to the proceeding.

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Although neither the IAA nor the AA prescribes a time limit within which an award should be rendered, a tribunal should conduct the arbitration 'without undue delay' (article 14, Model Law). Similar provisions can be found in the AA (section 16). There does not appear to be any Singapore case law defining what would amount to undue delay. In *Coal & Oil Co LLC v GHCL* [2015] 3 SLR 154, the Singapore High Court found that a 19-month delay in the release of the award did not violate any rule of natural justice.

Under the SIAC Rules, there is a default requirement for a tribunal to submit its draft award to the registrar within 45 days of the date on which the tribunal declares the proceedings formally closed. This deadline may be extended at the registrar's discretion or if the parties agree (SIAC Rules, Rule 32.3).

If the expedited procedure under Rule 5.1 of the SIAC Rules is adopted, the tribunal must render its award six months from the date when the tribunal is constituted, unless the registrar extends that period owing to exceptional circumstances (SIAC Rules, Rule 5.2).

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the award is relevant for enforcement purposes. An award must be enforced within six years (Limitation Act (Chapter 163), section 6(1)(c)). Further, under the Model Law, article 33, as enacted by the IAA:

- if a party wishes to request a correction or interpretation of the award, it may do so within 30 days of the party's receipt of the award;

- if the tribunal wishes to make corrections to the award (on its own initiative), it may do so within 30 days of the date of the award; and
- if a party wishes to challenge or set aside the award, the application must be made to the Singapore courts within three months from the date of the receipt of the award by the applicant (Model Law, article 34, IAA).

The AA has similar provisions – see AA, section 43. The tribunal may, under the AA, also issue interpretations (on its own initiative) within 30 days of the date of the award (AA, section 43(3)).

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

The IAA defines an award as any decision of the arbitral tribunal on the substance of the dispute. This includes an interim, interlocutory or partial award, 'but excludes any orders or directions made under section 12 (of the IAA)' (IAA, section 2(1)). The purpose of this phrase is to distinguish an award from procedural orders. This is significant because an award may be challenged but a procedural order may not (see *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157).

The terms 'interim', 'interlocutory' and 'partial' are not statutorily defined. In *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364, the Singapore Court of Appeal held that a partial award finally disposes of part, but not all, of the parties' claim in an arbitration, leaving some claims for further consideration and resolution in future proceedings in the arbitration. An interim award decides a preliminary issue relevant to the disposing of a particular claim. In contrast, a provisional award is effectively an order or direction made under section 12 of the IAA. It is issued to preserve a factual or legal situation so as to safeguard rights that one party is attempting to have the arbitral tribunal recognise; it does not definitely or finally dispose of either a preliminary issue or a claim in arbitration. Therefore, although partial or interim awards qualify as an award under section 2 of the IAA (and can be challenged), a provisional award does not qualify under section 2 of the IAA and is not capable of being challenged by way of a setting-aside application.

If the dispute is settled, the parties can record the settlement and its terms by way of a consent award, that is, an arbitral award on agreed terms (Model Law, article 30, IAA, First Schedule and AA, section 37).

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

Proceedings may terminate in one of several ways, for example:

- by the final award;
- by an order of the arbitral tribunal when the claimant withdraws his or her claim, or when the parties agree on the termination of the proceedings; or
- if the tribunal finds that the continuation of proceedings becomes unnecessary or impossible (article 32, Model Law).

Arbitral proceedings shall also be terminated by the arbitral tribunal if the claimant fails to serve its statement of claim within the prescribed time limit, without showing sufficient cause (article 25, Model Law).

If the parties settle the dispute, the tribunal can issue a consent award on agreed terms to record the settlement or issue an order for termination of the arbitration by way of a procedural order (Model Law, article 32, IAA, First Schedule).

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

A Singapore-seated arbitral tribunal has wide and general discretion to allocate and apportion costs in its awards, unless the parties have agreed otherwise.

The general rule, however, is that costs follow the event. This rule derives from court proceedings and means that the losing party will be ordered to bear the legal costs and arbitration costs incurred by the successful party, in full or in part. The paying party has the right to apply to the registrar of the SIAC for taxation (assessment) of the costs to be paid under an award, unless the award directs otherwise (section 21(1), IAA). A tribunal need not take Singapore civil procedure principles on the allocation of costs into account (see *VV v VW* [2008] 2 SLR 929).

The SIAC Rules provide that most forms of costs are recoverable, including the fees and expenses of the tribunal and the SIAC's administration, as well as legal and expert fees and expenses (SIAC Rules, Rules 35 to 37).

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

A Singapore-seated tribunal may award simple or compound interest on the whole or any part of sums awarded or costs awarded under an award for any period ending no later than the date of payment (IAA, sections 20 and 12(5)).

A sum directed to be paid under an award shall, unless the award otherwise directs, carry interest from the date of the award until date of payment and at the same rate as a judgment debt (IAA, section 20(3)).

The default rate for judgment debts in Singapore is at present 5.33 per cent per annum (Supreme Court Practice Directions, Part IX, paragraph 77).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Any request for a correction or interpretation of the award must be submitted within 30 days of the party's receipt of the award (Model Law, article 33, International Arbitration Act (IAA), First Schedule). Similar provisions exist in the Arbitration Act (AA) (section 43). If the tribunal wishes to make corrections to the award (on its own initiative), it may do so within 30 days of the date of the award (Model Law, article 33, IAA, First Schedule and AA, section 43(3)).

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

An award is challenged by making an application to the Singapore High Court to set aside the award. Unless a correction to the award is sought, the application must be made within three months from the date that the award is received by the applying party (Model Law, Art. 34(3), IAA). The Singapore courts have no power to extend this time limit, which is absolute; they cannot even do so in cases of fraud – see *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] SGGA 9.

The three-month period may, however, run from the date that a legitimate application to correct an award is made under article 33 of the Model Law (see article 34(3), Model Law), namely, one that validly falls under the provision and is not in truth a request for the tribunal to review or revisit its decision – see *BRS v BRQ* [2020] SGCA 108. Where the application for correction does not fall legitimately under article 33, the time in which an application for setting aside must be made remains three months from the date that the award is received by the applying party.

The grounds for setting aside are stated in article 34 of the Model Law, supplemented by two additional grounds set out in section 24 of the IAA.

Article 34 of the Model Law provides that the award may be set aside on the following grounds:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was not valid;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the proceedings and was unable to present its case;
- the award dealt with a dispute not falling within the terms of the arbitration agreement;
- the tribunal was improperly constituted;
- the subject matter of the arbitration was not capable of settlement by arbitration; or
- the award was contrary to public policy.

Under section 24 of the IAA, the following are two further grounds for setting aside an award:

- the making of the award was induced or affected by fraud or corruption; or
- a breach of natural justice occurred in connection with the making of the award, by which the rights of a party were prejudiced.

Under the AA, unless the parties have agreed otherwise, a party may appeal against an award on a question of law arising out of an award (AA, section 49). If the parties agree for any reason to dispense with the tribunal giving reasons for the award, that agreement should include a waiver of the right to appeal against the award on a question of law. That said, a 'question of law' does not arise merely because there was an error in the arbitrator's application of the law. It must be shown that there is a finding of law that the parties had disputed and required the guidance of the court to resolve, namely, 'a point of law in controversy which has to be resolved after opposing views and arguments have been considered'; this is a high threshold to meet – see, for example, *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1993] 2 SLR(R) 208 and *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] SGHC 81 at [36]–[37].

An award will not be set aside for breach of an agreed procedure if the non-observance is derived from the applicant's own doing, or if the challenge to the award is against the arbitral tribunal's procedural orders or directions that fall within the exclusive domain of the arbitral tribunal - see *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014] SGHC 220.

Neither will an award be easily set aside for allegedly being in conflict with the public policy of Singapore (Article 34(2)(b)(ii), Model Law, IAA, First Schedule). In *Gokul Patnaik v Nine Rivers Capital Limited* [2020] SGHC (I) 23, the Singapore International Commercial Court (SICC) – a division of the Singapore High Court – affirmed that the threshold for setting aside was very high. The SICC refused to set an aside an award despite expert evidence that the underlying contract was illegal in another jurisdiction – the applicant had not demonstrated that the illegality would 'shock the conscience' or 'violate the most basic notions of morality and justice'.

In *Coal & Oil Co LLC v GHCL* [2015] 3 SLR 154, the Singapore High Court held that for an award to be set aside under article 34(2)(a)(iv) of the Model Law, the procedural breach complained of could not be of an arid, technical or trifling nature; rather, it had to be a material breach of procedure serious enough that it justified the exercise of the court's discretion to set aside the award. This would often, though not invariably, require proof of actual prejudice. In that case, neither the tribunal's failure to declare the proceedings closed nor the 19-month delay in the release of the award violated any rule of natural justice. Further, such complaints did not rise to the level of gravity that the notion of public policy contemplated. The court also observed that an accusation against a tribunal for committing a breach of natural justice was a serious matter; as such, courts take a serious view of such challenges, and this was the reason those that had succeeded were few and far between and limited only to egregious cases where the error was 'clear on the face of the record'.

Further, in *ASG v ASH* [2016] 5 SLR 54, the Singapore High Court clarified that for an award to be set aside under article 34(2)(a)(ii) of the Model Law, the party alleging a breach of natural justice must demonstrate 'a clear and virtually inescapable inference that the arbitrator did not apply his mind at all to [an important] aspect of that party's submissions' and that this set a 'high bar' for the party making the assertion of a breach of natural justice. It is only if the aggrieved party can show either that the tribunal might have realised the issue for determination but deliberately avoided grappling with it, or the tribunal entirely overlooked the issue in question, that a breach of natural justice can be established. There is a 'crucial difference between a tribunal's decision to reject an argument, whether explicitly or implicitly, and its failure even to consider that argument. There will be no breach of natural justice if the tribunal reaches its decision implicitly, or reaches the wrong decision, or in fact fails to understand the argument'. Illustrating these principles, the Singapore Court of Appeal upheld the setting aside of a Singapore Chamber of Maritime Arbitration (SCMA) award on the grounds of the tribunal's breach of natural justice in disallowing the parties from calling any witness evidence, and convening a hearing for oral submissions only; the respondent had been denied a full opportunity to present its case – see *CBS v CBP* [2021] SGCA 4. Again, where a tribunal's decision on various issues falls outside the scope of the parties' submission to arbitration (eg, as stated in Terms of Reference under the ICC Rules) this would occasion a breach of natural justice justifying the setting aside of an award where the parties were deprived of a sufficient opportunity to present their case – see *CBX v CBZ* [2021] SGCA(I) 3.

In 2019, the Singapore Court of Appeal set aside an award rendered in a Permanent Court of Arbitration investor–state arbitration seated in Singapore for lack of jurisdiction under article 34(2)(a)(iii) of the Model Law, stating that it could also have done so under article 34(2)(a)(i) of the Model Law – see *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263. In that case, the court held that where an investor purports to accept a state's offer to arbitrate certain disputes under an investment treaty, but the dispute falls outside the scope of the offer as stated in the treaty, there would be a lack of jurisdiction, and the Singapore courts (as the supervisory courts at the seat) would have jurisdiction to set aside the award.

As made extremely clear by the Singapore Court of Appeal in *CAJ v CAI* [2021] SGCA 102 in which the Singapore Court of Appeal (in unusual fashion) partially set aside an award due to the tribunal's breach of natural justice and acting in excess of its jurisdiction:

> *The court will exercise its power with restraint, setting aside awards only when there is good reason to do so. This strikes a balance between the need to respect the autonomy of arbitration proceedings and to give effect to the principle of minimal curial*

intervention, while ensuring that meritorious challenges are properly ventilated … A perusal of the published decisions of the Singapore court would show that, over the past 20 years, approximately only 20% of applications to set aside arbitral awards have been allowed. This attests to the fact that it is not common in Singapore for awards to be set aside, and the courts have only done so in exceptional cases when the grounds are clearly made out. In these cases, the awards were typically set aside on grounds of breach of natural justice and/or excess of jurisdiction.

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The application to challenge an award is made in the first instance to the General Division of the Singapore High Court by way of an application to set aside the award. The application must be made within three months of the date of receipt of the award. If the application fails, a party, with leave of the General Division of the High Court, may pursue an appeal to the Singapore Court of Appeal. Given that applications to set aside awards are court proceedings, the general rule that costs follow the event applies. In practice, a challenge is usually decided within six to nine months of the application being filed in court.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Awards made in Singapore, as well as awards made in countries that are parties to the New York Convention, may be recognised and enforced in Singapore by application to the Singapore High Court.

Singapore courts have developed a pro-arbitration reputation and generally favour the recognition and enforcement of awards, unless there are solid grounds upon which enforcement should be refused.

The grounds for (1) refusing enforcement of a Singapore-seated non-international arbitral award under the AA, section 46, (2) enforcement of a Singapore-seated international arbitral award under the IAA, section 19 and (3) refusing recognition and enforcement of a foreign arbitral award, are all generally similar – see IAA, section 31 and article V of the New York Convention 1958 (as reproduced in the Second Schedule, IAA) and *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372.

The Singapore Court of Appeal has rejected the enforcement of arbitral awards where the arbitral tribunal lacked jurisdiction – see, for example, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 and *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372.

Further, in 2019, the Singapore Court of Appeal in *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1 refused enforcement of a foreign award because it found that the arbitration had been 'wrongly seated', that is, the arbitration ought to have been seated in Macau instead of Singapore, and as such, the award had not been obtained in accordance with the parties' arbitration agreement. It also held that in those circumstances, a party who objected to the jurisdiction of the tribunal but did not participate in the arbitration proceedings at all would still be able to rely on that objection in setting aside or enforcement proceedings taken after the issue of the final award; there was no waiver or estoppel in relation to the erroneous seat and composition of the tribunal.

The Singapore High Court in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 also refused enforcement of an arbitral award against a non-party to the arbitration agreement (who was also a non-party to the arbitration reference), rejecting the single economic entity concept.

The Singapore Court of Appeal has upheld the enforceability of an interim award in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Yes. A party seeking to enforce an arbitral award in Singapore, must do so within six years from the date that the award was issued (Limitation Act (Cap 163), section 6(1)(c)).

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Singapore courts are unlikely to recognise the enforcement of foreign awards that have been set aside at the place of arbitration. See, for example, the Patron's speech of Singapore Chief Justice Sundaresh Menon at the Chartered Institute of Arbitrators London Centenary Conference on 2 July 2015 in which he stated the traditional view as being that 'an award which is set aside at the seat of arbitration has no legal existence or effect because the force of an award comes from the law of the seat, ex nihilo nihil fit'.

This is one of the grounds upon which recognition and enforcement may be refused under the New York Convention, namely, that the award 'has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made' (article V(1)(e)).

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Such provisions exist in Singaporean arbitration legislation. An emergency arbitrator (appointed pursuant to the rules of arbitration agreed to by the parties) falls within the definition of an arbitral tribunal (see AA, section 2 and IAA, section 2). As such, in Singapore, orders and directions made by emergency arbitrators have the same standing as orders and directions made by actual tribunals and may, by leave of the High Court or a judge thereof, be enforceable in the same manner as if they were orders made by a court, and where leave is so given, judgment may be entered in terms of the order or direction (see AA, section 28(4) and IAA, section 12(6)).

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Court fees and legal fees will be incurred in the enforcement of awards.

OTHER

Influence of legal traditions on arbitrators

53 What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Since Singapore is a 'Model Law' jurisdiction, Singapore-seated tribunals and the Singapore courts are guided by judicial decisions in other prominent 'Model Law' jurisdictions concerning provisions within the Model Law.

Further, by reason of the close links between the Singapore and English legal systems, judicial decisions from England and other prominent British Commonwealth jurisdictions, though not binding, have some persuasive authority in the Singapore courts and in Singapore-seated arbitrations, provided that they are not inconsistent with Singapore statutes, case law or the Model Law. The higher the level of court the English or Commonwealth judicial decision derives from, the greater its persuasive power before Singapore courts and Singapore-seated arbitral tribunals.

A Singaporean arbitrator can therefore be expected to be familiar with English law principles and traditions. Many Singaporean arbitrators have also obtained varying degrees of exposure to the legal systems of other countries (including civil law jurisdictions) and are therefore able to adapt to the needs, expectations and nuances of the parties appearing before them.

Professional or ethical rules

54 Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Counsel who are registered with the Singapore Legal Services Regulatory Authority are regulated by the Singapore Legal Profession Act and the rules made under it, in particular, the Legal Profession (Professional Conduct) Rules 2015, as well as the Law Society of Singapore's Practice Directions. On 18 November 2015, the legal professional disciplinary framework in Singapore was extended to include all foreign-qualified lawyers registered to practise in Singapore law practices; a common set of professional conduct rules now applies to registered Singapore-qualified and foreign-qualified lawyers. Counsel who are admitted to practise law in jurisdictions outside Singapore are also subject to the legal and ethical standards applicable to their specific jurisdictions. As a matter of best practice, arbitration counsel also generally have regard to, and comply with, the IBA Guidelines on Party Representation in International Arbitration.

There are no national professional or ethical rules applicable to arbitrators in international arbitrations seated in Singapore. That said, arbitrators will have to abide by the professional and ethical standards set by institutes of which they are members, such as the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members. Arbitrators in SIAC arbitrations will also be bound by the SIAC Code of Ethics for an Arbitrator.

Third-party funding

55 Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding for arbitral claims is regulated by the Civil Law (Amendment) Act and Civil Law (Third Party Funding) Regulations, which came into force in March 2017.

These enactments:

- clarify that the common law torts of champerty and maintenance are abolished in Singapore;
- provide that, in certain prescribed categories of dispute resolution proceedings (as set out in the Civil Law (Third Party Funding) Regulations), third-party funding contracts are not contrary to public policy or illegal;
- provide for conditions to be imposed on funders through subsidiary legislation; and
- provide that lawyers may recommend third-party funders to their clients or advise their clients on third-party funding contracts so long as they do not receive any direct financial benefit from the recommendation or facilitation.

Funding may only be provided by an entity that meets the criteria for a qualifying third-party funder. Also, related amendments to the Legal Profession (Professional Conduct) Rules 2015 – see Rules 49A and 49B – have been made. Legal practitioners are under a duty to disclose the existence of a third-party funding contract and the identity of the third-party funder to the court or tribunal, and to every other party to the proceedings, as soon as is practicable. Legal practitioners and law practices are also prohibited from having interests in relevant third-party funders and from receiving referral fees and commissions.

Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

A person does not need to be admitted to legal practice in Singapore to represent a party or to sit as an arbitrator in an arbitration in Singapore. For this purpose, foreign arbitrators and counsel may obtain a short-term visit pass to Singapore (see the Singapore Ministry of Manpower's website, www.mom.gov.sg, for more details).

Business-visit visas are required for foreign nationals holding travel documents issued by certain countries including China, but not Australia, the United Kingdom, the United States or most EU countries.

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UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Despite challenges posed by the ongoing covid-19 pandemic, 2021 was momentous for Singapore as an arbitral seat, and for SIAC as an international arbitral institution. In the Queen Mary University of London - White & Case International Arbitration Survey released on 6 May 2021, Singapore tied with London as the world's most-preferred arbitral seat for the first time, ahead of Hong Kong, Paris and Geneva. In the same survey, SIAC was recognised as the world's second most-preferred arbitral institution after the ICC (and most-preferred in the Asia-Pacific region), ahead of the LCIA.

SIAC had a bumper year in 2020 with 1,080 new case filings with a total sum in dispute of US$8.49 billion. To add to those achievements, SIAC opened its representative office in New York in December 2020, and in May 2021 obtained approval from the Ministry of Justice of the Russian Federation to be recognised as a Permanent Arbitral Institution under the Russian Federal Law on Arbitration, allowing SIAC to administer Russian-seated international commercial arbitrations. SIAC is also in the middle of revising its arbitration rules, the latest version of which was released in 2016.

In addition, amendments to Singapore's International Arbitration Act (IAA) were passed by the Singapore Parliament in December 2020 to augment the power of arbitral tribunals and the Singapore courts to enforce obligations of confidentiality in arbitration, and also to provide a default mode for the appointment of three-member tribunals in multi-party arbitrations (ie, with three parties or more). Other suggestions arising from public consultations held in 2019 are still being considered, for example, a proposal to allow parties to agree that an appeal may lie to the court in respect of a question of law arising from an award.

Slovakia

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Barger Prekop sro

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Slovakia (as one of two successor states of Czechoslovakia) succeeded to the New York Convention as of 1 January 1993. For Czechoslovakia, the New York Convention entered into force as of 10 October 1959. At that time, Czechoslovakia made declarations under article I of the New York Convention, pursuant to which it would apply the Convention to awards made in the territory of another contracting state and to awards made in the territory of a non-contracting state to the extent that such states grant reciprocal treatment. Neither Czechoslovakia nor Slovakia made declarations or notifications under any other articles of the New York Convention.

Slovakia is a party to the following multilateral conventions:

- the Energy Charter Treaty, Lisbon (1998);
- the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States), Washington (1994);
- the European Convention on International Commercial Arbitration, Geneva (1964);
- the Protocol on Arbitration Clauses, Geneva (1931); and
- the Convention on the Execution of Foreign Arbitral Awards, Geneva (1931).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

As of 22 November 2021, Slovakia has entered into 63 bilateral investment treaties (BITs). Twenty-three of them have been terminated (16 of them due to the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union) and two of them (with Kenya and Libya) have not yet entered into force.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Arbitration Act (No. 244/2002, as amended) is the primary source of arbitration law in Slovakia, except for consumer arbitration. The Arbitration Act governs arbitral proceedings if the place of arbitration is in Slovakia, and recognition and enforcement of domestic and foreign awards in Slovakia. Since 1 January 2015, consumer arbitration has been governed by the Act on Consumer Arbitration (No. 335/2014). The Act on Consumer Arbitration significantly departs from commercial arbitration standards. The principles and standards of consumer arbitration are not addressed in this document, which focuses exclusively on commercial arbitration.

In addition, the Civil Dispute Procedure Code (No. 160/2015) and the Enforcement Act (No. 233/1995, as amended) regulate certain key arbitration issues. These laws cover domestic and foreign arbitral proceedings and awards, and there is no special law dealing with purely domestic or foreign proceedings or awards.

The Arbitration Act does not provide for the definition of 'foreign arbitral proceeding'. It only provides that an arbitration award on merits issued within the territory of another state is considered a foreign arbitral award. While preparing for an amendment to the Arbitration Act (the 2014 Amendment), some practitioners suggested that a standalone act on international commercial arbitration (the Swiss model) be adopted. However, this idea did not find adequate support.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

In 2014, the legislature adopted the 2014 Amendment, which became effective on 1 January 2015. The main purpose of the 2014 Amendment was to transpose the UNCITRAL Model Law, as amended in 2006. However, even after the 2014 Amendment, the Arbitration Act does not reflect certain important features of the UNCITRAL Model Law. For instance, the courts may only order interim measures or provisional orders before the arbitral tribunal has been appointed. After the arbitral tribunal has been appointed, courts may only order interim measures against third parties.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Parties are free to agree upon the majority of issues related to a potential or existing arbitration proceeding. The Arbitration Act does not contain an explicit list of mandatory procedural provisions.

However, the following provisions are mandatory:

- principal conditions of arbitration:
  - arbitrability of dispute;
  - form of the arbitration agreement;
  - uneven number of arbitrators in the arbitral tribunal; and
- personal requirements for arbitrators; and
- due process of law in the arbitration proceeding:

- equal position of the parties;
- the right of parties to access documents and information submitted to the arbitrator or arbitral tribunal by the opposing party without undue delay; and
- a tribunal's duty to order a hearing if requested by a party.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In determining the substantive law, the rules differ slightly for purely domestic disputes and for disputes with international elements. Pursuant to the Arbitration Act, in domestic disputes the arbitral tribunal shall apply the rules of law (not necessarily the particular law of a certain country) agreed by the parties, to the extent that such agreement is permitted under conflict of law rules applicable in Slovakia. Failing such agreement, the arbitral tribunal shall apply the law determined by the conflict of laws rules applicable in Slovakia. In disputes with an international element, conflict of laws rules applicable in Slovakia permit the parties to agree on the substantive law. Failing such agreement, the tribunal shall apply the substantive law determined by the conflict of laws rules that it considers appropriate.

Each agreement regarding applicable law is considered as agreement to use the substantive law of the respective state, excluding its conflict of laws principles, unless the parties agree otherwise.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

According to the official list published by the Ministry of Justice, there were 156 permanent arbitration courts in Slovakia as of 8 June 2021, out of which 111 were designated as 'active'. This information, however, is most likely inaccurate. In fact, the vast majority of the permanent arbitration courts listed as active no longer exist as a result of an amendment to the Arbitration Act adopted in 2016 (the 2016 Amendment), according to which a permanent arbitration court may only be established by a national sport association, a chamber established by law or a specific legal entity explicitly set out in special laws. Under the 2016 Amendment, founders of permanent arbitration courts not meeting these requirements were required to dissolve the courts by 31 March 2017, but the official list published by the Ministry of Justice does not seem to reflect this change.

Arguably, the most prominent permanent arbitration court remains the Court of Arbitration of the Slovak Chamber of Commerce and Industry in Bratislava (the SCC Court of Arbitration).

However, the Arbitration Court of the Slovak Bar Association (the SBA Court of Arbitration) is proving its increased popularity, mainly owing to its strong push for increased transparency:

Arbitration Court of the Slovak Bar Association
Kolárska 4
813 42 Bratislava
Slovakia

The SBA Court of Arbitration satisfies the practitioners' appetite for a complete separation of arbitrators' offices from the arbitration court's leadership and administration.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

The 2014 Amendment significantly modifies provisions on arbitrability. Starting in 2015, arbitral tribunals may hear any dispute (including disputes involving claims for declaratory relief) to the extent that the parties can conclude a settlement. However, it remains unclear whether labour law matters are arbitrable.

The Arbitration Act provides a list of explicitly non-arbitrable disputes, which include real property disputes regarding creation, modification and termination of ownership rights or other rights in rem, disputes concerning personal status, consumer disputes and disputes relating to enforcement proceedings or arising in the course of bankruptcy or restructuring proceedings. Consumer disputes are only arbitrable under the Act on Consumer Arbitration.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

An arbitration agreement can be concluded as a separate agreement or can take the form of an arbitration clause in an agreement. The arbitration agreement must be concluded in writing or it is null and void. The agreement is deemed to be in writing if it is as follows:

- included in the parties' mutual written communications;
- concluded by electronic means that records the parties' will and identifies its author;
- included in a written accession to a memorandum of association of a limited liability company;
- included in by-laws of an 'interest association' or in other legal entity in which a person acquires a membership; or
- alleged in a statement of claim and the respondent does not deny it in its statement of defence submitted to the arbitral tribunal.

The reference in a contract or in written communication to any document containing an arbitration clause also constitutes a written arbitration agreement, provided that the reference makes that clause part of the contract. Arbitration clauses can also be included in general terms and conditions.

An arbitration agreement's failure to meet a formal requirement can be cured by the parties' joint declaration before an arbitrator and recorded in the minutes. Such declaration must contain the arbitration agreement. As of 1 January 2015, such declaration does not have to be made before the commencement of proceedings on jurisdiction.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

The existence, validity and enforceability of arbitration clauses are governed by the principles of civil and commercial law. Circumstances such as death or liquidation of a party to the arbitration agreement without a legal successor, termination of the underlying contract by agreement or passing of time in the case of fixed-term arbitration agreements may result in arbitration agreements being no longer enforceable.

Insolvency may also have impact on the enforceability of the arbitration clauses. If the party is declared bankrupt, all proceedings to which it was a party are stayed. In addition, any disputes that have arisen after the declaration of bankruptcy are ex lege non-arbitrable.

Legal incapacity at the time of conclusion of the arbitration agreement renders such agreement invalid. Legal incapacity that occurs

afterwards does not render the arbitration agreement unenforceable; however, the incapacitated party must be duly represented.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

In cases concerning invalidity and rescission from the underlying contract, the Arbitration Act sets out the following severability principles: if the arbitration clause is part of an invalid underlying contract, the arbitration clause is invalid only if the reason for invalidity applies also to the arbitration clause; and if the parties rescind from the underlying contract, the rescission does not affect the arbitration clause. The parties, however, may agree otherwise.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

In general, arbitration agreements bind the parties to the agreement. The legal successors of the parties are also bound, unless the parties specifically excluded such extension in the arbitration agreement. This rule applies to both universal and individual succession (eg, assignment). There is no case law available that would suggest that under Slovak law an arbitration clause could be extended to a party's parent company.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Act contains no specific regulation concerning participation of third parties; however, in practice, relevant provisions of the Civil Dispute Procedure Code are followed. The Civil Dispute Procedure Code allows third parties having an interest in the proceeding to join the proceedings, either on their own motion or upon a court's request. The courts decide whether to admit a joining party to the proceeding. The joining party has the same duties as any party to the proceedings. In institutional arbitration, the rules of procedure usually address this question in detail, mostly following rules set out in the Civil Dispute Procedure Code.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

There is no case law available that would suggest that the group of companies doctrine is recognised in Slovakia.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Act contains no specific provisions dealing with multiparty arbitration agreements or arbitration proceedings. However, the arbitration rules of several permanent arbitration courts deal with multiparty arbitrations and provide for specific rules of arbitrators' appointment.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Arbitration Act contains no specific provisions governing consolidation of separate arbitral proceedings. However, under the Procedural Rules of the SBA Court of Arbitration, the court itself can consolidate multiple arbitral proceedings pending before it, taking into account, in particular, compatibility of the arbitration agreements and the composition of the arbitral tribunals.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

In general, any natural person of any nationality who has full legal capacity and no criminal record for intentional crime may act as an arbitrator. Certain exceptions are laid down for public officials, such as active judges or public prosecutors; such exceptions are addressed in legislation on protection of public interest. Permanent arbitration courts may provide for further requirements. It cannot be excluded that requirements of parties relating to nationality, gender or religion of arbitrators would be viewed as controversial. Registration of arbitrators is generally not required; however, some arbitration courts may require registration.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Given the lack of transparency rules, there are no details of who sits as an arbitrator. Based on the list of arbitrators maintained by the SCC Court of Arbitration, one could infer that arbitrators are usually Slovak men with a legal background in advocacy or academia. In particular, there are 61 male arbitrators and nine female arbitrators in the SCC Court of Arbitration, who are almost exclusively attorneys practising law in law firms and law academics. The SBA Court of Arbitration maintains a list of 18 practitioners, all being practising advocates.

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Parties may agree on a number of arbitrators. The number must be odd. Failing such agreement, the arbitral tribunal by default consists of three arbitrators. In the case of a sole arbitrator, the parties appoint the arbitrator jointly. In the case of three arbitrators, each party appoints one arbitrator and the appointed arbitrators subsequently appoint the tribunal's chair. Failing to do the above within the prescribed time limits, the remaining arbitrator or arbitrators shall be appointed by a person upon which the parties have agreed (often an arbitration authority), or by the court. The agreed-upon person or the court must appoint an arbitrator who meets the relevant professional qualification (if agreed by the parties) and is independent and impartial. In institutional arbitrations, the consequences of a failure by the party to actively participate in the process of appointment or requirements on arbitrators are usually addressed in the relevant procedural rules; for example, under the Procedural Rules of the SBA Court of Arbitration, the appointments are made by the three-member presidium of the SBA Court of Arbitration from the official list of arbitrators that it maintains. The Procedural

Rules of the SBA Court of Arbitration require, as is customary in international arbitration, that a prospective arbitrator submit a declaration of independence and impartiality. In ad hoc arbitrations, the appointment authority is the competent court.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator must inform the parties without undue delay of circumstances that give rise to doubts as to his or her independence or impartiality that involve his or her relationship to the subject matter of the dispute or to the parties (but not their counsel). Parties may agree on the details of the challenge procedure, except that they may not exclude a party's right to final recourse to a court. Failing such agreement, the following default rules apply: first, a party notifies the arbitral tribunal of the reasons for a challenge. Notwithstanding the foregoing, the party may challenge the arbitrator it appointed or in whose appointing it took part only for reasons it became aware of after the appointment. Second, unless the arbitrator resigns or the other party agrees with the challenge, the arbitral tribunal shall decide on the challenge. If the challenge is unsuccessful, the challenging party may request the court to decide on the challenge. Until the court decides on the challenge, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. The court's decision on the challenge is final and may not be appealed. If the challenge is upheld, the arbitrator's mandate terminates.

A mandate of an arbitrator further terminates if the arbitrator withdraws from office, or upon removal of the arbitrator from office (reasons being failure to meet the conditions to be appointed as arbitrator or failure to act without undue delay after having been advised so by the parties). The arbitrator may be removed from office jointly by the parties or upon upholding the challenge by the arbitral tribunal or the court. The mandate of an arbitrator further terminates if the arbitrator no longer has full legal capacity or in the case of his or her death. Consequently, a substitute arbitrator must be appointed under the same rules for appointment of arbitrators.

The Arbitration Act contains several provisions that are similar to the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines); however, the Arbitration Act does not go into such detail (eg, as regards disclosure obligation of an arbitrator, relationship of an arbitrator to the subject matter of dispute or to parties). There is no publicly accessible case law related to arbitrators' conflict of interest, or disclosure obligation expressly referring to the IBA Guidelines.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Slovak law does not expressly regulate the relationship between parties and arbitrators. Some academics (advocating the contractual theory of arbitration) argue that a special contract exists between the parties and arbitrators; however, such contractual relationship is without prejudice to the requirement of arbitrator's independence and impartiality. This requirement applies also to party-appointed arbitrators. Each arbitrator must perform the mandate with due care to ensure fair protection of parties' rights and to avoid misuse and breaching of parties' rights. Arbitrators must also proceed without undue delay. The remuneration and expenses of arbitrators are part of the costs of the proceedings. There is no statutory amount of remuneration. In ad hoc arbitration, the parties may agree on remuneration in the arbitration agreement; otherwise, the arbitral tribunal decides on its remuneration and expenses in the final award. In institutional arbitration, arbitrators' remuneration and expenses are determined in accordance with the arbitration court's procedural rules.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The Arbitration Act and the vast majority of Slovak arbitration institutions do not address arbitrators' duties of disclosure. One of the most important exceptions is set out in the Procedural Rules of the SBA Court of Arbitration, which require that any potential arbitrator make a disclosure in form of a statement of arbitrators' independence and impartiality in which the arbitrator is required to state all circumstances that could give rise to doubts as to the arbitrator's independence or impartiality in the parties' eyes. Such statement is subject to review by the Board of the SBA Court of Arbitration and the parties to a particular arbitral proceeding, which, in case of doubts, are entitled to raise an objection.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Unlike the liability of state courts, which is governed by a special legislation (Act No. 514/2003 on Liability for Damage Caused in the Exercise of Public Authority, as amended), the liability of arbitrators and permanent arbitration courts is not explicitly regulated and there is no publicly available case law addressing the issue. Further, the legal theory in this respect is not uniform. It seems that the prevailing opinion of legal commentators is that arbitrators in ad hoc arbitrations and founders of permanent arbitration courts in institutional arbitrations (permanent arbitration courts are not legal persons) are liable under the Civil Code (No. 40/1964, as amended) for monetary compensation for damage incurred as a consequence of unlawful arbitral award or arbitration proceedings. To give rise to liability, a fault (intentional or negligent) must be established.

In 2010, Parliament approved a draft amendment to the Arbitration Act regarding liability of arbitrators, but the amendment was vetoed by the president and is not effective.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

A party may challenge the jurisdiction of the court, but such challenge must be made no later than in its first submission, irrespective of whether procedural or on merits. The Civil Dispute Procedure Code does not follow the previous rule, under which the parties were required to raise such jurisdictional challenge in the first submission on merits. Provided that the challenge is well founded, the court will suspend the proceedings.

However, the court shall hear the case if:

- both parties agree on the court's jurisdiction;

- recognition of foreign arbitral award has been rejected;
- the subject matter of the dispute is not arbitrable; or
- the arbitral tribunal has refused to deal with the case.

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

The arbitral tribunal is entitled to rule on its own jurisdiction, including objections regarding the existence or validity of the arbitration agreement. If the arbitral tribunal concludes that it lacks jurisdiction, it suspends (terminates) arbitral proceedings by an arbitral order. If the tribunal concludes that it does have jurisdiction, it either issues a separate arbitral order to this effect or, unless the parties agree otherwise, continues with the proceedings, and the decision on jurisdiction then forms part of the final award. In the former case, the party that challenged the tribunal's jurisdiction may request the court, within 30 days of delivery of the order, to decide on the challenge. Notwithstanding the ongoing review by the court, the arbitral tribunal may continue the proceedings, decide and issue the award. A decision by the court on the challenge is final and may not be appealed.

Time limits for raising objections vary. In particular, a challenge concerning validity or existence of the arbitration agreement must be filed no later than, or together with, the challenging party's first act in the merits of the case. A challenge that the subject matter of a dispute is not arbitrable under Slovak law or that the dispute must be determined under the Act on Consumer Arbitration may be filed until the end of the hearing (if there is no hearing, until the issuance of award). A challenge that the dispute goes beyond the tribunal's jurisdiction must be filed as soon as the challenging party, in the course of the proceedings, becomes aware of such fact.

It is possible, in as late a stage as the enforcement proceedings, to object to the arbitrability of the subject matter or existence of the arbitration agreement to avoid enforcement. The Supreme Court concluded that if an arbitral tribunal makes an award, despite no arbitration agreement having been concluded, the court supervising the enforcement proceedings must not authorise enforcement. The fact that the obliged party failed to challenge the tribunal's jurisdiction or subsequently failed to file an action for setting aside the award was not found relevant. However, the 2014 Amendment is expected to limit the consequences of this decision as it assumes that an arbitration clause was concluded in writing if the respondent fails to challenge the tribunal's jurisdiction in its statement of defence submitted to the tribunal.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Failing agreement on place of arbitration, the arbitral tribunal determines the place of arbitration having regard to the character of dispute and interests of parties. In institutional arbitration, the procedural rules of respective permanent arbitration court determine such place. Unless parties agree otherwise, the arbitral tribunal may perform certain specific acts at any proper place (eg, for consultation among its members; hearing of witnesses, experts or the parties; or inspection of goods, property or documents) without prejudice to the determined place of arbitration.

Failing agreement on language, the arbitral tribunal determines the language or languages to be used in arbitral proceedings. This determination applies to each written statement of a party, and the hearing and award or other communication of the arbitral tribunal, unless the parties otherwise agree or the arbitral tribunal determines otherwise. The arbitral tribunal may order the official translation of documents into the language of arbitration.

In determining the substantive law, the rules differ slightly for purely domestic disputes and for disputes with international elements. Pursuant to the Arbitration Act, in domestic disputes, the arbitral tribunal shall apply the rules of law (not necessarily the particular law of a certain country) agreed by the parties, to the extent that such agreement is permitted under conflict-of-law rules applicable in Slovakia. Failing such agreement, the arbitral tribunal shall apply the law determined by the conflict-of-law rules applicable in Slovakia. In disputes with an international element, conflict-of-law rules applicable in Slovakia permit the parties to agree on the substantive law. Failing such agreement, the tribunal shall apply the substantive law determined by the conflict-of-law rules it considers appropriate.

Each agreement regarding applicable law is considered as an agreement to use the substantive law of the respective state, excluding its conflict-of-law principles, unless the parties agree otherwise.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Arbitral proceedings are initiated by filing a statement of claim. Unless the parties agree otherwise, the arbitral proceedings commence on the date of receipt of the statement of claim by the other party, if the arbitrators have not been appointed yet by the chair of the arbitral tribunal, if appointed; otherwise, by any member of the arbitral tribunal; or by the permanent arbitration court in institutional arbitration. The statement of claim must contain the identification of parties, true description of decisive facts, specification of proposed evidence to be taken, specification of relevant provisions of law, relief sought and signature of the claimant or its representatives. Each respondent and the arbitral tribunal must receive a copy of the statement of claims. For example, the Procedural Rules of the SCC Court of Arbitration lay down additional material requirements (eg, specification of dispute's value) and formal requirements (eg, the claimant must deliver sufficient copies for each respondent and member of the arbitral tribunal as well as the secretary of the SCC Court of Arbitration).

Hearing

28 | Is a hearing required and what rules apply?

Failing agreement of the parties, the arbitral tribunal decides at its own discretion whether to hold a hearing or to conduct a written proceeding; however, pursuant to the Arbitration Act the tribunal always orders a hearing at an appropriate stage if so requested by a party, unless the parties agree otherwise. The parties must be given sufficient advance notice (at least 30 days if the notice is being delivered outside of Slovakia) of any hearing. The parties participate in a hearing directly or through their representatives.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In general, the arbitral tribunal must establish the facts of the case completely, quickly and effectively. Statutory procedure for the taking of

evidence is fairly general and anticipates a wide range of discretion for the parties' agreement or for the arbitral tribunal.

First of all, the arbitral tribunal only takes evidence proposed by the parties. The arbitral tribunal, at its own discretion, considers the selection of evidence and the manner of taking of evidence (eg, hearing of witnesses, parties and experts, submission of documentary evidence, inspection of goods or real property). However, if there are mandatory provisions on the taking of evidence, the tribunal must abide by them. For instance, if witnesses or experts are under a statutory confidentiality obligation (eg, classified information, commercial or bank secrets), they may only be heard if they have been exempted according to respective laws.

Under the Arbitration Act, the arbitral tribunal cannot, unlike the courts in standard civil proceedings, enforce cooperation of third persons (eg, witnesses, experts or third persons possessing a relevant documentary evidence or property) in arbitration proceedings. As regards experts, the arbitral tribunal may appoint an expert if the decision depends on the assessment of facts requiring special knowledge; however, it is not unusual that parties submit party-appointed expert opinions. Unlike the IBA Rules on the Taking of Evidence in International Arbitration, under which the tribunal-appointed expert may order a party to provide any relevant assistance, the Arbitration Act vests this competence in the arbitral tribunal.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

The arbitral tribunal may request assistance from a court in connection with enforcement of interim measures ordered by the arbitral tribunal and taking of evidence. During the arbitral proceedings, the court may intervene in relation to the appointment and challenge of arbitrators.

Confidentiality

31 | Is confidentiality ensured?

Arbitrators must keep confidential all information of which they become aware during the arbitral proceedings. Arbitral awards are also kept confidential. The requirement for confidentiality, however, does not apply to effective decisions of state courts issued in proceedings on setting aside the award and proceedings concerning enforcement of arbitral awards. Since 1 January 2012, the decisions of state courts have been mandatorily publicised, identifying the parties (if they are legal persons), counsel, designation of the arbitral tribunal and arbitrators and subject matter of dispute, including amounts at stake. Exceptions only apply to the personal data of natural persons.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The Arbitration Act provides that a party to the arbitration may request, and the court may order, interim measures before the arbitral tribunal has been appointed. After the arbitral tribunal has been appointed, a party may only request a court to order interim measures against third persons. Details of the court proceedings relating to interim measures are provided for in the Civil Dispute Procedure Code. In brief, the court may order interim measures if it is necessary to temporarily adjust relationships between the parties or if there is a risk that the enforcement of an award could be endangered. Interim measures may take various forms, including, inter alia, a prohibition to dispose of immovable or movable assets or rights, an obligation to deposit movable assets or financial amounts with the court, or a general obligation to do something, to refrain from doing something or to bear something.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Under the 2014 Amendment, the Arbitration Act explicitly allows parties to agree that a permanent arbitration court can order an interim measure before the arbitral tribunal has been appointed.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The 2014 Amendment introduced numerous changes regarding interim measures ordered by arbitral tribunals. First, the Arbitration Act now clearly lists reasons for ordering interim measures. Pursuant to the Arbitration Act, upon request of a party to the arbitration, the arbitral tribunal may order interim measures if it is necessary to temporarily adjust relations between the parties or there is a risk that the enforcement of the award or preservation of evidence could be endangered. The arbitral tribunal may require the party requesting an interim measure to provide adequate security for damages that may occur as a result of the interim measure. If the party fails to pay such security, the arbitral tribunal must dismiss the request.

Second, pursuant to the 2014 Amendment, the Arbitration Act now lists specific types of interim measures. This list is not exhaustive. Third, the 2014 Amendment also introduced ex parte interim measures. As opposed to the UNCITRAL Model Law, however, the parties must agree on the applicability of provisions on ex parte interim measures. Fourth, pursuant to the 2014 Amendment, the Arbitration Act now explicitly states when interim measures expire. In particular, an interim measure ceases to exist:

- if the claim on merits was rejected;
- if the claim on merits was upheld and 30 days lapsed following the date when the award became enforceable; or
- upon expiration of the period for which it was ordered. Upon request of a party, the arbitral tribunal may also cancel the interim measure if it is no longer necessary.

Finally, pursuant to the 2014 Amendment, the Arbitration Act now provides that interim measures, except for ex parte interim measures, are directly enforceable. The 2014 Amendment indicates that foreign interim measures might also be enforceable. However, it remains to be seen whether enforcement courts would support this interpretation.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Arbitration Act or the Procedural Rules of the SCC Court of Arbitration do not deal with the arbitral tribunal's competence to order sanctions against parties or their counsel who use guerrilla tactics in

arbitration. Additionally, there is no case law suggesting that the arbitral tribunal is entitled to do so.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal is made by a majority of all its members. A unanimous vote is not required. If one or more arbitrators do not participate in a vote, the other arbitrators may decide without them. In the case of a tied vote, the chair of the tribunal has a casting vote. The award must be signed by all members of the arbitral tribunal. If a tribunal member refuses to sign the award or does not sign it for any reason, this must be noted in the award, together with the reason.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

The Arbitration Act recognises the existence of dissenting opinions. If an arbitrator has been outvoted, the dissenting opinion has no consequences for the award, provided that the required majority has been achieved. The arbitrator, however, may attach the dissenting opinion, together with reasons, to the award.

Form and content requirements

38 | What form and content requirements exist for an award?

The 2014 Amendment introduced the concept that the award must be in hard-copy format (as opposed to electronic form).

The content requirements include:

- identification of the arbitral tribunal;
- names and surnames of the arbitrators;
- identification of the parties and their representatives;
- place of arbitration;
- date of the award;
- operative part – decision on the substance;
- reasoning – except where the parties have agreed that no reasoning is needed or the award is a consent order; and
- information on the possibility of filing an action with a court to set aside the award.

The operative part of the award does not have to include the decision on costs of the arbitration. The arbitral tribunal may decide on costs in a separate award, after it has rendered a final award.

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Arbitration Act does not specify any time limit within which the award must be rendered.

Certain arbitral institutions (eg, the SCC Court of Arbitration), however, allow the parties to request expedited arbitral proceedings, within which the award is issued in a specific, relatively short time. The time limit is usually a couple of months (eg, for the SCC Court of Arbitration either two or four months) and starts to run from the date of payment of the court fee. The fees for expedited proceedings are higher than standard fees. If the arbitral tribunal does not meet the expedited time limits, the fee is reduced to the standard amount; however, there are no further procedural consequences.

However, the parties do not seem to have an effective remedy if there is a delay in rendering awards. In particular, the Constitutional Court has repeatedly refused to hear a constitutional complaint concerning delayed arbitration proceedings.

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the award is relevant for the time limits for correction of the award. The date of delivery of the award is decisive for the time limits for interpretation of the award by the arbitral tribunal, time limits for review of the award by other arbitrators and time limits for setting aside of the award.

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

The Arbitration Act differentiates between partial awards, final awards on merits, awards on costs and consent awards (awards on the agreed terms of the parties).

Besides standard relief for monetary and non-monetary performance, the Arbitration Act permits declaratory relief and relief for substituting the will to enter into a contract.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

The Arbitration Act provides that arbitral proceedings shall be terminated if parties after commencement of the proceedings agree on settlement, if the tribunal in deciding on jurisdiction concludes that it does not have jurisdiction to hear the case and through default; for example, where a party fails to pay the deposit on the costs of arbitral proceedings or fails to amend or supplement the statement of claim, after having been required to do so, or if the statement of claim does not meet the legal requirements.

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Arbitral tribunals decide on the allocation of costs of proceedings based on rules agreed by the parties in the arbitration agreement. In institutional arbitration, the arbitration courts apply their procedural rules. In the absence of such rules, the relevant provisions of the Civil Dispute Procedure Code apply, pursuant to which the court would order that the costs of the successful party are recovered by the losing party. If the success was only partial, the court may order that the costs be apportioned or that no costs be recovered. The above are the basic rules; however, further rules exist addressing specific situations (eg, taking into consideration the behaviour of the parties during proceedings).

The parties are free to agree on the costs and the rules of their recovery. Lacking such rules, as a standard, recoverable costs include expenses of the parties and their representatives, costs of carrying out the evidence, fees for arbitration proceedings, remuneration of the arbitration court and expenses incurred by the court, remuneration of the experts and interpreters, and remuneration of the legal counsel.

Tribunals tend to award statutory attorneys' fees (set out in the Decree No. 655/2004 on Remuneration and Costs of Advocates, as amended), as opposed to negotiated fees.

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

Interest for principal claims may be awarded. Whether and at what rate it is awarded depends on the substance and the subject matter of the claim. The rules are set out in the applicable substantive law governing the dispute and the claim.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal can correct any clerical or typographical errors, or errors in computation and other errors of a similar nature within 60 days of the date of award, either on its own motion or upon request of a party. The tribunal delivers the corrected award to the parties. Time limits (eg, for setting aside the award) begin to run from the date of delivery of the corrected award. Any party may ask the arbitral tribunal to interpret any part of the award. Such request must be filed within 30 days of the receipt of the award.

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

The Arbitration Act provides for both the possibility to challenge an award and have it reviewed by another arbitrator or arbitral tribunal, and to petition the court to set aside the award. The former is, however, available only if the parties in the arbitration agreement explicitly agreed so. Both remedies are available only with respect to domestic arbitral awards.

Review of an award is initiated by a party to the arbitration filing a request to review the award. Such request must be filed within 15 days of the delivery of the award. The procedural rules for revision proceedings are similar to the original proceedings.

An action to have an award set aside must be brought to the court within 60 days of the delivery of the award. The reasons for setting aside an award are listed exhaustively in the Arbitration Act. Under the 2014 Amendment, these reasons are practically identical to those set out in the UNCITRAL Model Law. In addition, the court hearing an application to set aside an arbitral award must disregard the reasons that it cannot raise on its own (article 36 (1)(a) of the UNCITRAL Model Law) if the party failed to raise them in the arbitral proceeding within the stipulated time period or, failing such stipulation, without undue delay.

In addition, the Constitutional Court seems to have opened a new avenue for potential challenges of domestic arbitral awards. In 2011, the Court for the first time reviewed the merits of an arbitral award issued in Slovakia and set it aside. The Court held that the tribunal manifestly erred in its application of substantive law and thus violated the complainant's right to a reasoned decision that clearly and comprehensibly addressed all relevant factual and legal issues. However, recent case law indicates that the Constitutional Court would set aside an arbitral award only in an identical situation.

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There are two levels of appeal in proceedings concerning the action to set aside the award. The first level – ordinary appeal – is available in all cases, the second level – extraordinary appeal – only if certain specific conditions set out in the Civil Dispute Procedure Code are met. The length of the proceedings varies. Based on statistics of the Ministry of Justice, the district and regional courts both decide within 21 months. The costs mainly consist of the court fees and attorneys' fees. The court fees in connection with an action to set aside the award reach €331.50, the same fee applies to ordinary appeal, and the fee for extraordinary appeal is €663. Attorneys' fees are recoverable only to the extent set out in Decree No. 655/2004 on Remuneration and Costs of Advocates, as amended. As a general rule, the costs are borne by the losing party.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Valid and effective domestic awards become enforceable automatically after expiry of the deadline for voluntary fulfilment of obligations stipulated in the domestic award. If an action for setting aside the award is filed, the award remains valid and effective. The court may, upon a motion of a party, postpone its enforcement. The enforcement rules are set out in the Enforcement Act.

Foreign awards must be recognised before they can be enforced. The requirements in the Arbitration Act that must be fulfilled for a foreign award to be successfully recognised are practically identical to those set out in the New York Convention. Slovak courts do not issue individual decisions on recognition of foreign awards (exequatur), except for declaratory awards. Normally, however, the court deciding on enforcement, after having received the documentation required for recognition of an award, regards the foreign award as a domestic award. The recognition is regarded as a preliminary question in enforcement proceedings. The enforcement rules for foreign arbitral awards are set out in the Enforcement Act. They are identical to those for domestic awards.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The right to enforce an awarded claim is subject to the same limitation periods as the right to enforce a claim granted by a court judgment. If an arbitral tribunal grants a claim of civil law nature, a new 10-year limitation period starts when the award becomes enforceable. This new limitation period applies irrespective of when the original limitation period for the claim submitted to arbitration started. If an arbitral tribunal upholds a claim of commercial law nature, a new four-year limitation period starts when the award becomes enforceable. However, if an award is rendered later than 10 years (or six years in respect of trade secret matters) of the date when the limitation period regarding the claim first started (eg, the date when the creditor could have submitted the claim to arbitration), the creditor must commence enforcement proceedings within three months of when the award becomes enforceable.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The Arbitration Act explicitly allows that a party to the arbitration that applied for the setting aside of a foreign award abroad files a motion requesting the relevant court in Slovakia to postpone enforcement until the setting aside is decided upon and provides that courts will not recognise and enforce awards that have been set aside by the courts at the place of arbitration. Nonetheless, there is no publicly accessible case law that would address the limitation set out in the European Convention on International Commercial Arbitration.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Orders by emergency arbitrators fall into the category of interim measures by emergency arbitrators. Such interim measures are only enforceable if not issued ex parte.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The costs include court fees, fees of judicial executors and attorneys' fees. The basic court fee for commencement of enforcement procedure is €16.50. Objections against enforcement (by the debtor) are not subject to any court fee. The fees of judicial executors include remuneration and costs of the judicial executor. The remuneration of the judicial executor is 20 per cent of the enforced amount with a maximum of €33,000. If no amount is enforced, the judicial executor is only entitled to the remuneration for performed legal actions (fixed fee) with a minimum of €30. In addition, the judicial executor has a right to compensation for reasonably incurred costs. Attorneys' fees are set out in Decree No. 655/2004 on Remuneration and Costs of Advocates, as amended. As a general rule, the costs of enforcement are borne by the losing party.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Arbitration practice is significantly affected by the Civil Dispute Procedure Code that is to be applied to questions not specifically addressed in the Arbitration Act. In particular, the Civil Dispute Procedure Code applies to procedural questions not addressed in the Arbitration Act, provided that the nature of the matter permits such application. The Arbitration Act does not provide for US-style discovery or witness preparation. As a result, there is no apparent tendency to apply such tools to arbitration in Slovakia. However, in general, arbitrators are free to set the procedural rules and, for example, may decide on applying special rules on evidence-taking, such as the IBA Rules on the Taking of Evidence.

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Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules applicable to counsel or arbitrators in international arbitration in Slovakia.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitral claims is regulated to the extent the funding is provided by an insurance house under 'legal protection insurance'. This insurance, in general, requires the insurance house to pay the insured party's costs of pursuing its claims or defending against third-party claims set out in the insurance policy. Among other regulatory requirements under the legal protection insurance, any restrictions on the insured party's right to choose its counsel are prohibited. This regulation does not apply to other instances usually falling within the concept of third-party funding. In particular, applicable laws explicitly provide that the legal protection insurance regulation does not apply to various forms of legal support provided by the insurance house to the insured parties to effectively defend against third parties' claims under a 'liability for damage insurance'. Finally, the area of third-party funding after the claim has arisen is a relatively new concept in Slovakia. For instance, there are several entities providing such funding in Slovakia, but they are not subject to specific regulatory requirements relating to this business activity.

Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no unusual restrictions or rules applying to counsel and arbitrators from outside Slovakia appearing and sitting in Slovakia-seated arbitrations.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Investment dispute on extraction of crude petroleum and natural gas

According to the ICSID website, in October 2021, a US investor Discovery Global LLC filed a request for arbitration against Slovakia based on the Slovak–US BIT. According to the publicly available information, the claimant claims that it was prevented from conducting drilling operations by Slovak state authorities. The arbitration is in its early stages and no documents have been published thus far.

Arbitration Court of the Slovak Bar Association

Following its 2016 reform incorporating modern practices in international arbitration, the Arbitration Court of the Slovak Bar Association continues to be more proactive as a trendsetter in administering arbitrations in Slovakia. In particular, throughout 2021, the SBA Court of Arbitration continued organising lectures with foreign arbitration experts, published a transparent report on activity for 2020 and established an platform for cooperation on matters involving arbitration between the Slovak arbitration community, general courts and Slovak Ministry of Justice. The SBA Court of Arbitration continues to attract more and more litigants seeking independent and impartial resolution of domestic and international disputes. One of the goals of this arbitration court is to pioneer approaches typical for modern international arbitration such as organisational transparency and gender equality, and to serve as an example for other permanent arbitration courts in Slovakia.

South Korea

Joel E Richardson, Hyungkeun Lee and Hyemin Park
Kim & Chang

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Korea signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on 8 February 1973, and it entered into force on 9 May 1973. Korea declared that it will only apply the New York Convention to arbitral awards made in the territory of states that are also parties to the Convention, and only to disputes that would be considered commercial disputes (contractual or otherwise) under Korean law.

Korea signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on 21 February 1967, and it entered into force on 23 March 1967.

Bilateral investment treaties

2 Do bilateral investment treaties exist with other countries?

Korea has entered into more than 100 bilateral investment treaties and free trade agreements (FTA) that permit disputes between a contracting party and an investor of the other contracting party to be resolved by arbitration, predominantly at the International Centre for the Settlement of Investment Disputes or, alternatively, through ad hoc arbitration under the UNCITRAL Rules.

Domestic arbitration law

3 What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary source of law relating to arbitral proceedings is the Arbitration Act of Korea (the Korean Arbitration Act), which is based on the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law). The Korean Arbitration Act was enacted in 1999, replacing the former Arbitration Act of 1966. The most recent major revisions to the Korean Arbitration Act, which primarily adopts the 2006 amendments of the Model Law (the 2006 UNCITRAL Model Law) came into effect as of 30 November 2016.

The amended Korean Arbitration Act governs both domestic arbitration and international arbitration that takes place in Korea. The primary features of the amended Korean Arbitration Act include, among others:

- expansion of the scope of arbitration to non-property rights, which may be resolved by the parties' settlement (article 3);
- relaxation of the requirements regarding the written form of an arbitration agreement (article 8);
- detailed provisions regarding interim measures ordered by an arbitral tribunal, and Korean courts' enforcement of such tribunal-ordered interim measures (chapter III-2);
- simplified procedures for recognition and execution of arbitration awards in Korean courts (article 37); and
- provisions regarding cooperation by Korean courts in arbitral proceedings regarding the collection of evidence (article 28).

However, the amended Korean Arbitration Act did not adopt certain features of the 2006 UNCITRAL Model Law.

Article 39 of the Korean Arbitration Act provides that arbitral awards from foreign jurisdictions that are signatories to the New York Convention shall be recognised and enforced in accordance with the Convention. Awards from jurisdictions that are not signatories to the New York Convention shall be recognised and enforced in accordance with the provisions of Korea's Civil Procedure Act and Civil Execution Act relating to the recognition and enforcement of foreign court judgments.

Domestic arbitration and UNCITRAL

4 Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Korean Arbitration Act governs both domestic arbitration and international arbitration.

The amended Korean Arbitration Act is based on the 2006 UNCITRAL Model Law, with some variations:

- Article 27(3) of the Korean Arbitration Act permits the parties to challenge experts appointed by an arbitral tribunal on the same grounds and through the same procedures used to challenge an arbitrator.
- The Korean Arbitration Act omits the provision in article 34(4) of the Model Law, which states that, at the request of a party, a court may suspend its proceedings in a set-aside action to allow the tribunal to resume its proceedings or take other action that may eliminate the grounds for setting aside the award.
- Where an arbitral tribunal rules on its own jurisdiction as a preliminary matter, article 17 of the Korean Arbitration Act – in contrast with the Model Law – allows a dissatisfied party to request within 30 days that a competent Korean court rule on the jurisdiction of the arbitral tribunal; the court's decision in that event is binding and is not subject to appeal.
- Although the Korean Arbitration Act largely incorporated provisions on interim measures in the 2006 UNCITRAL Model Law, it limits enforcement of interim measures ordered by an arbitral tribunal to

those issued by arbitration seated within Korea (articles 18-7 and 2(1)) and did not adopt the provisions regarding preliminary orders.
- Article 35 of the Korean Arbitration Act, which applies only to awards made in Korea, provides that 'arbitral awards shall have the same effect as the final and conclusive judgment of [a Korean] court between the parties' unless the recognition or enforcement is denied under article 38 of the Act. This provision does not have an equivalent in the Model Law.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Procedural provisions of the Korean Arbitration Act are generally default provisions, applicable in the absence of an agreement between the parties. The parties have significant freedom to agree upon particular procedural rules, and arbitrators also have wide discretion to determine how the arbitration should proceed.

Article 19 of the Korean Arbitration Act, which requires that the parties receive equal treatment and that each party shall be given a full opportunity to present its case, is generally regarded as a mandatory provision. Article 13 of the Korean Arbitration Act requires potential arbitrators to disclose all circumstances likely to give rise to justifiable doubts as to their impartiality or independence, and the Supreme Court has ruled that parties cannot waive this requirement.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Pursuant to article 29(1) of the Act, the parties are free to decide on the law applicable to the merits of the case. In the absence of agreement between the parties, the arbitral tribunal shall apply the law of the state that it considers to have the closest connection to the subject matter of the dispute (article 29(2)).

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The Korean Commercial Arbitration Board (KCAB) is the main arbitral institution in Korea. Its contact details are as follows:

The Korean Commercial Arbitration Board
511 Yeongdongdae-ro
Gangnam-gu
Seoul 135-729
Korea
Tel: +82 2 551 2000 / 19
Fax: +82 2 551 2020 / 2113
www.kcab.or.kr

The KCAB has adopted separate rules applicable to domestic and international arbitrations. Arbitrations between Korean parties referred to the KCAB are conducted pursuant to the Domestic Arbitration Rules of the KCAB (the KCAB Domestic Rules), absent specific agreement to the contrary. For international arbitrations, in which at least one party has its place of business in any state other than Korea or the place of arbitration set out under an arbitration agreement is in any state other than Korea, the International Arbitration Rules of the KCAB (the KCAB International Rules) apply as the default rules.

Both sets of rules were revised in 2016. The revised KCAB International Rules apply to international arbitral proceedings commenced on or after 1 June 2016 unless parties agree otherwise, and the specific rules regarding joinder of parties (article 21) and emergency arbitrator proceedings (article 32(4)), which were newly adopted at that time, will only apply to arbitration agreements entered into after 1 June 2016. The revised KCAB Domestic Arbitration Rules apply only to arbitrations commenced on or after 30 November 2016 unless the parties to a previously initiated arbitration agree to apply the new rules. The KCAB also issued practice notes on arbitration costs and on appointment of arbitrators for international arbitrations on 1 January 2018.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

To date, there is no clear Korean court precedent with respect to whether claims related to economic regulatory laws, such as antitrust, competition, securities and environmental regulations, are arbitrable. Korean legal commentators, however, have noted the trend in international arbitration favouring the arbitrability of disputes in such areas, and at least one Korean court has enforced a foreign arbitral award in 1995 based on a licence agreement that was alleged to violate Korean fair trade laws. As part of its reasoning, the enforcing court emphasised the need to promote international trade relations.

As in most other jurisdictions, matters of criminal law, family law and administrative law are not arbitrable in Korea.

The amended Korean Arbitration Act has expanded the scope of arbitration to expressly include disputes on non-property rights that can be resolved through reconciliation by the parties, thereby allowing disputes arising out of public law, such as disputes relating to intellectual property, to be arbitrated in Korea as long as the nature of the disputes would allow the parties to settle.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

In keeping with article 7 (option I) of the 2006 UNCITRAL Model Law, article 8 of the Korean Arbitration Act requires that an arbitration agreement be in writing, either as an arbitration clause in a contract or as a separate agreement.

A written arbitration agreement will be deemed to exist if the agreement is made orally or through any other means as long as the substance of the agreement is recorded in any form. An arbitration agreement may be contained in a document signed by the parties, in an exchange of written (including electronic) communications or in an exchange of request for arbitration and answer if the existence of an arbitration agreement is alleged by one party and not denied by the other (article 8(3)). A reference in a contract to a document containing an arbitration clause also constitutes a binding arbitration agreement, provided that the reference is such as to make that clause a part of the contract (article 8(4)). An arbitration agreement may appear under the general terms and conditions of the contract.

The New York Convention does not permit the finding of an agreement to arbitrate on the basis of an exchange of request for arbitration and answer in which the existence of an arbitration agreement is alleged by one party and not denied by the other. Therefore, the Supreme Court has held that, notwithstanding the provisions of the Korean Arbitration Act, such an exchange may not be the basis for a finding that the parties have agreed to arbitration for purposes of an enforcement action under the New York Convention.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is not enforceable when it is proven that a party to the agreement was under some incapacity under the applicable law when the agreement was executed, or that the arbitration agreement is null and void, inoperative or incapable of being performed under the applicable law. In such a case, a Korean court would not dismiss a lawsuit on grounds that the dispute is the subject of an arbitration agreement under article 9 of the Korean Arbitration Act, and would set aside an arbitral award under article 36 of the Korean Arbitration Act.

Where a party to arbitration goes into court-supervised bankruptcy or reorganisation proceedings, the relevant insolvency laws apply. Under the applicable Korean laws, creditors should report their claims to the bankruptcy court to preserve such claims. Failure to report a claim within the period designated by the court may result in the lapse of the claim. If the receiver refuses to recognise a reported claim, the claimant should file an action in the bankruptcy court seeking confirmation of the claim. If the claimant fails to seek such confirmation, or if the bankruptcy court upholds the receiver's rejection of the claim, the claim will lapse. Where there is an arbitration agreement between a creditor and a debtor that is in bankruptcy or reorganisation proceedings, there is no clear statutory provision or court precedent regarding whether the court or an arbitral tribunal has jurisdiction over the dispute relating to the claim. In such circumstances, it is prudent to file the claim and confirmation action at the bankruptcy or reorganisation court within the designated period to maintain the enforceability of the arbitration agreement.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Article 17(1) of the Korean Arbitration Act prescribes that '[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. In such cases, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other clauses of the contract'. This article is understood to stipulate that an arbitration agreement is separable from the rest of the contract.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

In some cases, a third party may be bound to an arbitration agreement as a successor, for example, a contracting party's heir or assignee, or as a trustee of a contracting party that is so bound. Third parties may also be bound to an arbitration agreement by their subsequent consent, whether by affirmative consent in writing at the request of a party or failure to object to the jurisdiction of the arbitral tribunal. Pursuant to article 17 of the Korean Arbitration Act, a plea that the arbitral tribunal does not have jurisdiction over a party must be raised no later than the filing of the respondent's first written pleading on the substance of the dispute.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

There are no specific provisions in the Korean Arbitration Act that specifically preclude or permit third-party participation in arbitration in Korea.

Under article 21 of the 2016 KCAB International Rules, the arbitral tribunal may allow third parties to be joined in an existing arbitration by application of a party, provided that either:

- all parties and the third party have all agreed in writing to the joinder of the third party to the arbitration; or
- the third party is a party to the same arbitration agreement with the parties, and the third party has agreed in writing to be joined in the arbitration.

However, the arbitral tribunal may refuse joinder of a third party even if such requirements are satisfied where there are reasonable grounds to do so, such as delay of the arbitration proceeding.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

To date, there is no clear precedent in which courts have extended application of an arbitration agreement to a non-signatory parent or subsidiary of one of the signatory companies on the basis of the group of companies doctrine.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

There are no specific provisions in the Korean Arbitration Act or the KCAB Arbitration Rules and no court decisions setting out the requirements for a valid multi-party arbitration agreement. To date, courts have not been confronted with issues involving multi-party arbitrations, consolidation of multiple arbitral proceedings or joinder or intervention by additional interested parties. Nevertheless, the authors are aware of prior international arbitration cases seated in Korea involving multi-party arbitration agreements. Further, the 2016 KCAB International Rules provide for joinder of third parties to existing arbitral proceedings under a multi-party arbitration agreement.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Korean Arbitration Act does not contain specific provisions regarding consolidation of arbitral proceedings.

The KCAB International Arbitration Rules contain provisions regarding consolidation of arbitral proceedings. Specifically, article 23 of the KCAB International Arbitration Rules stipulates that 'the Arbitral Tribunal may, at the request of a party, consolidate claims made in a separate but pending arbitration if such arbitration is also under the Rules and between the same parties. Provided that, the Arbitral Tribunal may not do so if any one arbitrator of an arbitral tribunal has been appointed in such separate arbitration proceedings'.

Therefore, in a KCAB international arbitration, if the arbitral tribunal is not formed in the other KCAB international arbitration, upon the request of a party, the arbitral tribunal may consolidate the proceedings taking into account the arbitration agreement or agreements, the nature of the claims and any other relevant circumstances.

In contrast, the KCAB domestic arbitration rules do not contain provisions regarding consolidation of arbitral proceedings.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are no restrictions in the Korean Arbitration Act regarding who may serve as an arbitrator, and no specific qualifications are required. Parties are free to agree on the qualifications of the arbitrators and a procedure for selecting them. Korean courts would likely recognise and enforce the parties' agreement requiring arbitrators to meet specific qualifications.

While article 12(1) of the Act provides that no person may be precluded from serving as an arbitrator because of his or her nationality, the same provision allows the parties to agree otherwise. Sitting Korean judges may not serve as arbitrators because of their judicial duty not to engage in for-profit activities, but retired judges may freely serve as arbitrators and frequently do so.

Although the KCAB maintains a roster of domestic and international arbitrators, the parties are free to choose arbitrators who are not on the roster.

Background of arbitrators

18 Who regularly sit as arbitrators in your jurisdiction?

The authors are not aware of any published statistics on the identity of arbitrators sitting in Korea, including gender diversity in institutional appointments. The KCAB maintains separate pools of arbitrators for domestic arbitration cases and international cases. Whereas more than half of the KCAB domestic arbitrator pool consists of practising lawyers, with the remainder comprising academics, officials from public organisations, certified accountants, patent attorneys and industry experts, the pool for international arbitrators mainly consists of legal professionals both domestic and abroad.

Most, if not all, arbitrators sitting in domestic arbitration cases are part-time arbitrators. In the case of international arbitration cases seated in Korea, the vast majority of arbitrators appear to be legal professionals, including practising lawyers, law professors, full-time arbitrators and occasionally in-house counsel. The appointment of retired judges appears much more common in domestic arbitrations in which both parties are Korean. Appointment of non-lawyers, such as accountants and engineers, is also more common in domestic arbitration.

Default appointment of arbitrators

19 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under article 11 of the Korean Arbitration Act, the default number of arbitrators, in the absence of an agreement between the parties, is three.

Article 12(3) of the Korean Arbitration Act provides that if the parties have agreed to have a sole arbitrator but cannot agree upon an arbitrator within 30 days after one of the parties initiates the procedure for the appointment of the arbitrator, the competent court (a specific local court, designated under article 7 of the Korean Arbitration Act) or an arbitral institution appointed by the court shall appoint the arbitrator at either party's request.

If the parties have agreed to three arbitrators (or failed to agree a number of arbitrators) but have not agreed on a procedure for appointing the arbitrators, each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third. If a party fails to appoint an arbitrator within 30 days of a request by the other party that it do so, or if the two party-appointed arbitrators fail to appoint a third within 30 days of their appointment, the competent court or arbitral institution appointed by the court shall make the appointment at the request of either party.

Finally, according to article 12(4) of the Korean Arbitration Act, even if the parties have agreed on a procedure for appointment of the arbitrators, the competent court or the arbitral institution appointed by the court may intervene to appoint an arbitrator or arbitrators at the request of a party if:

- a party fails to act in accordance with such agreement;
- the parties (or party-appointed arbitrators) are unable to reach an agreement expected of them under such procedure; or
- a third party entrusted to appoint the arbitrator or arbitrators fails to do so.

Notwithstanding article 11 of the Korean Arbitration Act, article 11 of the KCAB International Rules provides that disputes 'shall be decided by a sole arbitrator' unless the parties have agreed otherwise or, absent agreement, the KCAB secretariat 'considers it appropriate' in the circumstances of the case to appoint three arbitrators.

The default mechanism for the appointment of arbitrators under the KCAB International Rules is in line with the rules of other major international arbitral institutions (article 12):

- In the case of a sole arbitrator, the KCAB secretariat will appoint the arbitrator if the parties fail to agree on an arbitrator within 30 days of the request for arbitration being received by the respondent, or if the secretariat decides to refer the dispute to a sole arbitrator within 30 days of the parties receiving notice of such decision.
- Where the parties have agreed to appoint three arbitrators, each party nominates its arbitrator when filing the request for arbitration and the answer, respectively, subject to confirmation of the party-nominated arbitrators by the KCAB secretariat.
- Where the parties have not agreed on the number of arbitrators and the secretariat decides to refer the case to three arbitrators, each party may nominate an arbitrator within 30 days of its receipt of the notice from the secretariat or within such additional time as may be allowed by the secretariat. In either event, if the two arbitrators fail to agree on a third – who will be the chair of the tribunal – within 30 days of the appointment of the second arbitrator, the secretariat shall appoint the chair.

The 2016 KCAB International Rules have amended article 12 so that the parties no longer 'appoint' arbitrators, but 'nominate' the arbitrators under the same procedures as before, and the 'nominated' arbitrators will be deemed 'appointed' only upon confirmation by the secretariat.

The default mechanism for appointing arbitrators under the KCAB Domestic Rules, failing prior agreement of the parties, is as follows:

- the KCAB secretariat provides the parties with a list of 10 candidates from the KCAB's roster of arbitrators;
- the parties rank the arbitrators in order of preference; and
- the secretariat appoints three arbitrators in the order of the combined ranking of the parties.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Pursuant to article 13 of the Korean Arbitration Act, an arbitrator may be challenged if there are circumstances likely to give rise to reasonable doubts as to his or her impartiality or independence, or if he or she does

not possess the qualifications agreed by the parties. Parties may agree to the procedure for challenge.

If there is no agreement by the parties, a party may object to the appointment of an arbitrator to the arbitral tribunal within 15 days from the constitution of the tribunal or within 15 days of the date the party became aware of the grounds for the challenge (article 14(2)), and if the challenge is not upheld, the party may file an objection with the competent court within 30 days of the receipt of the tribunal's decision (article 14(3)). The court's decision on the challenge is not subject to appeal (article 14(4)). The arbitral tribunal may continue with the arbitral proceedings or render an arbitral award during a court's consideration of an application challenging one or more of the arbitrators (article 14(3)).

Under article 23 of the KCAB Domestic Rules, a party may object to the appointment of an arbitrator by submitting a written objection to the KCAB secretariat within 15 days of the constitution of the arbitral tribunal or 15 days of the date when the party became aware of the grounds for challenge. Under article 14 of the KCAB International Rules, a party may also challenge an arbitrator for 'lack of independence, impartiality or otherwise' by submitting a written objection to the secretariat within 15 days of receiving notice of the appointment of the arbitrator or 15 days of becoming aware of the grounds for challenge. The challenged arbitrator, the other arbitrators (if any), and the other party or parties may comment on the challenge within 15 days of their receipt of the challenge.

The IBA Guidelines on Conflicts of Interest in International Arbitration are commonly consulted in arbitrations in Korea, but the authors are not aware of any court decision that has expressly applied the IBA Guidelines for the purposes of deciding a challenge of an arbitrator.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Neither the Korean Arbitration Act nor any Korean case of which the authors are aware directly address the legal nature of the relationship between the parties and the arbitrators (ie, contractual, fiduciary). The KCAB Rules are silent on this issue as well.

Article 13 of the Korean Arbitration Act permits the parties to file a challenge to an arbitrator on the basis of circumstances likely to give rise to reasonable doubts as to his or her impartiality or independence. Thus, the Korean Arbitration Act anticipates that all arbitrators, including party-appointed arbitrators, must remain independent and impartial, and the concept of neutrality of party-appointed arbitrators is generally agreed to fall within the scope of this requirement.

Both article 18 of the KCAB Domestic Rules and article 10 of the KCAB International Rules also provide that arbitrators under the Rules shall be, and shall remain at all times, impartial and independent, and can be challenged, or precluded from serving on a case, for lack of independence or impartiality.

In Korea, the parties are free to agree to the method of determining and effecting payment of the remuneration of the arbitrators, including through submission of the arbitration to administrative rules specifying how the remuneration is to be determined and collected.

In KCAB arbitrations, the remuneration of the arbitrators and expenses of the arbitration are paid by the KCAB out of the advance deposits paid by the parties. Under the KCAB International Rules, unless otherwise agreed, arbitrators' fees are determined according to a table appended to the Rules, based on the amount in dispute, and arbitrators are reimbursed for 'necessary expenses incurred during the proceedings'.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Article 13(1) of the Korean Arbitration Act requires the impartiality and independence of the arbitrator, stating that 'when a person is approached in connection with his/her possible appointment as an arbitrator or has already been appointed as such, he/she shall, without delay, disclose any circumstance likely to give rise to justifiable doubts as to his/her impartiality or independence to the parties'. However, the Act does not provide specific rules regarding the circumstances that will be considered as giving rise to justifiable doubts as to an arbitrator's impartiality and independence.

Article 10 of the KCAB International Arbitration Rules stipulate that 'arbitrators under the Rules shall be, and remain at all times, impartial and independent' and that 'an arbitrator who accepts an appointment or nomination shall sign and submit a Statement of Acceptance and a Statement of Impartiality and Independence in the form provided by the Secretariat'. Article 18 of the KCAB Domestic Arbitration Rules also mirrors such requirement.

Article 2 of the KCAB Code of Ethics further identifies circumstances where an arbitrator's impartiality and independence may be questioned:

- the arbitrator is a manager, director or supervisor of a party, or is in a similar position of influence upon a party;
- the arbitrator has a significant financial interest vis-à-vis a party or in the outcome of the case;
- the arbitrator currently represents or advises a party or an affiliate of a party;
- the arbitrator regularly advises a party or an affiliate of a party, and derives a significant financial income therefrom;
- the arbitrator is a lawyer within the same law firm as the counsel representing a party;
- the arbitrator's law firm currently has a significant commercial relationship with a party or an affiliate of a party;
- the arbitrator has served as counsel against a party or an affiliate of a party in a matter related to the dispute within the past three years;
- the arbitrator was in a partnership with a co-arbitrator or counsel of a party during the same arbitration case within the past three years; or
- the arbitrator was associated with a party or an affiliate of a party in a professional capacity, such as an employment relationship, within the past three years.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Liability of arbitrators is not expressly addressed in the Korean Arbitration Act. Under article 56 of the KCAB International Rules, the members of the arbitral tribunal may not be held liable to any party for any act or omission in connection with any arbitration conducted under the Rules, unless such act or omission is shown to constitute wilful misconduct or recklessness. Article 13 of the KCAB Domestic Rules also provides the same.

In the case of bribery, an arbitrator may be subject to criminal penalty under the Criminal Act and will likely be found liable to the parties for damages arising from his or her wilful misconduct. To date, there is no clear Korean court precedent dealing with this matter, nor do there appear to be any recent court cases in Korea that have held arbitrators liable for their conduct during the course of arbitral proceeding.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If a party initiates court proceedings despite the existence of an arbitration agreement, the court, pursuant to article 9 of the Korean Arbitration Act, is required to dismiss the case if the other party asserts the existence of an arbitration agreement, unless the court finds that the alleged arbitration agreement 'is null and void, inoperative or incapable of being performed'. A party moving for dismissal on the grounds of an arbitration agreement must do so no later than its filing of first written pleading to the court on the substance of the dispute. Arbitral proceedings may proceed, and an award may be rendered, while this issue is pending before the court (article 9(3)).

Jurisdiction of arbitral tribunal

25 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

Pursuant to article 17 of the Korean Arbitration Act, an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement (article 17(1)). A challenge to the jurisdiction of the arbitral tribunal must be raised no later than the filing of first written pleading on the substance of the dispute (article 17(2)), except that a plea that the tribunal is exceeding the scope of its authority must be made as soon as the matter alleged to be beyond the scope arises (article 17(3)). The arbitral tribunal may rule on a challenge to its jurisdiction as a preliminary question or in its award on the merits (article 17(5)). If the tribunal rules as a preliminary matter on its jurisdiction, a dissatisfied party may request that the competent court decide upon the jurisdiction of the arbitral tribunal, provided that the application is submitted to the court within 30 days of receiving notice of the tribunal's ruling (article 17(6)). Such a decision by the court is binding upon the parties and is not subject to appeal (article 17(8)).

Although the KCAB Domestic Rules do not prescribe a deadline for jurisdictional challenges, under article 25 of the KCAB International Rules, a challenge to the tribunal's jurisdiction must be raised no later than the filing of the answer to the request for arbitration or, with respect to a counterclaim, the filing of the answer to the counterclaim.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Pursuant to article 21 of the Korean Arbitration Act, in the absence of agreement of the parties, the arbitral tribunal shall determine the place of arbitration, having regard to the circumstances of the case, including the convenience of the parties. Pursuant to article 23 of the Korean Arbitration Act, the arbitral tribunal shall determine the language of the proceedings absent prior agreement of the parties, failing which the default language is Korean.

Under article 24 of the KCAB International Rules, in the absence of prior agreement of the parties, the place of arbitration is Seoul, Korea, unless the arbitral tribunal determines in view of all circumstances that another place is more appropriate. The language of the arbitration, in the absence of prior agreement of the parties, is determined by the tribunal, giving due regard to all relevant factors, including the language of the contract (article 28).

Under the KCAB Domestic Rules, the place of arbitration is deemed to be Korea pursuant to the Korean Arbitration Act (article 1), and the arbitral tribunal shall determine the place of arbitration within Korea pursuant to the Act. Absent prior agreement of the parties as to the language or languages to be used in the arbitration, the default language under the Domestic Rules is Korean. The Domestic Rules also provide that the secretariat may determine Korean or English as the language for communication, and the arbitral tribunal or secretariat may request translations, and in case the award is written in both Korean and another language and there are discrepancies, the Korean version will take precedence.

Under article 29 of the Korean Arbitration Act, the arbitral tribunal shall apply the law chosen by the parties, or, in the absence of a selection by the parties, the law of the state that it considers having the closest connection with the subject matter of the dispute.

Article 29 of the KCAB International Arbitration Rules also provides that in the absence of agreement between the parties regarding the substantive law of the dispute, the arbitral tribunal shall apply the substantive laws or rules of law that it deems appropriate. The KCAB Domestic Arbitration Rules do not contain specific provisions regarding the substantive law of the dispute.

Commencement of arbitration

27 How are arbitral proceedings initiated?

Article 22 of the Korean Arbitration Act provides that, unless otherwise agreed by the parties, arbitral proceedings commence on the date when a request that the dispute be referred to arbitration is received by the respondent. The request for arbitration must identify the parties, and state the subject matter of the dispute and the details of the arbitration agreement.

A party initiates arbitral proceedings under the KCAB International Rules by submitting a request for arbitration to the KCAB secretariat and paying the filing fees specified under the Rules. The request for arbitration must contain or be accompanied by, inter alia, the arbitration agreement, the names and addresses of all parties, and of the claimant's representative, a description of the claimant, a statement of the nature and circumstances of the dispute, a statement of the relief sought and (to the extent possible) the amount claimed, and the name and address of the arbitrator nominated by the claimant if applicable under the arbitration agreement. The date on which the request is received by the secretariat is, for all purposes, the date of commencement of the arbitration. Upon receipt of the request for arbitration and the filing fees, the secretariat sends a copy of the request to the respondent.

Similarly, a party initiates arbitral proceedings under the KCAB Domestic Rules by submitting a request for arbitration to the KCAB secretariat, a document certifying the parties' agreement to arbitrate, a power of attorney if the claimant is represented by counsel and payment of the costs specified in the Rules. The request for arbitration should include the names and addresses of the parties, the name and address of the claiming party's counsel, and the basis of the claim. Assuming all of these requirements have been met, the KCAB secretariat shall accept the request for arbitration, and the arbitration shall commence on the date of acceptance by the KCAB. The secretariat shall then notify and serve the respondent with a copy of the request for arbitration.

Hearing

28 | Is a hearing required and what rules apply?

Under article 25 of the Korean Arbitration Act, in the absence of agreement between the parties, the arbitral tribunal shall determine whether to hold oral hearings or to proceed on the basis of documentary submissions. However, unless the parties have agreed that no hearings shall be held, the tribunal must hold hearings at an appropriate stage of the proceedings if so requested by a party.

Under both the KCAB Domestic and International Rules, the tribunal decides the place of the hearing and has broad control over the conduct of the hearing. At the request of either party or at the direction of the tribunal, the KCAB secretariat shall make arrangements for interpretation or translation and for audio recording or transcription of the proceedings.

The KCAB International Rules provide that hearings are private in the absence of contrary provision or law or agreement of the parties. The Domestic Rules expanded the scope of confidentiality obligation to hearings and records.

Under the International Rules, the arbitral tribunal may conduct a preliminary procedural conference with the parties to discuss the arbitral proceedings, and it shall prepare a procedural timetable without delay at a preliminary procedural conference or after discussion with the parties through other means.

Owing to the covid-19 pandemic, the KCAB published the updated 'Seoul Protocol on Video Conferencing in International Arbitration' (the Seoul Protocol) on 18 March 2020. The Seoul Protocol is intended to provide guidance on best practices for planning, testing and conducting videoconferencing in international arbitration.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Article 20 of the Korean Arbitration Act provides that, absent the parties' agreement, 'the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance and weight of any evidence.'

Article 27 of the Korean Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral tribunal 'may appoint one or more experts to consult on specific issues' (who may be required to participate in the hearing) and may require a party to provide any relevant information or produce 'any relevant documents, goods or other articles' for inspection by such experts. Parties may challenge the appointment of an expert on the same grounds and following the same procedure as when challenging the appointment of an arbitrator.

Under article 28 of the Korean Arbitration Act, the arbitral tribunal may entrust the court with the taking of evidence or seek cooperation of the court. Where the court is entrusted with the taking of evidence, the parties or the arbitral tribunal may participate in the process of taking of evidence upon permission from the presiding judge, and the court shall, after taking evidence, send the records with respect to the taking of evidence, such as a certified copy of the report on witness examinations to the arbitral tribunal without delay. If the arbitral tribunal requests the court to cooperate with the taking of evidence, the court may order witnesses or those possessing documents to appear before the tribunal or submit necessary documents to the tribunal. The tribunal shall pay the fees for the taking of evidence by the court.

Under the KCAB International Rules, unless the parties have agreed otherwise, the arbitral tribunal may order the parties to provide documentary or other evidence at any time during the proceedings, conduct site or property inspections and require the parties to provide summaries of the evidence on which they will rely. The arbitral tribunal is empowered to determine the admissibility, relevance, materiality and weight of evidence. It may appoint one or more experts to report to it on specific issues, and may require the parties to provide evidence and information to the expert. The parties may comment on the expert's report and may examine any documents relied on by the expert. The Rules are silent as to participation by experts in the hearing, although article 27 of the Korean Arbitration Act, as noted, provides that the tribunal may require an expert to participate in the hearing.

The KCAB Domestic Rules provide that a party may produce any evidence to support its arguments and may seek the testimony of any witness or expert, but the Rules do not specify the types of evidence that may be adduced. The tribunal has full authority to determine the relevance and materiality of evidence, and may refuse to consider evidence it deems irrelevant.

Under both the Domestic and the International Rules, evidence may be given by an employee or officer of a party. Evidence must be submitted and examined in the presence of all parties unless a party has waived its right to be present. There is a tendency in international arbitrations seated in Korea to seek guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration in respect of documentary evidence, though the more limited document disclosure under the Korean Code of Civil Procedure is usually followed in domestic arbitrations. Although document disclosure is permissible and not uncommon, document disclosure in arbitrations in Korea (both domestic and international) is generally less extensive than that of most common law jurisdictions.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Under article 6 of the Korean Arbitration Act, a court may not intervene in arbitral proceedings except as provided in the Act. As noted above, the arbitral tribunal may seek assistance from a court in taking evidence pursuant to article 28 of the Act.

In addition, the Korean Arbitration Act permits a competent court to perform the following functions during the arbitration:

- appoint an arbitrator or the appointing authority pursuant to article 12, absent agreement by the parties on a procedure for appointing arbitrators, and where the parties or party-appointed arbitrators cannot agree on the selection of the chair;
- decide on a challenge to an arbitrator pursuant to article 14 (on appeal from the decision of the arbitral tribunal);
- decide on a request to terminate the mandate of an arbitrator pursuant to article 15 (at the request of any party);
- rule on the jurisdiction of the arbitral tribunal pursuant to article 17 (on appeal from a preliminary ruling by the tribunal on jurisdiction);
- decide on a challenge to an expert appointed by the tribunal pursuant to article 27 (on appeal from the decision of the tribunal); and
- recognise and enforce interim measures issued by the arbitral tribunal and order provision of security regarding enforcement of such interim measures pursuant to Chapter III-2.

Confidentiality

31 | Is confidentiality ensured?

The Korean Arbitration Act does not contain any provisions expressly requiring confidentiality in arbitral proceedings. Thus, absent agreement of the parties to the contrary, for example, in the rules of an administering institution or in a separate confidentiality agreement, there is no automatic requirement of confidentiality of arbitration conducted in Korea.

Under both the KCAB Domestic and International Rules, all arbitrations and all evidence and information submitted or disclosed in arbitrations are confidential. Both Rules further provide that hearings are private unless the parties provide otherwise or the law requires otherwise. The Domestic Rules provide that third parties that have an interest in the arbitration may participate in the hearing at the discretion of the tribunal. KCAB arbitral awards are regularly published, but only after any details identifying the parties have been redacted.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

There is no exclusivity for courts or arbitral tribunals with respect to interim measures; parties may apply for interim measures with the court or with the tribunal at their discretion.

Pursuant to article 10 of the Korean Arbitration Act, a party may request interim measures of protection from a court before or during the arbitral proceedings. This provision applies irrespective of whether the seat of arbitration is inside or outside of Korea. Courts grant injunctive relief such as preliminary injunctions to preserve the status quo or preliminary attachments on assets subject to dispute in the arbitration.

The KCAB Domestic and International Rules authorise the arbitral tribunal to order interim or conservatory measures at the request of a party.

Interim measures by an emergency arbitrator

33 Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the Korean Arbitration Act nor the KCAB Domestic Rules provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. However, the KCAB International Rules newly introduced emergency arbitration provisions (article 32(4) and Appendix 3) with its 2016 amendment. These emergency arbitration provisions apply to arbitration agreements entered into after 1 June 2016.

Interim measures by the arbitral tribunal

34 What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under articles 18 to 18-8 of the Korean Arbitration Act, which largely reflect the 2006 UNCITRAL Model Law, an arbitral tribunal's powers to grant interim relief are provided in more detail. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant such interim measures of protection as it deems necessary, and may require the party requesting the interim measures to provide appropriate security and determine an amount of security to be provided.

According to article 18(2) of the Korean Arbitration Act, the scope of interim measures is specified to include measures that:

- maintain or restore the status quo;
- prevent action likely to harm or prejudice arbitral process;
- preserve assets; or
- preserve evidence.

Also, article 18-2(1) provides that interim measures can be granted if:

- the irreparable harm likely to occur if such measures are not ordered is greater than the harm that would be suffered by the party against whom the measures are directed; and
- there is reasonable possibility that the requesting party will succeed on the merits.

However, the tribunal may apply the above requirements as it sees appropriate for measures to preserve evidence (article 18-2(2)).

For arbitrations seated in Korea, the Korean Arbitration Act provides that the tribunal's interim measures can be enforced through recognition or enforcement of the appropriate Korean court (article 18-7), but the Act does not address enforcement of interim measures ordered by tribunals seated outside of Korea.

The KCAB Domestic and International Rules contain similar provisions, and the International Rules further provide that a party may apply to a competent judicial authority for interim or conservatory measures before the file is transmitted to the arbitral tribunal, and in appropriate circumstances thereafter.

Sanctioning powers of the arbitral tribunal

35 Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Neither the Korean Arbitration Act nor the KCAB Domestic or International Rules expressly authorise an arbitral tribunal to order sanctions against parties or lawyers for misconduct or inappropriate tactics. Both sets of rules, however, grant arbitral tribunals broad authority with respect to the conduct of the arbitral proceedings, including with regard to the manner in which the arbitration costs are apportioned among the parties. With the exception of considering the conduct of parties and their counsel in allocating the arbitration costs, it is unclear what types of sanctions the tribunal could impose on the parties or their counsel, and how they would be enforced. The KCAB does not have authority to sanction counsel.

AWARDS

Decisions by the arbitral tribunal

36 Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Pursuant to article 30 of the Korean Arbitration Act, decisions by an arbitral tribunal may be made by a majority vote, except that questions of procedure may be decided by the presiding arbitrator, if agreed by the parties or if authorised by all members of the arbitral tribunal. If an arbitrator is unable to or refuses to sign the award, the award may be signed by the majority of the arbitrators with an explanation for the failure of the other arbitrator to sign the award (article 32(1)).

The KCAB Domestic and International Rules both provide that decisions may be made by a majority. Under the International Rules, failing a majority decision of the arbitrators on an issue, the chair of the arbitral tribunal may make a decision on that issue. Under the Domestic Rules, the chair of the arbitral tribunal may make decisions on procedural issues if both parties have agreed to give such power to the chair or if the arbitrators have conferred such authority on the chair.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

The Korean Arbitration Act and the KCAB Domestic and International Rules do not expressly address dissenting opinions in an arbitral award. There have, however, been past instances of dissenting opinions issued in arbitral awards. Under both the Domestic and the International Rules, an award may be made by a majority of the arbitrators.

Form and content requirements

38 | What form and content requirements exist for an award?

Article 32 of the Korean Arbitration Act requires that an award be in writing and signed by all of the arbitrators; if one of the arbitrators is unable or refuses to sign the award, the other arbitrators must sign the award and explain the reasons for the absence of an arbitrator's signature. An award must state its date, the place of the arbitration and, unless the parties have agreed otherwise or the award is a consent award based on the settlement of the parties, the reasons on which the award is based.

The KCAB Domestic and International Rules include the same requirements, except that the latter do not expressly require the award to identify the place of arbitration. The Domestic KCAB Rules additionally require that an award state the full names and addresses of the parties and their representatives.

The award may be issued in a language other than Korean, but to enforce any such award through a Korean court, a Korean translation of the award must be submitted to the court (article 37(3)).

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Korean Arbitration Act does not specify a time limit within which an arbitral award needs to be rendered, but the KCAB Rules do set time limits. Unless otherwise agreed by the parties, an award must be rendered no later than 30 days after the close of the hearings under the KCAB Domestic Rules, and 45 days after the close of the hearings (or 45 days after the final submissions are made, whichever is later) under the KCAB International Rules. Under the International Rules, the KCAB secretariat may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on the secretariat's own initiative.

Both the Domestic and International Rules have introduced expedited procedures that apply to cases where claim amounts in dispute fall below a specified threshold. Under the KCAB International Rules, the expedited procedures apply where the amount in dispute is not more than 500 million won, and under the KCAB Domestic Rules the threshold amount is 100 million won. Under both the International Rules and the Domestic Rules, the parties are free to agree to apply the expedited procedures even if the threshold amount in dispute is exceeded. Under these expedited procedures, for arbitrations under the International Rules the tribunal is required to render an award within six months of the constitution of the arbitral tribunal, and for arbitrations under the Domestic Rules the award must be issued within 100 days of constitution of the tribunal.

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under the Korean Arbitration Act, for purposes of requesting interpretation or correction of an arbitral award and applying to set aside an award, the date on which the party making the request or application received a duly authenticated copy of the award is decisive.

Under article 34 of the Korean Arbitration Act, within 30 days of receiving an authenticated copy of the award, a party may submit a request that the arbitral tribunal correct any clerical or computational errors, give an interpretation of a specific point or part of the award, or make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The tribunal shall decide on the first two issues within 30 days of the date of the request, and the third issue within 60 days. These provisions are also reflected in both the Domestic and the International KCAB Rules.

Under article 36 of the Act, a party may submit an application to a court to set aside an arbitral award within three months after the party received an authenticated copy of the award. Although the Korean Arbitration Act does not specify a limitations period within which enforcement of an arbitral award must be sought, the statute of limitations under the Korean Civil Code for claims that have been confirmed by court judgment is 10 years, and article 35 of the Korean Arbitration Act provides that an arbitration award has the same effect as a court judgment.

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under the KCAB International Rules, an arbitral tribunal is expressly authorised to issue interim, interlocutory or partial awards in addition to final awards. In the case of partial awards, the tribunal may make awards on different issues at different times, and such awards are individually enforceable when made unless the tribunal states otherwise. In addition, if the parties reach a settlement, the tribunal may enter a consent award if any party so requests.

Under the KCAB Domestic Rules, an arbitral tribunal is expressly authorised to issue interlocutory or partial awards in addition to final awards. The Domestic Rules also provide for a consent award.

Neither KCAB International nor Domestic Rules specify the types of relief an arbitral tribunal may grant, except that the tribunal is authorised to grant interim or conservatory measures at the request of a party.

Article 29 of the Korean Arbitration Act provides that the arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

Pursuant to article 31 of the Korean Arbitration Act, if the parties settle the dispute during the arbitral proceedings, the arbitral tribunal should terminate the proceedings. On request by the parties, the tribunal may record the settlement in the form of an arbitral award on agreed terms, which will have the same effect as an award on the merits of the case.

Pursuant to article 33 of the Korean Arbitration Act, the tribunal may also terminate the arbitral proceedings if the claimant withdraws its claim (unless the respondent objects and the tribunal recognises a legitimate interest on the part of the respondent in obtaining a final settlement of the dispute), if the parties agree on the termination of the proceedings or if the tribunal finds that the continuation of the proceedings has become unnecessary or impossible.

The KCAB International Rules authorise the secretariat, after consultation with the arbitral tribunal, to terminate the proceedings if a party fails to make an advance payment for the arbitration upon a request by the secretariat. Under the Domestic Rules, both the secretariat and the tribunal have the authority to terminate the proceedings

if a party fails to make relevant payments. According to both rules, the claimant cannot withdraw its claim if the respondent has already submitted its answer and does not agree to the withdrawal.

Cost allocation and recovery

43 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

With respect to the allocation of costs of the arbitral proceedings, article 34-2 of the Korean Arbitration Act provides that 'the arbitral tribunal may determine the allocation of costs of arbitration incurred in the arbitral proceedings, considering all circumstances of the relevant arbitration case'.

Under the KCAB Domestic and International Rules, the costs of the arbitration are to be borne equally by the parties during the arbitration procedure, but are to be allocated in the award. The International Rules stipulate that the arbitration costs are in principle to be borne by the unsuccessful party. Under the International Rules, recoverable costs include administrative fees, attorney fees and costs, and costs for experts, interpreters and witnesses. The Domestic Rules stipulate that the Arbitral Tribunal shall have the power to allocate the necessary expenses incurred during the proceedings in any manner it deems appropriate taking into account the circumstances of the case, unless otherwise agreed by the parties. The same categories of costs as those in the International Rules are generally recoverable under the Domestic Rules including attorney fees.

Interest

44 May interest be awarded for principal claims and for costs, and at what rate?

Article 34-3 of the Korean Arbitration Act and the KCAB Domestic Rules provide that the arbitral tribunal may award interest as it deems appropriate considering all the circumstances of the case. Neither the Korean Arbitration Act nor the Rules specify whether interest may be awarded for costs. The KCAB International Rules do not include specific provisions in relation to interest on awards or costs.

In the absence of an agreed interest rate, arbitrators normally refer to the statutory interest rates provided in the Korean Civil Code (5 per cent per annum, the general default rate) or the Korean Commercial Code (6 per cent per annum, the rate applicable to commercial transactions).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Under article 34 of the Korean Arbitration Act, a party may, within 30 days of receipt of the award, request that the arbitral tribunal correct any clerical or computational errors, give an interpretation of a specific point or part of the award, or make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The tribunal shall decide on the first two issues within 30 days, and the third issue within 60 days. Similar provisions are included in both the KCAB Domestic and International Rules.

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

Pursuant to article 36 of the Korean Arbitration Act, recourse against an arbitral award may only be made by an application to a court to set aside the award. Any such application must be made within three months of the date on which the party making such an application received a duly authenticated copy of the award.

An arbitral award may only be set aside by the court if the party making the application provides proof that:

- a party to the arbitration agreement lacked capacity under the law applicable to such party, or the arbitration agreement is not valid under the law selected by the parties to govern the agreement (or, failing any such indication, under Korean law);
- the party making the application was not given proper notice of the appointment of the arbitrators or of the arbitral proceedings, or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by or subject to the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the Act.

The court may also set aside the award if it finds on its own initiative that the subject matter of the dispute is not capable of settlement by arbitration under Korean law, or that the recognition and enforcement of the award is in conflict with the good morals or other public policy of Korea.

Korean courts rarely set aside a domestic arbitral award or refuse enforcement of a foreign arbitral award.

Levels of appeal

47 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

An application to set aside an arbitral award is filed at a district court. Thereafter, an appeal of the district court's decision may be pursued at a High Court, followed by the Supreme Court. Generally, it may take approximately eight to 12 months to obtain a decision at each of the district court and High Court levels, and approximately six to 12 months at the Supreme Court. Court filing fees are set by the court, based on a fee schedule that is linked to the amount in dispute. Such costs are initially paid by the claimant, but may be subject to recovery by the prevailing party in the litigation. A portion of legal fees could be also recovered in accordance with a statutory schedule.

Recognition and enforcement

48 What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Article 37 of the Korean Arbitration Act sets out the procedure by which an arbitral award can be recognised or enforced. The party requesting recognition or enforcement of an arbitral award may initiate the recognition or enforcement process by submitting an authentic copy or a plain copy of the award. The court's enforcement decision is rendered in the form of a court order (rather than a formal judgment). Either

party may file an appeal against the enforcement order, but such an appeal does not suspend the enforcement order.

Under article 39 of the Act, where the New York Convention applies, recognition and enforcement of a foreign arbitral award shall be granted in accordance with the Convention.

Where the Convention does not apply, foreign arbitral awards are reviewed in the same manner as foreign court judgments, pursuant to article 217 of the Civil Procedure Act and articles 26(1) and 27 of the Civil Execution Act. Under those provisions, a Korean court will recognise and enforce a foreign award not subject to the New York Convention if:

- the award is final and conclusive;
- the jurisdiction of the arbitral tribunal is consistent with Korean law and treaties to which Korea is a party;
- the losing party received adequate notice of the arbitration and sufficient time to defend its case;
- the award is not in conflict with the good morals or other public policy of Korea; and
- the country in which the arbitral award was issued provides reciprocity to Korean judicial decisions and arbitral awards.

Article 38 of the Korean Arbitration Act stipulates that a domestic award shall be recognised or enforced unless:

- any of the grounds for the annulment of an arbitral award under article 36(2) exist;
- the arbitral award has no binding power over a party; or
- the arbitral award has been set aside by a court.

Korean courts are known to be friendly to arbitration. For example, they have adopted a narrow interpretation of the limits on the enforceability of arbitral awards on public policy grounds. The Supreme Court has ruled that under the New York Convention, considerations of public policy must take into account not only Korea's domestic situation, but also the need for foreseeability and stability in international business transactions.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The Korean Arbitration Act does not specify a limitation period for enforcement of arbitral awards. However, article 35 provides that unless the award is denied recognition or execution, the award has the same effect as a final court decision. Article 165 of the Korean Civil Code provides that the limitation period for exercise of a claim confirmed by court decision is 10 years. Therefore, in theory, the execution of any claim confirmed by an arbitral award, unless the award is denied recognition, would be only possible within 10 years after the issue of the award.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Where the New York Convention is applicable, it is unlikely that a Korean court would recognise or enforce a foreign arbitration award that has been set aside by a court at the place of the arbitration, pursuant to article V(1)(e) of the New York Convention and article 39 of the Korean Arbitration Act. If such a motion to set aside has been filed at the place of arbitration, a Korean court has the discretion to suspend a pending enforcement action in Korea or to proceed despite the pendency of the motion to set aside in the foreign court. There are cases in which Korean courts have enforced a foreign arbitral award while a motion to set aside such award was pending in a court at the place of the arbitration.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

For arbitration agreements entered into after 1 June 2016, the KCAB International Rules provide for emergency arbitrators, and provide that the parties are bound by the emergency arbitrator's order on emergency measures, although such orders do not bind the arbitral tribunal. The amended Korean Arbitration Act only provides for recognition and enforcement of the arbitral tribunal's interim measures, and it is silent on the enforcement of emergency measures ordered by emergency arbitrators.

Since emergency arbitrators are not included in the definition of 'arbitral tribunal' under the Korean Arbitration Act, it would be difficult to enforce emergency arbitrators' interim measures through Korean courts. However, the KCAB International Rules provide that emergency arbitrators' orders shall be deemed to become interim measures granted by the arbitral tribunal when the tribunal is constituted. Therefore, emergency arbitrators' orders in arbitrations under the KCAB International Rules and seated in Seoul would be enforceable once the arbitral tribunal is constituted and the order is not modified by the arbitral tribunal.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

A claimant in a court must pay the stamp tax and service fees associated with accessing the courts, and these costs apply to a prevailing party seeking recognition and enforcement of an arbitral award. Unlike set-aside actions, enforcement actions are now simplified under the amended Korean Arbitration Act. Previously, enforcement of an arbitral award required issuance of a court judgment, but not if the Korean court's enforcement decision is issued in the form of a court order. As a result, the court fees are significantly reduced to only 1,000 won. Nonetheless, the Supreme Court has ruled in 2021 that when calculating attorney's fees to determine the litigation costs, considering the purpose of the amendment to the Arbitration Act, it is reasonable to deem that the existing article 16-1(a) of the Rules on Stamp Duties of Civil Litigation etc., which provides the method to calculate the claim amount in a case seeking a judgment enforcing an arbitral award, will apply by analogy to a case seeking decision of enforcing of an arbitral award. As a result, the cost of attorney's fees continues to be calculated based on one-half of the value of the arbitral award.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Korea is a civil law jurisdiction, and Korean arbitrators are therefore more familiar with jurisprudence and practice developed and established in civil law jurisdictions. Although an arbitral tribunal may order the disclosure of documents or examination of witnesses, and may seek the assistance of the courts in obtaining or examining such evidence, the scope of discovery in Korea is generally more limited than that of many common law jurisdictions. An arbitral tribunal has limited means to compel disclosure of documents effectively, aside from the threat

of adverse inferences and cost awards. Written witness statements are frequently used in lieu of direct witness testimony in hearings, and there are no restrictions with respect to who may be called as a witness. Officers or other representatives of the parties to the arbitration may testify at hearings or submit written witness statements. For international arbitrations in Korea, most cases are conducted in a manner consistent with the practice in other major jurisdictions, and such proceedings are thus less inclined to be influenced by local court practice and procedures.

Professional or ethical rules

54 Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There is no separate guideline or ethical rule applicable to counsel and arbitrators in international arbitration. The Korean Bar Association applies its own ethical rules to Korean-licensed lawyers pursuant to the Lawyers Act. The Foreign Legal Consultants Act regulates activities of foreign legal consultants in general. The IBA Guidelines on Party Representation in International Arbitration are yet to be reflected in the ethical rules of the Korean Bar Association. However, the KCAB has issued a Code of Ethics for Arbitrators, which must be accepted by all arbitrators appointed to hear arbitration administered by the KCAB.

Third-party funding

55 Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There is no act or regulation that specifically prohibits third-party funding. However, because there is no express regulation allowing third-party funding either, there is uncertainty as to whether third-party funding is allowed and, if so, to what extent. Depending on the particularities of the arrangement, there may be a risk that third-party funding would constitute a violation of the Korean Attorney-at-Law Act, which prohibits sharing of profits earned through legal services with any person who is not a licensed attorney-at-law.

Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There is no restriction on the appointment of foreign nationals (attorneys or otherwise) as counsel or arbitrators in international arbitration cases conducted in Korea. Article 24-2 of the Foreign Legal Consultants Act allows foreign-licensed lawyers (even if they are not registered as foreign legal consultants under the law) to practise as counsel in international arbitration cases conducted in Korea. However, these foreign-licensed lawyers are not permitted to reside in Korea for more than 90 days per year when working as counsel in international arbitration cases.

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UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

There are currently no publicly disclosed plans for amendments or legislative of any arbitration related laws, and there is no publicly disclosed effort being undertaken to revise or reform either the KCAB's Domestic or International Rules.

Korea is the respondent in currently six pending investment arbitration cases, as follows:

Mohammad Reza Dayyani, et al.	Iran–Korea BIT (2006)	UNCITRAL Arbitration Rules	15 October 2021
Fengzhen Min	China–Korea BIT (2007)	ICSID	18 July 2020
Schindler Holing AG	EFTA–Korea Investment Agreement (2006)	Permanent Court of Arbitration/ UNCITRAL Arbitration Rules	11 October 2018

Claimant	Underlying treaty	Institution/ rules	Notice of arbitration date
Mason Capital LP and Mason Management LLC	US–Korea FTA (2007)	Permanent Court of Arbitration/ UNCITRAL Arbitration Rules (1976)	13 September 2018
Elliot Associates LP	US–Korea FTA (2007)	Permanent Court of Arbitration/ UNCITRAL Arbitration Rules (2013)	12 July 2018
LSF-KEB Holdings SCA and others	Belgium–Luxembourg/ Korea BIT (1974)	ICSID	10 December 2012

There are six cases where notices of intent were filed against Korea, as follows:

Claimant	Underlying treaty	Institution/ rules	Notice of intent
Central Bank of Iran	Iran–Korea BIT (2006)	N/A	October 2021
N/A (an individual)	US–Korea FTA (2019)	N/A	7 February 2020
Won Tae Yoon	US–Korea FTA (2019)	N/A	2 January 2020
Berjaya Land Berhad	Malaysia–Korea BIT (1989)	N/A	17 July 2019
Gale Investments Co. LLC	US–Korea FTA (2019)	ICSID	20 June 2019
Young Mo Kim and Jeon Ok Lim	Canada–Korea FTA (2015)	N/A	23 May 2019 (Amended on 15 June 2020)

Spain

Alfredo Guerrero and Fernando Badenes

King & Wood Mallesons

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Spain is a contracting State of the New York Convention of 1958, which has been in force since 10 August 1977. Spain did not make any reservations or declarations.

Spain is also party to the European Convention on International Commercial Arbitration of 1961, which has been in force from 10 August 1975, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 in force from 17 September 1994, and the Energy Charter Treaty ratified on 11 December 1997 and entered into force on 16 April 1998.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Spain has 87 bilateral investment treaties in force, for instance, with most Latin and Central American countries, China, Turkey, Morocco, South Korea, Egypt, India and Iran.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Primary domestic sources in arbitration are the Spanish Arbitration Act (SAA), particular substantive law applicable to the case – including international conventions – case law produced by national courts and arbitration tribunals, and scholars.

The SAA does not generally differentiate between domestic and foreign arbitral proceedings. In fact, in its recitals it is recognised that the law has opted for a monistic system.

According to the SAA, an arbitration is considered foreign where, indistinctively:

- the parties are domiciled in different states at the time of entering the arbitration agreement;
- the place of the arbitration, the location where substantial part of the contractual obligations are fulfilled or the closest place to the dispute, is located outside the state where the parties are domiciled; or
- the relationship from which the controversy derives affects the interests of international trade.

Furthermore, an award is considered foreign when it has been rendered out of Spain (article 46.1 SAA). In terms of recognition and enforcement of foreign awards, the general legal framework to be applied is the Civil Procedure Act and the Legal Cooperation Act.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Although the SAA is based on the UNCITRAL Model Law, it (primarily) presents the following differences:

- any matters that can be freely and legally disposed of by the parties are arbitrable (article 2.1);
- in international arbitration, states (or the entities controlled by them) cannot invoke prerogatives recognised under their national law to circumvent the obligations deriving from the arbitral proceedings (article 2.2);
- arbitral proceedings are also considered foreign if they affect the interests of international trade (article 3.1.c);
- in international arbitration, arbitration agreements are valid provided that the requirements set forth in the legal rules chosen by the parties, the rules applicable to the merits of the dispute or the SAA (article 9) are met;
- the default rule is only one arbitrator (article 12);
- a particular procedure for the appointment of arbitrators in the case of several parties (article 15.2.b) is foreseen;
- if arbitrators do not confirm the appointment within the agreed period (default rule of 15 days from the nomination), it will be understood that it has been declined (article 16);
- arbitrators may incur liability in the event of bad faith, gross recklessness or wilful act (article 21); and
- arbitral proceedings are presumed confidential (article 24.2).

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The SAA gives primacy to party autonomy. Nonetheless, parties cannot deviate from due process. Article 24 states that parties shall be treated with equality and each party shall be given full opportunity to present its case.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

According to article 34 of the SAA, in international arbitration, arbitrators shall resolve the dispute following the legal rules (including non-national laws) agreed by the parties (the only limitation is public policy). Failing an agreement, arbitrators shall apply those rules that they deem appropriate, considering that any reference to national laws (save any agreement otherwise) excludes conflict of laws rules. Therefore, both the parties and arbitrators are given a high degree of flexibility and freedom in this sense, under the SAA.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

Some of the most prominent Spanish arbitral institutions are as follows:

Civil and Commercial Court of Arbitration (CIMA)
Calle Jorge Juan, No. 8 (2nd floor)
28001 Madrid
www.arbitrajecima.com

Madrid Court of Arbitration (CAM)
Calle de Las Huertas, 11 (3rd Floor)
28012 Madrid
www.arbitramadrid.com

Madrid International Arbitration Centre (CIAM)
Calle de las Huertas, 13
28012 Madrid
www.madridarb.com

Both CIMA and CAM utilise the assistance of lists of arbitrators and tariffs to fix the fees. CIAM does not have a specific list of arbitrators, although it has tariffs to fix the fees of the arbitrators and CIAM.

Both CIMA and CIAM rules foresee the possibility of challenging the validity of the award before the arbitral institution (based on limited grounds and provided that it is expressly agreed by the parties), and CAM and CIAM rules provide a summary procedure.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

The Spanish Arbitration Act (SAA) favours arbitrability. In fact, it provides that any matters that can be freely and legally disposed of by the parties can be submitted to arbitration (article 2). This is a clear demonstration in favour of arbitration, following the premises of the Model Law and taking non-arbitrability as an exception.

In addition, the possibility to submit intra-company disputes to arbitration is expressly recognised in article 11-bis. Moreover, securities transactions are considered as arbitrable, and Spanish case law has recognised the arbitrability of subjective rights related to competition law (judgment of the Madrid Appeal Court, 25 September 2015).

Notwithstanding, some matters remain non-arbitrable, such as family law issues, the civil status and capacity of individuals, criminal liability, insolvency procedure and, in general, matters related to public policy. Further, there is still a reluctance to admit the arbitrability of tax disputes, and the SAA excludes labour disputes from its scope (article 1).

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The SAA sets forth the requirements of arbitration agreements (without determining any particularities for public entities).

According to article 9, an arbitration agreement shall be in writing, in a document signed by the parties or an exchange of letters, telegrams, telexes, faxes or other telecommunication methods (including electronic) that ensure a record of the agreement is kept. Additionally, where an arbitration agreement is accessible for subsequent reference on electronic, optical or other media, it will be regarded as compliant with this requisite.

When construing these requirements, the Spanish Supreme Court has concluded that conclusive facts can evidence the consent to submit a dispute to arbitration even if the agreement is only signed by one party (judgment 24 November 1998), and that apart from formal requirements attention shall be paid to the willingness of the parties (judgment 9 May 2003).

In this vein, for instance, as stated in article 9, tacit consent is accepted when there is an exchange of statements of claim and defence and the existence of the arbitration agreement is alleged by one party and not denied by the other.

Lastly, pursuant to article 9.2, arbitration agreements can be contained in adhesion contracts. Their validity and interpretation will be governed by the rules applicable to such contracts. In particular, arbitration agreements signed by consumers, under certain circumstances, are not binding for them as it is set forth under the General Consumer and User Protection Act of 16 November 2007.

In any case, it is strongly recommended to use standard clauses provided by the various arbitration courts (for instance, Civil and Commercial Court of Arbitration (CIMA), Madrid Court of Arbitration (CAM) or Madrid International Arbitration Centre (CIAM)), to avoid any doubt about the willingness of the parties to submit all disputes to arbitration or any omission in the arbitration clause.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

If the parties expressly submit the dispute to a particular individual who subsequently dies or is declared unable to perform his or her duties, the validity of the arbitration agreement could be jeopardised (judgment of the Superior Court of Justice of Castilla y La Mancha, 25 September 2013).

Additionally, although according to the Spanish Insolvency Act, the mere declaration of insolvency does not affect the validity of arbitration agreements, if the court considers that they could prejudice the course of insolvency proceedings, then it can stay the effects of the arbitration agreement.

The parties may of course agree on the termination of the arbitration agreement or they can just enter into a new agreement that overrides (tacitly or expressly) the previous one.

Moreover, please note that an arbitration clause may be considered not valid (and therefore, non-enforceable) if the willingness of the parties to submit to arbitration is not clear enough (judgment of the Constitutional Court, 2 December 2010, and of the Supreme Court, 27 June 2017).

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The SAA provides that the arbitration agreements must be considered a separate and independent agreement from the underlying contract. Therefore, they are not affected by the fate of the latter.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under the SAA, signature is not essential to confirm the consent to submit a dispute to arbitration.

Having said that, the SAA in article 11-bis allows the inclusion of an arbitration agreement in the articles of association for inter-company disputes if a qualified majority of two-thirds of the shareholders votes in favour. If so, those shareholders who have not voted in favour would nonetheless be bound by the arbitration agreement.

Additionally, in certain limited circumstances, Spanish case law has extended its effects to non-signatory parties. For instance:

- in case of assignment of a contract that contains an arbitration agreement, it is generally accepted that the latter is transmitted to the assignee (judgment of the Madrid Appeal Court, 18 February 2002);
- the same outcome is achieved in cases of succession, including mergers and acquisitions, and contractual subrogation (judgment of the Madrid Appeal Court, 26 October 2010); and
- with regard to mandate contracts, representation is recognised, and, therefore, an agent can bind the principal if he or she has enough power to do it (judgment of the Madrid Appeal Court, 16 January 2006).

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The SAA does not contain any special rule on joinder or notice to third parties. Thus, third-party participation will depend upon the arbitration rules chosen by the parties. The interest of the joinder of third parties for the parties initially involved in the arbitration will have to be assessed on a case-by-case basis.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Spanish case law extends the effects of an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that certain requirements are met. The Superior Court of Justice of Valencia has set forth, in its judgments dated 19 November 2014 and 5 May 2015, that the essential elements to be considered are as follows:

- the existence of a group of companies: paying attention to European legislation;
- effective participation of the non-signatory: in relation to the dispute and regardless of the stage in which participation took place; and
- application to the facts of a legal doctrine: among others, the estoppel or the piercing of the corporate veil.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The SAA does not have any special provision on the validity of multiparty arbitration agreements. It merely provides an arbitrator's appointment procedure in case of several parties.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The SAA does not have any special provision on consolidation of separate arbitral proceedings. Thus, the consolidation of separate arbitral proceedings will depend upon the arbitration rules chosen by the parties.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Any individual in full possession of his or her civil rights may be an arbitrator, provided that he or she is not barred from it by his or her professional rules. Unless otherwise agreed by the parties, nationality shall not be an impediment to act as an arbitrator (article 13 Spanish Arbitration Act (SAA)), and neither shall be religion or gender.

Nonetheless, for arbitrations in which only one arbitrator is appointed, the arbitrator shall be a jurist (unless the parties have agreed otherwise or in ex aequo et bono arbitrations). Equally, when arbitration is to be conducted by three or more arbitrators, at least one of them shall be a jurist.

For instance, lawyers, public notaries, scholars or ex judges can be appointed as arbitrators (the SAA does not require a minimum experience).

Conversely, active judges, magistrates and public prosecutors cannot be appointed as arbitrators, nor the person who has been previously appointed as the mediator in the dispute, save agreement on the contrary by the parties (article 17.4 SAA). Further, if it is an institutional arbitration, the organisation shall be capable of conducting the arbitrations (judgment of the Superior Court of Justice of Galicia, 24 July 2014), and an internal body of one of the parties is ineligible (ruling of the Barcelona Appeal Court, 28 September 2012).

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

In general terms, in most of the cases, practising lawyers tend to sit as arbitrators.

Having said that, there is a tendency to provide more diversity. In particular, gender diversity. This is actually supported by institutions and also by private practitioners. At an institutional level, for instance, the Club Español del Arbitraje (CEA) established in 2017 a special section particularly dedicated to women: CEA Mujeres.

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The default rule is to appoint only one arbitrator.

Regarding the procedure, failing an agreement, article 15 of the SAA foresees an appointment procedure depending on the number of arbitrators:

- in the case of a sole arbitrator, he or she will be appointed by the competent court upon request of the interested party;
- in the case of an arbitral panel of three arbitrators, each party shall appoint one, and then two arbitrators appointed shall choose the chair. If a party does not appoint an arbitrator within 30 days of a request, appointment will be made by the competent court,

upon request of the interested party. The same procedure will be followed in case the two appointed arbitrators do not reach an agreement as to the chair within 30 days of the last acceptance. When there are several claimants and respondents, each group shall appoint one arbitrator. Failing an agreement, all the arbitrators will be appointed by the competent court upon request of the interested party; and

- when arbitration is to be conducted by more than three arbitrators, all of them shall be appointed by the competent court upon request of the interested party.

In those cases where appointment shall be carried out by national courts, they will provide a list of three candidates for each arbitrator (taking into consideration any requirements agreed by the parties and trying to assure independence and impartiality). Appointment will take place by drawing lots, and it is not possible to challenge the final decision.

Lastly, similar appointment rules (although with different terms and specific appointment rules) apply for Civil and Commercial Court of Arbitration (CIMA), Madrid Court of Arbitration (CAM) and Madrid International Arbitration Centre (CIAM), although reference to the court should be substituted by the arbitral institution.

Challenge and replacement of arbitrators

20 | On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Arbitrators shall be and maintain themselves as impartial and independent throughout the whole procedure, being barred from having personal, professional or commercial relationships with the parties. In fact, arbitrators are under the obligation to disclose any circumstances that may affect their impartiality or independence (article 17 SAA). In this sense, there is a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration (judgment of the Superior Court of Justice of Madrid, 4 November 2016), as well as the recommendations published by the CEA (judgment of the Superior Court of Justice of Madrid, 4 May 2017).

Notwithstanding, being independent and impartial should not be compared with not incurring in any of the abstention or recusal causes provided for the judges and magistrates foreseen in the Spanish Organic Law of the Judicial Power (judgment of the Superior Court of Asturias, 25 April 2017). An arbitrator may only be challenged if there are grounded doubts concerning partiality or independence or if he or she does not hold the qualifications agreed by the parties.

Challenge proceedings can be agreed by the parties. Failing such agreement, arbitrators will hear the challenge, which shall be filed within 15 days of the interested party being aware of the acceptance by the arbitrator or of the circumstances that would ground the challenge. If the challenge is not upheld, the decision cannot be appealed, although the interested party could reiterate the arguments within the eventual challenge proceedings of the award.

Lastly, if the arbitrator is legally or de facto impeded because of any circumstance (eg, illness or declaration of disability) in properly conducting the arbitration, he or she shall cease performance of arbitrator duties, unless there is a disagreement as to whether the arbitrator is impeded. In these cases, the competent authority to hear the challenge, failing any agreement, would be the court (in cases of a sole arbitrator) or the arbitrators not affected (in the case of arbitral tribunals).

Relationship between parties and arbitrators

21 | What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Once arbitrators accept the appointment, they shall faithfully fulfil the mandate given by the parties, with independency and impartiality. This relationship is equivalent to a mandate contract.

In institutional arbitral proceedings, remuneration is based on tariffs and it is paid (as well as the expenses) by both parties equally, save any agreement otherwise or an eventual condemnation in costs.

Although the SAA does not govern communications between arbitrators and parties, it also imposes the obligation to communicate to the counterparty any writs and documents filed for the arbitrators. Additionally, unilateral communications would be prohibited based on the obligation of the arbitrators to be impartial and independent and to treat the parties equally, which is in line with the CEA published recommendations on the independence and impartiality of arbitrators.

The above is regardless of whether an arbitrator has been appointed by a party, court or arbitral institution.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

According to the SAA, the proposed arbitrators are required to disclose any circumstances that may affect their impartiality or independence, before accepting the position. Once the arbitrators are elected, they remain obligated to disclose any new circumstances that may occur.

Immunity of arbitrators from liability

23 | To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are not immune from liability (nor are arbitral institutions). In fact, according to article 21 of the SAA, arbitrators may incur in liability in case of bad faith, gross recklessness or wilful default. Thus, arbitrators will only incur in liability in those cases where damage is intentionally caused or when they have acted with gross negligence or recklessness (judgments of the Supreme Court of 22 June 2009 and 15 February 2017). Liability can be either civil or criminal.

Although with some caveats, Spanish case law has recognised that the procedure to be followed is similar to the one foreseen for judges and magistrates (judgment of the Seville Appeal Court, 30 April 2010).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 | What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

When a valid arbitration agreement has been entered into, parties are barred from filing a claim at national courts (positive effect) and national courts are prevented from hearing them (negative effect).

However, negative effect is not automatic (further, no anti-suit injunctions are foreseen). Accordingly, a party shall challenge the jurisdiction of national courts within 10 days of those provided to file the answer to the claim (staying the legal period to file the said answer), against which an opposition could be filed within five days of its

notification. An appeal could be filed in case the court denies its jurisdiction. Otherwise, it would only be possible to file a challenge before the same court.

Challenge over jurisdiction does not impede commencement or continuation of arbitral proceedings (article 11 Spanish Arbitration Act (SAA)). If no challenge to jurisdiction is filed, it would be considered as a tacit waive to arbitration.

Lastly, it shall be stressed that the Spanish Supreme Court has embraced the soft application of the Kompetenz-Kompetenz principle, confirming that national courts are fully empowered to carry out a full review of the case whenever jurisdiction is challenged (judgment 27 June 2017).

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

Article 22 of the SAA confirms the application of the Kompetenz–Kompetenz principle (as expressly admitted in its recitals, and despite the Supreme Court judgment that has embraced the soft application of this principle). Hence, arbitrators are also competent to rule on jurisdiction (either through a partial or final award), even in those situations where the validity or existence of the arbitration agreement itself is challenged.

These claims shall be made when filing the statement of defence at the latest. The fact of having participated in the appointment of the arbitrator does not bar from filing it. The claim grounded on the fact that the dispute falls out the jurisdiction of the arbitrator shall be made as soon as practicable during arbitral proceedings.

In particular, Civil and Commercial Court of Arbitration (CIMA) rules stipulate that the objection to the jurisdiction of the arbitral tribunal shall be raised no later than at the time of filing the response to the request for arbitration. And, where the objection relates to any matter arising from the filing of the counterclaim, at the time of response to the notice of counterclaim. Madrid Court of Arbitration (CAM) and Madrid International Arbitration Centre (CIAM) rules, as the SAA, allow the parties to object the jurisdiction later, in the statement of defence.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Pursuant to articles 26 and 28 of the Spanish Arbitration Act (SAA), when no agreement exists, arbitrators shall determine the place and language of arbitration, taking into consideration all the circumstances of the case. Further, when from the said circumstances a particular language cannot be agreed upon, arbitration will be conducted in any of the official languages of the place of the proceedings.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Unless otherwise agreed, arbitration commences on the date upon which the notice of arbitration is served on the respondent (article 27 SAA).

Although the SAA does not develop the requirements of the notice of arbitration, Civil and Commercial Court of Arbitration (CIMA), Madrid Court of Arbitration (CAM) and Madrid International Arbitration Centre (CIAM) rules does stipulate certain information and documentation that must be included in the request for arbitration, in a similar wording. For example, CAM rules states the following:

- the notice for arbitration shall include:
  - the arbitration agreement;
  - the parties involved in the arbitration and the claimant's counsel (name, address and other relevant particulars to identify and contact them);
  - a description of the controversy and the reliefs sought;
  - the act, contract or legal transaction from which the dispute arises; and
  - any comments as to the arbitrators (as a proposal to the number, the language or the place of arbitration) and, if the arbitration agreement already provides for the appointment of three members, the designation of the one arbitrator that the claimant is entitled to appoint, the law applicable to the merits of the dispute, evidence of the payment of the provision of funds, etc; and
- the applicant shall submit a digital copy, and copies for the institution, each party involved and the arbitrators.

Hearing

28 | Is a hearing required and what rules apply?

Parties are free to decide on the particularities of arbitral proceedings (article 25 SAA). Failing such agreement, arbitrators may decide as they deem appropriate.

Additionally, failing any agreement otherwise, arbitrators shall decide on whether hearings take place (to make any pleas, take evidence or make conclusions). In practice, conclusions are in writing and, although it is not common, it is possible to not schedule any hearings (unless the parties refuse, arbitrators generally fix hearings).

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Any evidence legally taken or obtained is admitted, upon which the facts of the controversy will be established. The SAA is based on the premise that parties can agree on the particular procedure. In practice, guidance is sought (particularly in international arbitration) from the IBA Rules on the Taking of Evidence.

Failing any agreement, parties should file all available documents and expert reports along with their corresponding statements. Under Spanish law neither disclosure nor discovery is recognised although the parties could agree otherwise. Party-appointed experts are more common than tribunal-appointed ones.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

The SAA states that, save in those cases where it is expressly foreseen, national courts shall not intervene (article 7).

Intervention is foreseen for the appointment or challenge of arbitrators (articles 15.3 and 19.1.a), the taking of evidence (article 33), application for interim measures (article 11.3), challenge of the validity of the award (article 40 et seq) or its enforcement (article 45).

Confidentiality

31 | Is confidentiality ensured?

According to article 24 of the SAA, arbitrators, the parties and the arbitral institutions shall keep confidential any information received on occasion of the arbitration, including the award. Confidentiality is considered as a cornerstone of arbitration.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Both national courts and arbitrators are competent to order interim measures (articles 11 and 23 Spanish Arbitration Act (SAA)). According to article 11.3, interim measures can be requested to national courts by any party either before the commencement or during arbitration proceedings.

This dual system is considered by the recitals of the SAA as alternative. Therefore, parties are free to choose to address its application to either arbitrators or courts.

Available interim measures are listed in articles 726 and 727 of the Spanish Civil Procedure Code (SCPC), which is an open list. Courts will uphold an application for interim measures if security is provided and the following are evidenced:

- bonus fumus iuris;
- periculum in mora; and
- proportionality.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The SAA does not govern emergency arbitrators. Conversely, the Civil and Commercial Court of Arbitration (CIMA), Madrid Court of Arbitration (CAM) and Madrid International Arbitration Centre (CIAM) rules expressly foresee particular proceedings for the appointment of an emergency arbitrator to adopt interim measures.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

An arbitral tribunal may order any of the interim measures listed in the SCPC after it is constituted. Among them are interim freezing orders, appointment of a receiver, an order to cease a certain activity or to refrain from a particular behaviour, etc. As expressly stated in the SAA, arbitrators may (ie, it is a matter of discretion) request the applicant to provide security.

Notwithstanding this, if the affected party decides not to comply with the interim measure ordered by the arbitrators, the latter will have to seek judicial assistance for the enforcement of the interim measure.

Finally, it is not yet common for arbitrators in domestic arbitration proceedings to order security for costs – being mostly applied in practice in international investment arbitration proceedings.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Regarding the party, the only sanction that can be imposed as a result of this tactics is the condemnation in costs. In particular, the arbitral decision to condemn in costs to a party may be founded, among others, under the principle of good faith that all person participating in the arbitration proceedings shall embrace.

Moreover, as regards the counsels of the parties, there are certain ethical rules for those who are qualified in Spain (such as the Spanish and European code of conduct for lawyers or the Spanish Statute of the Practice of Law), and reference is also made to the IBA and Club Español del Arbitraje recommendations in this regard, which are aligned. The infringement of these rules can be sanctioned by the corresponding Bar Association pertaining to the counsel with the prohibition to act either before court or arbitration proceedings or even with the exclusion from the Bar.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Pursuant to article 35 of the Spanish Arbitration Act (SAA), it is sufficient if the decision is adopted by the majority, unless the parties have agreed otherwise. If it is not possible, the chair will decide.

The arbitrator who does not agree with the majority can freely dissent. Although they would not affect the validity or effectiveness of the award, dissenting opinions are used in subsequent challenge of awards proceedings.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

If any arbitrator does not agree with the sense of the award, he or she may explain the reasons (article 37.3 SAA).

Although no guidelines are provided as to how to express them, dissenting opinions are generally used when arbitrators disagree with the opinion reached. Dissenting opinions will not benefit from the legal effects of the award, the effectiveness of which will not be affected.

Form and content requirements

38 | What form and content requirements exist for an award?

Pursuant to article 37 of the SAA, awards shall be rendered in writing (electronic means are accepted), dated, expressing the venue of the arbitration and signed by the arbitrators, who may express their favouring or dissenting opinion. For arbitral tribunals, it is enough if it is signed by the majority or even just the chair, provided that reasons are given justifying the lack of the absent signatures.

The above does not justify in any event the exclusion of a dissenting arbitrator from the decision-making process, since otherwise liability could be imposed to the arbitrators (judgment of the Supreme Court, 15 February 2017).

Further, the award shall always be reasoned, unless it is an award by consent.

Time limit for award

39 Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Unless otherwise agreed, according to article 37 of the SAA, arbitrators have six months from the date when the statement of defence is or should have been filed to render the award, and it can be extended by the arbitrators for no more than two months by means of a reasoned decision.

The Civil and Commercial Court of Arbitration (CIMA) and Madrid Court of Arbitration (CAM) rules on arbitration echo the SAA. The Madrid International Arbitration Centre (CIAM) rules provides a general three-month term to issue the award after the issuance of the parties' writs of conclusions. In particular, the CAM and CIAM rules expressly allow the extension of the term to submit the award, by agreement of all parties, as many times and for the time limit they consider convenient.

Date of award

40 For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The award is effective and binding on the parties from the date it is served. This date also marks the beginning of the term in which the parties may challenge the award before a tribunal.

Types of awards

41 What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under the SAA, final and partial awards are possible, as well as consent awards (article 36). Further, the award can condemn a party, declare any rights or create, modify or extinguish any rights or obligations.

Termination of proceedings

42 By what other means than an award can proceedings be terminated?

Aside from the award, arbitration proceedings terminate when:

- the claimant has withdrawn, save the defendant refuses and arbitrators recognise to the latter a legitimate interest to continue with the arbitration proceedings;
- parties agree on the termination; or
- arbitrators verify that proceedings have become unnecessary or impossible (article 38.2 SAA).

The mere default does not imply termination of the proceedings, unless it is the claimant who does not file the statement of claim in time, without explaining such behaviour. In this case (failing an agreement otherwise), proceedings will be considered as terminated, save if the defendant shows an interest in making any plea (article 31 SAA).

Cost allocation and recovery

43 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

As stated in article 37.6 of the SAA, arbitrators shall decide on the allocation of the costs. However (conversely to domestic litigation), there is no imperative imposition of criteria to be followed. Therefore, failing an agreement of the parties, it is left to the discretion of the arbitrator.

The SAA expressly includes as costs:

- the fees and costs of the arbitrators;
- fees of the legal counsels;
- the costs of the arbitral institution; and
- any other cost originating from the proceedings (thus, including experts).

Interest

44 May interest be awarded for principal claims and for costs, and at what rate?

Interest is allowed under Spanish law. As to the principal amount, it will include the interest agreed by the parties or, failing such agreement, the legal interest rate published in the Official Gazette or the interest rate foreseen in the Spanish Act 3/2004, 29 December, combating late payment in commercial transactions, that applies to certain commercial transactions.

Once the award is rendered and until it is fully complied with, the interest resulting from adding two points to the legal interest rate will be included, unless the parties have agreed otherwise or any substantive law applicable to the arbitration proceedings provides a different interest rate.

Costs do not accrue interest. However, if a party is obliged to trigger enforcement proceedings, the Spanish Civil Procedure Code foresees a provisional increase of 30 per cent of the amount for which enforcement is sought by way of interest and costs of the enforcement proceedings.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

According to article 39 of the Spanish Arbitration Act (SAA), any party may apply, within 10 days of the notification of the award (unless any other time limit has been agreed), to:

- correct any calculation, copies, typographical or similar mistakes;
- clarify part of the award;
- supplement the reliefs sought that were not addressed; and
- rectify partial exceedances, when it has decided on non-arbitrable differences or on those that were not submitted to arbitration.

Arbitrators on their own can only proceed to correct calculation, copies, typographical or similar mistakes, within the time limit of 10 days from the date when the award was signed.

Notwithstanding, the above-mentioned time limits are extended to one month for international arbitrations.

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

The only possible grounds are expressly listed in article 41 of the SAA, which echoes article V of the New York Convention. In essence, an award could only be set aside if it is evidenced that:

- the arbitration agreement does not exist or it is not valid;
- appointment of the arbitrator or arbitral proceedings have not been properly notified or, for any reasons, a party has been impeded from presenting its case;
- arbitrators have decided on differences not contemplated by, or not falling within, the terms of the submission to arbitration;
- the appointment of arbitrators or the arbitral procedure was not in accordance with the agreement of the parties (unless the

agreement was against public policy) or, failing such agreement, was not in accordance with the SAA;
- the subject matter of the difference is not capable of settlement by arbitration; or
- the award is contrary to public policy.

The application to set aside shall be brought before the Superior Court of Justice of the autonomous community in which the award is rendered (article 8.5 SAA) – within two months of the notification of the final award (ie, once, if so, the corresponding clarification, correction or supplement has been served on, or the time to do it has elapsed).

Having said that, the SAA also provides particular review proceedings for awards with res judicata effects (article 43). These proceedings are for very limited scenarios (eg, the award was based on evidence that thereupon was considered false by a criminal judge), and the procedure is governed by the Spanish Civil Procedure Code (SCPC) (article 509 et seq).

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Aside from the possibility to set aside the award based on very limited grounds, the SAA does not provide for any further appeal or challenge.

Conversely, for example, Civil and Commercial Court of Arbitration (CIMA) or Madrid International Arbitration Centre (CIAM) rules foresee the possibility of an agreed intra-arbitral challenge when there is a manifest disregard of the substantive law on which the decision is based; or when the award is based on a clearly erroneous assessment of the facts, which have been of decisive importance. These proceedings are usually promptly decided, and the costs, which are generally imposed to the losing party (unless otherwise agreed), would depend on the disputed amount.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

In relation to enforcement of domestic awards, the SAA (article 44) refers to the SCPC, save certain provisions regarding the stay, dismissal of the challenge of the award and restart of the proceedings. The SCPC considers the award as an enforceable title (ie, it can be directly enforced), governs the procedure and provides very limited grounds for opposition to the enforcement:
- the limitation period to file the enforcement claim has elapsed;
- the debtor has complied with the judgment; and
- other limited procedural grounds (for instance, the lack of capacity of the claimant).

Moreover, if the award is against Spanish public policy, it cannot be either recognised or enforced.

Article 46 of the SAA provides that recognition and enforcement of foreign awards shall be governed by the New York Convention, save any other more favourable international convention. Thus, the grounds for refusal are the same as those foreseen in the said international convention. The enforcement procedure will be the same as for domestic awards though (ie, under the SCPC).

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

The limitation period is five years as from the date the award is served (or if corrected or clarified, as from this latter date), pursuant to the SCPC (article 518).

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Spanish courts have a favourable attitude towards recognition and enforcement of foreign awards.

However, enforcement of an annulled award is disputed. In fact, there are reputable Spanish scholars who have rejected this possibility. Moreover, case law has not thoroughly addressed this particular issue, and, therefore, the outcome is uncertain.

Notwithstanding, for instance, the ruling of the first instance court of Rubí, dated 11 June 2007, which expressly recognised (referring to French cases *Hilmarton* and *Chromalloy*) the possibility of enforcing an award set aside by the courts at the place of the arbitration. Nonetheless, this possibility was envisaged assuming that, aside from the New York Convention, the European Convention on International Commercial Arbitration also applied (which is more lenient concerning enforcement of set aside awards). Additionally, it is specifically stated that, unlike the New York Convention, the annulment of an award in the state of origin does not imply as a 'necessary consequence' the impossibility of being recognised or enforced in another state.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Emergency arbitration is not governed under the SAA. However, most arbitral institution rules govern it and its enforceability is widely accepted.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Costs for the applicant directly depend upon the economic value of the award, and include the solicitors, court agents and court fees. For the other party, the SCPC also foresees a provisional increase of 30 per cent of the amount enforced.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Under Spanish law neither disclosure nor discovery is recognised although the parties could agree otherwise. Conversely, parties shall provide all available documents along with their corresponding statements.

However, this is not as stringent as it may seem. The Spanish Civil Procedure Code allows a party to trigger preliminary proceedings aimed at obtaining essential documents for the controversy from the counterparty or any third party, and the production of specific documents related to the subject matter of the dispute, or the evidence to be taken can also be requested during the proceedings.

Further, written witness statements are not usual, and party officers in most cases can only testify within the proceedings if their testimony has been requested by the counterparty (although some arbitral rules provide otherwise).

Notwithstanding, there is a tendency (particularly in international arbitration) to apply, or seek guidance from, the IBA Rules on the Taking of Evidence.

Lastly, conversely to Anglo-Saxon judicial systems, law is exclusively enacted through writing legal codes and laws. Therefore, in Spain case law is not recognised as serving the same function.

Professional or ethical rules

54 Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The Spanish Arbitration Act (SAA) does not provide any guidance as to professional or ethical behaviour, beyond the obligation for arbitrators to be and stay impartial and independent.

Nonetheless, there are certain ethical rules for those who are qualified in Spain (such as the Spanish and European code of conduct for lawyers or the Spanish Statute of the Practice of Law), and reference is also made to the IBA and Club Español del Arbitraje recommendations in this regard, which are aligned.

Third-party funding

55 Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The SAA does not govern third-party funding. However, in practice, this type of funding is becoming more used in practice (especially in international arbitration).

Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no noteworthy particularities.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Arbitration proceedings against Spain

In recent years, there have been numerous arbitration proceedings against Spain under the Energy Charter Treaty owing to several legislative reforms in the field of renewable energies. The European Court of Justice issued a judgment on 2 September 2021 in *Republic of Moldova v Komstroy*, following the sense of the previous *Achmea* judgment, where it concluded that the investor-state arbitration clause in the Energy Charter Treaty is contrary to European Law. In practice, this presents a major obstacle to the enforcement of awards against Spain within the European Union.

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Dispute over awards, scope and the concept of 'public order'

Historically, there has been an open debate in Spain among scholars and arbitration practitioners regarding the limited grounds for annulment of arbitral awards based on the Spanish Arbitration Act. This is because the Spanish high courts of justice have been inclined in their majority, during almost the entire last decade, to set them aside on the basis of a generous interpretation of the margins of public policy, which, in practice, has led to a review of the merits of a case on multiple occasions.

The Spanish Constitutional Court recently issued a series of judgments (in June 2020, and February and March 2021), which confirmed that it is impossible for tribunals to carry out an interpretation of the concept of public order that allows a review of the grounds of a case, as the only competent people to rule on them, as a result of the parties' will, are the arbitrators.

Sri Lanka

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Sri Lanka is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, having signed and ratified the Convention on 30 December 1958 and 9 April 1962, respectively. Sri Lanka has not made any declarations or notifications under articles I, X and XI of the Convention. The Convention's salient provisions were transposed into Sri Lankan municipal law by Arbitration Act No. 11 of 1995 (the Act). Sri Lanka is also party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (theICSID Convention), which it signed on 30 August 1967 and ratified on 12 October 1967. The ICSID Convention entered into force for Sri Lanka on 11 November 1967.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Sri Lanka is party to 321 bilateral investment treaties that are currently in force. It is also party to one bilateral treaty with investment provisions, namely, the Singapore–Sri Lanka Free Trade Agreement.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Act governs both international and domestic arbitral proceedings as well as the recognition and enforcement of arbitral awards. The Act does not provide a definition for 'foreign' arbitral proceedings.

However, the Act adopts the provisions set out in the New York Convention relating to the recognition and enforcement of foreign arbitral awards. For this purpose, it defines a 'foreign arbitral award' as 'an award made in an arbitration conducted outside Sri Lanka'.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

While the Act is based on the Model Law (excluding the amendments to the Model Law adopted in 2006), it also draws inspiration from the draft Swedish Arbitration Act of 1994. As a result, the Act deviates from the Model in the following important respects.

First, unlike the Model Law, the Act does not expressly define the territorial scope of its application with reference to the place of arbitration. Section 2(1) of the Act merely provides that the provisions of the Act apply to 'all arbitrations commenced in Sri Lanka after the appointed date, whether the arbitration agreement in pursuance of which such arbitration proceedings are commenced, was entered before or after the appointed date.'

Second, while the Act recognises the arbitral tribunal's competence to rule on its own jurisdiction, unlike the Model Law, it does not afford parties an opportunity to prefer an appeal to court from a negative jurisdictional ruling madeby the tribunal as a preliminary issue.

Third, while the Model Law does not regulate the fixing of costs and fees in arbitral proceedings, the Act, under section 29, deals with the manner and the extent to which the tribunal may determine and award costs and the payment of security deposits.

In addition to the above, there are also several variations in how comparable provisions in the Model Law and the Act are worded.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The Act does not expressly demarcate mandatory and non-mandatory provisions on procedure.

However, section 17 of the Act provides as follows:

> *subject to the provisions of this Act, the parties shall be free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*

Accordingly, those provisions in the Act that do not expressly provide for the parties' freedom to deviate from default procedures may be regarded as mandatory procedural provisions. These include procedures relating to the appointment of a substitute arbitrator where the mandate of an arbitrator terminates, disclosure of arbitrators' conflicts of interest, applying for interim measures of protection, applying for summonses to be issued on witnesses or relating to the production of documents, and the enforcement and setting aside of awards.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Yes. Under section 24 of the Act, the rules of law applicable to the substance of the dispute as chosen by the parties must be applied by the tribunal when deciding the dispute. Failing such designation by

the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules that it considers applicable.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The two most prominent arbitration institutions in Sri Lanka are the Sri Lankan National Arbitration Centre (SLNAC) and the Arbitration Centre established by the Institute for the Development of Commercial Law and Practice (ICLP), which is known as the ICLP Arbitration Centre.

In addition to the above, the Ceylon Chamber of Commerce (CCC) and the ICLP jointly established the CCC–ICLP ADR Centre, Sri Lanka, to provide alternative dispute resolution services including arbitration, and the Rules on Arbitration of the CCC–ICLP ADR Centre came into force on 1 April 2021.

The SLNAC was established in 1985 and is located at No. 120/7, Vidya Mawatha, Colombo 7. The SLNAC does not administer its own rules of arbitration. Rather, it facilitates the conduct of ad hoc arbitral proceedings under the UNCITRAL Rules or under the auspices of the Act, or both. Its functions are therefore limited to providing a hearing venue, interpreters and transcription services and coordinating the payment of fees, filings and correspondence between the parties and the tribunal. As a result, the SLNAC charges a lump-sum administrative fee for its services.

The ICLP Arbitration Centre, which was set up in 1996, administers its own set of rules known as the ICLP Rules, which have been in force since 29 February 1996 and were amended in April 2021. The Centre also has a set of expedited rules named the 'Rules of the ICLP Expedited Arbitrations' The Centre has its premises at 53, Ananda Coomaraswamy Mawatha, Colombo 7. At the time of writing, the amended Rules are not available online.

In addition to administering arbitrations under its own rules, the ICLP Arbitration Centre provides translation, transcription, catering and document dispatch services, as well as providing hearing venues for arbitrations.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Arbitration Act No. 11 of 1995 (the Act) does not clarify the types of disputes that are not arbitrable (or arbitrable) under its provisions.

While issues of arbitrability of IP, securities transactions and competition or antitrust disputes have not come up before the Sri Lankan courts, there are several decisions by the High Court that hold that statutory remedies of oppression and mismanagement under company law legislation cannot be referred to arbitration.

For example, in *Aitken Spence & Co v Garment Services Group Limited* (HC(Civil)/02/2003(02) and *Subramaniam and another v Mascons (Private) Limited and others* (HC(Civil) 31/2018/CO) the High Court held that it has jurisdiction to hear statutory claims of oppression and mismanagement notwithstanding parties agreeing to refer their disputes to arbitration. Conversely, the High Court in *Heung In Enterprises Company v Alumex (Pvt) Ltd and others* (CHC/06/2005(02)) dismissed claims of oppression and mismanagement for want of jurisdiction on grounds that the parties had agreed to refer their disputes to arbitration.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Section 3(1) of the Act provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Insofar as formal requirements are concerned, section 3(2) of the Act provides that arbitration agreements shall be in writing and goes on to set out that 'an agreement shall be deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement.'

Section 50 of the Act defines an arbitration agreement as 'an agreement 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'.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

Section 4 of the Act provides that any dispute that the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the matter in respect of which the arbitration agreement is entered into is contrary to public policy or is not capable of determination by arbitration.

Similarly, section 11 of the Act provides that a tribunal's competence to rule on its own jurisdiction includes deciding questions with respect to the existence or validity of the arbitration agreement or as to whether the agreement is to public policy or is incapable of being performed.

In the case of *Hotel Galaxy (Pvt) Ltd v Mercantile Hotels Management Ltd* (SC Appeals 26/85 and 27/85), the Supreme Court held that an arbitration clause is not displaced or abrogated by repudiatory breaches of the contract unless the contract itself or arbitration clause itself is invalid or not binding on the parties or the parties have waived it or are estopped from relying upon it. Similarly, in *Elgitread Lanka (Private) Limited v Bino Tyres (Private) Limited* (SC (Appeal) No. 106/08), the Supreme Court held that a mere misidentification or misdescription of an arbitral institution in an arbitration agreement does not necessarily invalidate it.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Yes. Section 12 of the Act provides that an arbitration agreement that forms part of another agreement shall be deemed to constitute a separate agreement when ruling upon its validity.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

Such instances have not been set out under the Act or considered in any judicial precedent relating to arbitration.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Act does not provide for joinder of third parties or third-party notice provisions.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The 'group of companies' doctrine has not been recognised in Sri Lanka.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The Act does not specifically provide for multiparty arbitration agreements. There is also no judicial precedent in Sri Lanka on the enforceability of multiparty arbitration agreements or the procedural issues that arise as a result.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Act does not specifically provide for the consolidation of separate arbitration proceedings.

However, in practice, tribunals often do consolidate separate arbitral proceedings with the consent of all parties where (1) the parties are identical; (2) the tribunal is the same; and (3) the disputes referred to arbitration are in some way connected.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

As a general matter, there are no restrictions as to who may act as an arbitrator. Sri Lankan courts often recognise contractually agreed criteria in the appointment of arbitrators. While retired judges often sit as arbitrators in arbitral proceedings, active judges do not.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

While retired judges often sit as arbitrators, this trend is now changing where practising lawyers are increasingly appointed to arbitral tribunals.

In the case of disputes requiring particular technical expertise, such as those arising from engineering and construction contracts, other professionals such as civil engineers and quantity surveyors are regularly appointed as arbitrators.

There is no tendency or particular initiatives by arbitral institutions or the legal community to promote gender or other forms of diversity when making arbitral appointments. That being said, women, in particular retired female judges, are regularly appointed as arbitrators.

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Where the parties have not agreed on the procedure for appointing arbitrators, section 7(2) of Arbitration Act No. 11 of 1995 (the Act) provides that in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, that arbitrator shall be appointed on the application of a party by the High Court.

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 the arbitrator within 60 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 60 days of their appointment, the appointment shall be made upon the application of a party, by the High Court.

The Institute for the Development of Commercial Law and Practice (ICLP) Rules provide broadly for a similar procedure as above, except that any appointments the parties or their respective nominee-arbitrators cannot agree on will be made by the board of the ICLP.

Challenge and replacement of arbitrators

20 | On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Under section 8(1) of the Act, the mandate of an arbitrator will terminate in the following circumstances:

- the arbitrator becomes unable to perform the functions of the office;
- the arbitrator dies;
- the arbitrator for any other reason fails to act without undue delay; or
- the arbitrator withdraws from office.

Where an arbitrator unduly delays in discharging the duties of his or her office, the High Court may, upon the application of a party, remove the arbitrator and appoint another arbitrator in his or her place, unless the parties have agreed for an arbitral institution to make the removal or appointment.

Under section 10 of the Act, arbitrators may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence. The procedure for making a challenge in such circumstances is to make an application to the arbitral tribunal within 30 days of the party becoming aware of the circumstances that gave rise to such doubts. If the parties have agreed that the decision on such challenges must be made by any other person (including an arbitral institution), the challenge must be referred to that person. Where the party making the challenge is dissatisfied with the arbitral tribunal's decision thereon, it may appeal the decision to the High Court within 30 days.

When deciding on issues of bias, arbitral tribunals and courts will consider the IBA Guidelines on Conflicts of Interest in International Arbitration as persuasive.

Relationship between parties and arbitrators

21 | What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The relationship between parties and arbitrators is not expressly set out under the Act.

That being said, the compensation of arbitrators to be borne by the parties is decided by the arbitral tribunal in terms of section 29 of the Act. Section 29(1) further provides that 'the parties shall be jointly and severally liable for the payment of reasonable compensation to the arbitrators . . . for their work and disbursements'.

Section 30 of the Act provides that an arbitral tribunal shall not withhold delivering its award pending the payment of the compensation due to them.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

An arbitrator is obliged to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence at the time of being requested to accept appointment, and should, from the time of his or her appointment and throughout the arbitral proceedings, disclose without delay any new circumstances to all the parties and to the other arbitrators.

Immunity of arbitrators from liability

23 | To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Section 45 of the Act provides that an arbitrator shall not be liable for negligence in respect of anything done or not done by him or her in the capacity of arbitrator. However, arbitrators are liable for fraud in respect of anything done or not done in that capacity.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 | What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Section 5 of Arbitration Act No. 11 of 1995 (the Act) provides that 'where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration . . . the court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction.'

As such, a party must raise an objection to the court exercising jurisdiction, in the event it wishes to refer the dispute to arbitration. This must be done at the first available opportunity after the commencement of the court proceedings.

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

While the Act recognises the arbitral tribunal's competence to rule on its own jurisdiction, it does not afford parties an opportunity to prefer an appeal to court from a negative jurisdictional ruling made by the tribunal as a preliminary issue.

Instead, section 11 of the Act provides parties who wish to raise a jurisdictional challenge with the options of either raising it with the tribunal or with the High Court. This was clarified by the High Court in the case of *Mahawaduge Priyanga Lakshitha Prasad Perera v China National Technical Imports & Export Corporation* (HC/210/2014/ARB).

Therefore, under the Act, an arbitral tribunal is competent to finally rule on its own jurisdiction only insofar as the parties raise the jurisdictional objection before the tribunal and not before the High Court.

Parties may be precluded from raising jurisdictional objections if such objections are not raised in a timely manner.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Failing any agreement by the parties on the issue, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

Arbitration Act No. 11 of 1995 (the Act) does not provide any rules regarding the determination of the language of arbitration. However, any choice made by the parties in this regard is usually upheld by tribunals.

Under the Act, the rules of law applicable to the substance of the dispute as chosen by the parties must be applied by the tribunal when deciding the dispute. Failing such designation by the parties, the tribunal must apply the law determined by the conflict of laws rules that it considers applicable.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Under the Act, an arbitration is deemed to have been commenced if a dispute to which the relevant arbitration agreement applies has arisen and a party to the agreement (1) has received from another party to the agreement a notice requiring that party to refer, or to concur in the reference of, the dispute to arbitration; or (2) has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join, concur in or approve the appointment of an arbitral tribunal in relation to the dispute. The Act does not prescribe any formal requirements that a notice of arbitration must satisfy.

Arbitral proceedings are commenced under the Institute for the Development of Commercial Law and Practice (ICLP) Rules by filing a request for resolution by arbitration with the ICLP Arbitration Centre.

Hearing

28 | Is a hearing required and what rules apply?

The Act does not mandate that a hearing must be held. The parties are, accordingly, free to agree on whether or not they wish to hold a hearing in their arbitration, subject to the views of the tribunal.

In this regard, section 15(2) provides that 'the arbitral tribunal may, at the request of a party, have an oral hearing before determining any question before it.'

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Section 22 of the Act provides that subject to any contrary agreement by the parties, evidence before the arbitral tribunal may be given orally, in writing or by affidavit. Section 22(3) provides that an arbitral tribunal in conducting proceedings shall not be bound by the provisions of the Evidence Ordinance, unless the parties have agreed otherwise.

Parties usually use fact and party-appointed expert witnesses (including party representatives) to lead evidence, and tribunals are generally guided by principles of materiality, relevance and issues of credibility and authenticity when admitting and evaluating evidence.

The IBA Rules on the Taking of Evidence in International Arbitration are generally used as a guide by parties and tribunals in international arbitrations conducted in Sri Lanka.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Parties may, with the prior sanction or consent of the arbitral tribunal, seek assistance from court where any person not a party to the arbitration agreement:

- refuses or fails to attend before the arbitral tribunal for examination when required under summons or by the arbitral tribunal to do so;
- appearing as a witness before the arbitral tribunal:
  - refuses or fails to take an oath or make an affirmation or affidavit when required by the arbitral tribunal to do so;
  - refuses or fails to answer a question that the witness is required by the arbitral tribunal to answer; or
  - refuses or fails to produce a document that he or she is required under summons or by the arbitral tribunal to produce; or
- refuses or fails to do any other thing that the arbitral tribunal may require.

Parties may also, with prior consent in writing of the arbitral tribunal, apply to the High Court for summons requiring a person to attend for examination before the tribunal and to produce to the tribunal any document or thing specified in the summons.

Confidentiality

31 | Is confidentiality ensured?

Although the Act does not regulate the issue of confidentiality, it is generally accepted by parties and tribunals that proceedings conducted before the arbitral tribunal are confidential. Awards and other relevant material produced before the tribunal are generally filed in enforcement and set-aside proceedings and form part of the public court record thereafter.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Courts may order interim measures prior to the arbitral tribunal being constituted to maintain the status quo. This was decided in *Backson Textile Industries Limited v Hybro Industries Limited* (CA/LA/51/97).

During the arbitration, courts may issue summons requiring a person to attend for examination before the tribunal and to produce to the tribunal any document or thing specified in the summons.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither Arbitration Act No. 11 of 1995 (the Act) nor the Institute for the Development of Commercial Law and Practice (ICLP) Rules provide for an emergency arbitrator.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under the Act, an arbitral tribunal may order a party to take such interim measures as it may consider necessary to protect or secure the claim that forms the subject matter of the dispute.

Security for cost applications is seldom made before arbitral tribunals and the Act does not provide for any express rules in this regard.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

No such provisions or rules exist under the Act or the ICLP Rules.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

An award may be made by a majority of the arbitrators of the arbitral tribunal. As such, a dissent bears no legal consequences upon the validity of the award and any such award made is final and binding on the parties to the arbitration agreement.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Arbitration Act No. 11 of 1995 (the Act) is silent on dissenting opinions.

Form and content requirements

38 | What form and content requirements exist for an award?

Section 25 of the Act sets out the following form and content requirements for an award:

- it shall be made in writing and shall be signed by the arbitrators constituting the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated;
- it 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; and
- it shall state its date and place of arbitration as determined in accordance with section 16.

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

There is no such time limit set out under the Act.

However, Rule 25 of the Institute for the Development of Commercial Law and Practice (ICLP) Rules provide that '[a]n award shall be made not later than one year after the case has been referred to the Arbitral Tribunal. At the request of the Arbitral Tribunal, the Board may, however, if appropriate extend this period.'

Date of award

40 For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of receipt of the award by the relevant party is relevant for the time limit applicable for the correction and interpretation of the award under section 27 of the Act and for making an application to set aside the Award under section 32 of the Act.

The date of the award is decisive for the time limit to enforce an award under section 31(1) of the Act.

Types of awards

41 What types of awards are possible and what types of relief may the arbitral tribunal grant?

The Act defines an award as a decision of the arbitral tribunal on the substance of the dispute. Subject to this qualification, the Act does not expressly provide for partial, final or interim awards. However, there is nothing in the Act that prevents a tribunal from making such awards.

The Act, however, does provide for a settlement entered into by the parties to be recorded in the form of an arbitral award on agreed terms, under section 14.

Termination of proceedings

42 By what other means than an award can proceedings be terminated?

Proceedings may be terminated by the parties' consent or in the event a settlement is reached.

Furthermore, where there has been undue delay by a claimant in instituting or prosecuting a claim, then, on the application of any party to the dispute, the tribunal may make an order terminating the arbitration proceedings.

The tribunal may terminate proceedings also where none of the parties pay the deposit of security ordered by the tribunal, within the period specified in the order.

Cost allocation and recovery

43 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The manner in which the costs of arbitral proceedings are allocated depends on the parties' appetite to recover costs and the tribunal's own experience with regard to determining issues relating to the allocation of costs. Since domestic court proceedings rarely provide for the recovery of costs that are actually incurred by parties, substantial cost awards are not frequently made in domestic arbitration proceedings.

That being said, in principle, there is no limitation on the type and extent of costs that may be recovered by a party to an arbitration proceeding insofar as these can be established as being reasonable.

Interest

44 May interest be awarded for principal claims and for costs, and at what rate?

Interest may be awarded for principal claims and for costs. In the absence of any rate determined by the parties in their arbitration agreement, the legal interest rate in force in Sri Lanka will apply.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Yes. A party must apply for the correction or interpretation within 14 days of the receipt of the award, unless the parties have agreed to a different time limit.

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

Awards can be set aside where the party making the application furnishes proof that:

- a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or failing any indication on that question, under the law of Sri Lanka;
- 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 or her 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;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of the Act, or, in the absence of such agreement, was not in accordance with the provisions of the Act; or
- where the High Court finds that:
  - the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or
  - the arbitral award is in conflict with the public policy of Sri Lanka.

Levels of appeal

47 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Set-aside applications are heard by the High Court, and orders of the High Court pursuant to such applications may be appealed from to the Supreme Court, with the leave of the Supreme Court first obtained on a question of law. The Supreme Court's decision in this regard will be final with no further appeals being possible.

Set-aside or enforcement proceedings before the High Court take between one and two years to conclude, whereas any appeals heard by the Supreme Court where leave is granted will also generally take anywhere between one and two years to conclude.

Parties incur nominal costs at each stage in terms of stamp duties and court expenses.

Successful parties in court proceedings are generally able to recover nominal costs based on a scale of taxation set out under the Civil Procedure Code.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Sri Lankan courts generally recognise and enforce arbitral awards and will only refuse to do so if any of the grounds set out under section 32 of the Arbitration Act No. 11 of 1995 (the Act) are satisfied.

To enforce an award, a party must apply to the High Court for the enforcement of the award. Such an application to enforce the award must be accompanied by the original of the award or a duly certified copy of such award and the original arbitration agreement under which the award purports to have been made or a duly certified copy of such agreement.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Yes. An application to enforce an award must be made within one year after the expiry of 14 days of the making of the award.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Sri Lankan courts generally recognise and enforce foreign arbitral awards and will only refuse to do so if any of the grounds set out under section 34 of the Act are satisfied. These grounds are the same as those found under article V of the New York Convention.

The issue of enforcement has not come up before the Sri Lankan courts in the case of an award that has been set aside at the place of arbitration. However, Sri Lankan courts do stay or postpone the hearing of any enforcement applications where set aside proceedings are pending at the place of arbitration and will usually only make a determination thereon after the foreign set aside proceedings are concluded.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There is no specific rule or provision under the Act or the ICLP Rules that provides for the enforcement of orders by emergency arbitrators.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Generally, the costs associated with enforcing an award are:

- court fees and stamp duties for filing court papers;
- any costs incurred for obtaining certified copies or translations of the award or arbitration agreement or any other document to be tendered along with the application;
- legal costs; and
- any other costs or disbursements incurred by the parties.

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OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Despite there being discovery procedures in Sri Lankan civil court proceedings, parties do not regularly avail themselves of these provisions. As a result, while discovery procedures are not ordinarily resorted to by parties in domestic arbitral proceedings, these are more commonly utilised in international arbitrations held in Sri Lanka.

It is common practice for witness statements to be submitted in written form and to be made out by party officers.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules applicable to counsel and arbitrators in international arbitration.

Sri Lanka's professional and ethical rules are broadly aligned with the guidelines set out in the IBA Guidelines on Party Representation in International Arbitration.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no specific regulatory restrictions that apply to third-party funding; however, the Supreme Court Rules that govern the conduct of attorneys-at-law in Sri Lanka prohibit champerty.

Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

In arbitration proceedings governed under Arbitration Act No. 11 of 1995 (the Act), section 23 provides that parties may be represented by attorneys-at-law. The Act does not therefore expressly permit the representation of parties through foreign-qualified lawyers. This provision however can be opted out of by the parties' agreement in writing.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The Arbitration Rules of the CCC-ICLP ADR Centre, which was established in 2018, came into force on 1 April 2021.

Recently, in *Raymond Charles Eyre and another v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/16/25), an ICSID tribunal declined jurisdiction to hear the claimants' claims under the US–Sri Lanka bilateral investment treaty (BIT).

Sri Lanka has been party to several BIT claims before the ICSID, including in *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2 and *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

KLS Energy Lanka Sdn Bhd and KLS Energy Lanka (Private) Ltd v Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/18/39) is currently pending determination.

Sweden

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention was ratified without reservations in 1972. The Washington Convention on the Settlement of Investment Disputes of 1965 (the ICSID Convention) was ratified in 1966 and the Energy Charter Treaty in 1997. Since 1929, Sweden has also been a party to the 1927 – seldom applied but still effective – Convention on the Execution of Foreign Arbitral Awards and the 1923 Protocol on Arbitration Clauses.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Sweden is party to some 70 bilateral investment treaties (BITs), which all contain arbitration clauses.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Swedish Arbitration Act of 1999 (the Arbitration Act; online in English, Russian and Ukrainian) provides the primary legislative framework relevant to arbitration. On 1 March 2019, a number of amendments to the Act entered into force intended to make the arbitration process more efficient and easily accessible, especially for non-Swedish parties.

The Arbitration Act is applicable to both international and domestic arbitration but deals only with arbitral proceedings seated in Sweden. The Arbitration Act implements the New York Convention in respect of awards rendered outside of Sweden. Arbitral awards rendered under the Arbitration Act are enforced according to the Swedish Enforcement Code.

With the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) being one of the world's leading forums for dispute resolution, the SCC Rules often play an important role in domestic and foreign arbitral proceedings.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

No, but the Arbitration Act draws much of its contents from the UNCITRAL Model Law. Contrary to the UNCITRAL Model Law, the Arbitration Act:

- applies to domestic as well as international arbitration;
- does not require that the arbitration agreement be in writing;
- allows a party to request the Court of Appeal to review a tribunal's decision to dismiss a claim on the basis that the tribunal lacks jurisdiction; and
- enables the parties – if both are foreign – to waive section 34 of the Arbitration Act concerning the setting aside of awards, and that the Arbitration Act has rules on fees and costs of the arbitration.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The Arbitration Act contains a few mandatory provisions. The most important ones are section 21 (the arbitrators must hear a case on a non-discriminative basis); section 24(1) (the arbitrators must allow the parties to plead a case as extensively as necessary in writing or orally); section 25(3) (the arbitrators are prohibited to use means of compulsion such as to swear somebody in or to impose fines); and sections 33 and 34 concerning invalid awards and the setting aside of awards.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Yes. According to Section 27(a) of the Arbitration Act, the arbitral tribunal shall apply the parties' chosen substantive law without regard to conflict-of-law rules. In the absence of a party agreement, the act gives the arbitrators explicit mandate to determine the applicable substantive law but does not specify the basis for such determination. However, in practice, the approach to the law governing the arbitration agreement in the silence of the parties has been to apply the law of the seat, namely, Swedish law. The arbitral tribunal may also decide ex aequo et bono, which, however, requires – as is common – the consent of the parties.

Article 15 of the SCC Rules contains rules almost identical to those set out in the Arbitration Act with regard to the determination of the applicable law.

Mandatory laws of another jurisdiction within the European Union other than the one chosen by the parties can be applied by the arbitral tribunal if allowed under the Rome I Regulation (EC 593/2008) (see Rome

I articles 3 and 9). With respect to jurisdictions outside of the European Union, Swedish choice-of-law rules will decide whether there are overriding mandatory provisions that the arbitral tribunal shall apply. As a minimum standard, the arbitral tribunal will normally be bound by Swedish (if the arbitral proceedings are governed by Swedish law) and international public policy.

In relation to the arbitration agreement, the governing law shall be decided by the arbitral tribunal pursuant to section 48 of the Arbitration Act. If it has not been determined that the Arbitration Act is applicable before such issues arise, inter alia, because the place of the arbitration has not yet been decided, a Swedish court or arbitration institute shall apply Swedish choice-of-law rules when deciding whether the arbitral proceedings are governed by Swedish law.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitration institution is the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute). The SCC Institute has developed into one of the leading arbitration institutions in the world, and every year parties from some 40 countries use its services. There are also some much smaller arbitration institutes, such as the West Sweden Chamber of Commerce and the German-Swedish Chamber of Commerce.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Disputes that the parties may not settle by agreement are non-arbitrable. This is generally the case when the dispute concerns a public interest or third-party interest, such as security rights in property. Arbitrators may determine the civil law effects of competition law as between the parties. As a main rule, consumer disputes are only arbitrable if the arbitration agreement was made after the dispute arose.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Arbitration agreements become valid and binding, as with any other kind of consensual agreement. Thus, there is no written form requirement. For the arbitration agreement to be recognised, the agreement must, however, be made in respect of a specified legal relationship (eg, a contract). An arbitration agreement may be concluded by means of a reference to general terms and conditions containing an arbitration clause. However, case law has suggested that in situations where only a single reference to the general terms and conditions is made (containing an arbitration clause) – without further talks or negotiations on the matter – the arbitration clause in the terms and conditions may, under certain conditions were the parties have unequal bargaining power, be found null and void, although the remainder of the terms and conditions are valid and binding between the parties (see the Appeal Court of Övre Norrland, case RH 2012:8, decided on 19 January 2012; cf. NJA 1979 p. 666).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

The validity of the arbitration agreement shall be determined separately from the validity of the main agreement. Ordinary Swedish contract law rules and principles apply in respect of determining the validity of an arbitration agreement. Further, a party may lose the right to invoke an arbitration agreement as a bar to court proceedings if it opposes a request for arbitration, omits to choose an arbitrator in time or omits to pay its portion of the security demanded by the arbitrators. A declaration of bankruptcy or liquidation does not terminate the arbitration agreement.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Yes. The separability of arbitration agreements from main agreements (the doctrine of separability) is laid down in section 3 of the Arbitration Act. Accordingly, when assessing issues regarding the validity of an arbitration agreement that forms an integral part of a main agreement, the arbitrators shall consider the arbitration agreement as a separate and independent agreement.

It is important to note, however, that the doctrine of separability does not mean that an issue regarding the validity of the arbitration agreement will always fall under the jurisdiction of an arbitral tribunal, since the jurisdiction of the arbitral tribunal is also subject to other rules and principles.

Certain grounds for invalidity of a main agreement may also apply to the arbitration agreement, such as invalidity due to lack of authority of persons having signed the main agreement.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

There are no rules concerning this matter in the Arbitration Act and there is no clear-cut general answer in case law. Following a universal succession, a successor is bound by an arbitration agreement. Following a singular succession, the successor would normally be bound except where this would be unreasonable (see the *Emja* case, NJA 1997 p. 866). The same principles seem to apply in respect of guarantors, etc.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

No. The possibility for third parties to participate in arbitration is subject to contractual dispositions in the arbitration agreement, either as a part of the main agreement negotiated at the outset of the parties' business relationship, or as a supplementing or separate arbitration agreement at the time of the dispute.

However, article 13 of the SCC Rules provides a possibility for additional parties to join an existing arbitration under certain circumstances.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is not recognised as such, but a member of the same company group as the signatory may be or become bound by an arbitration agreement owing to general rules and principles of Swedish contract law.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

The validity of such an agreement is subject to the same requirements as ordinary arbitration agreements.

As to the different problems associated with multiparty arbitration, as of 1 March 2019, section 14(3) of the Arbitration Act addresses arbitrator appointments in multi-party proceedings. If multiple respondents cannot agree on a joint arbitrator appointment, a respondent party may request that the district court appoint arbitrators on behalf of all parties. This may result in the excusal of any arbitrator who has already been appointed. Moreover, article 14 of the SCC Rules codifies when parties are allowed to make claims arising out of or in connection with more than one contract in a single arbitration. In deciding whether the claims shall be processed in a single arbitration, emphasis shall be placed on:

- whether the respective arbitration agreements are compatible;
- whether the relief sought arises out of the same transaction or series of transactions;
- the efficiency and expeditiousness of the proceedings; and
- any other relevant circumstances.

Article 15 of the SCC Rules further enables consolidation of arbitrations under certain circumstances. At the request of a party, a newly commenced arbitration may be consolidated with a pending arbitration if the parties agree to consolidate; all the claims are made under the same arbitration agreement; or where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions and the arbitration agreements are found to be compatible.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Yes, according to section 23(a) of the Arbitration Act, an arbitral tribunal may consolidate two or more separate arbitral proceedings under the following conditions:

1 all parties involved must consent to the consolidation;
2 the consolidation must be beneficial for the management of all cases; and
3 the same arbitral tribunal must have been appointed in all arbitrations.

Naturally, the second condition will vary depending on the circumstances; however, should the parties agree that the cases shall be consolidated, the arbitral tribunal should normally comply with such a request.

Once consolidated, the cases may be bifurcated again should reasons therefore arise; for example, if the consolidation has proven to be non-beneficial for the management of the cases.

Article 15 of the SCC Rules contains a similar rule. However, under the SCC Rules it is also a condition that the claims concerned have been made under the same arbitration agreement, or that the relief sought arises out of the same transaction or series of compatible transactions. It is the board of the SCC, not the arbitral tribunal, that decides upon a request to consolidate.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

No, provided that the person appointed as arbitrator has full legal capacity. Foreign nationality or lack of legal education is no impediment and there is no requirement that an arbitrator must be selected from a list of arbitrators. No such official list exists. As concerns judges from a court of law, both active and retired judges may be appointed.

Contractual stipulated requirements are not accepted in relation to gender, sexual identity, ethnic affiliation, religion, disability or age. This follows from sections 1 and 3 of the Swedish Discrimination Act of 2008, which states that a contract that reduces somebody's rights or obligations according to the Discrimination Act is invalid. Thus, the Discrimination Act applies to all kinds of contracts, including arbitration agreements, and also addresses indirect discrimination, meaning the effect that a contract might have on third parties. With regard to requirements in relation to nationality, it is not synonymous with ethnic affiliation, and if a requirement based on nationality can be objectively motivated, such a requirement would be allowed.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

If the parties are Swedish or Swedish law governs the dispute, the arbitrators are normally lawyers qualified in Sweden and specialised in either arbitration or the subject matter of the dispute. Furthermore, some active or retired judges, from all levels in the court system, are regularly appointed and then, often, appointed as chair of the tribunal. It is not common to appoint government officials as arbitrators in Sweden.

The SCC Institute has a policy for appointment of arbitrators (http://sccinstitute.se/media/220131/scc-policy-appointment-of-arbitrators-2017.pdf) where it is noted that it seeks to foster diversity (under policy 6). Statistics regarding the appointed arbitrators show continued increase in the number of women appointed by the SCC, from 29 per cent in 2018 to 32 per cent in 2019 and to 47 per cent in 2020.

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The Arbitration Act stipulates that the parties may determine the number of arbitrators. However, the Arbitration Act also states that unless the parties have agreed otherwise, there shall be three arbitrators. Each party has the right to appoint one arbitrator and the appointed arbitrators subsequently appoint the third, who also becomes chair of the arbitral tribunal. If one party fails to appoint an arbitrator, the other party may request that the district court makes the appointment. The court can also appoint the third arbitrator if the party-appointed arbitrators fail to do so.

According to article 17 of the SCC Rules, the SCC Institute may determine the number of arbitrators having regard to the complexity of

the case, the amount in dispute and any other relevant circumstances. The parties may appoint one arbitrator each if the tribunal is to be made up of three arbitrators. If any party omits to appoint an arbitrator, the SCC Institute will make the appointment. The SCC Institute always appoints the chair and the same applies when the dispute shall be referred to a sole arbitrator. If the parties can agree on a chair or sole arbitrator, the SCC Institute would not normally oppose the parties' choice.

Further, where there are multiple claimants or respondents and the arbitral tribunal is to consist of more than one arbitrator, the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointment, the SCC Institute may appoint the entire arbitral tribunal.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

A party may request that an arbitrator be removed if the arbitrator's impartiality can be questioned. Such a request must first be made to the arbitral tribunal and the party may recourse to courts only if the request is denied. Under the SCC Rules, a challenge is forwarded to the Board of the SCC, which decides on the challenge. The Board's decision may not be appealed.

The Swedish Supreme Court has confirmed the high standard of impartiality that is demanded. In *Jilkén v Ericsson AB* (NJA 2007 p. 841), the Supreme Court made explicit reference to the IBA Guidelines on Conflict of Interest in International Arbitration.

A request to the tribunal must be made within 15 days of the date of the party's knowledge of the cause of his or her suspicions, and a petition to the court must be made within 30 days of the tribunal's decision. A court may also remove an arbitrator if he or she has delayed the proceedings. The court can then appoint a new arbitrator at the request of a party. The parties may agree that an arbitration institution shall determine all of these questions.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Most scholars argue that the relationship between the parties and the arbitrators is contractual, although the contractual relation is deemed to be of a procedural law nature. All arbitrators must be impartial, including party-appointed arbitrators.

The parties are obliged to pay reasonable remuneration and expenses. This obligation is joint and several unless otherwise agreed.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

According to section 9 of the Arbitration Act, a person who is asked to accept an appointment as arbitrator shall immediately disclose all circumstances that might be considered to affect his or her impartiality.

Article 18 of the SCC Rules contains a similar rule, which also imposes an obligation on the arbitrator, once appointed, to submit to the SCC secretariat a signed statement of acceptance, availability, impartiality and independence, disclosing any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence.

The arbitrator must disclose the circumstances that might be considered to affect his or her impartiality to both the parties and the other arbitrators, and the obligation is continuous throughout the arbitration proceedings.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The liability of the arbitrators is subject to the general rule of liability for negligence in Swedish contract law; thus no explicit regulation exists. Failure to apply procedural rules would normally be considered negligent, and the arbitrators' liability is in that sense equivalent to the liability of judges. However, the contractual relationship between the parties and the arbitrators may allow for more flexibility in terms of letting inter alia the parties' expectations on the arbitrators have an effect on the liability assessment.

Notably, article 52 of the SCC Rules provides that neither the SCC, the arbitrator, the administrative secretary of the arbitral tribunal, nor any expert appointed by the arbitral tribunal, is liable to any party for any act or omission in connection with the arbitration, unless such act or omission constitutes willful misconduct or gross negligence.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

For the arbitration agreement to be a bar to court proceedings a party must object to the court's jurisdiction at the first opportunity it has to plead the case before the court, otherwise the right to arbitration is considered waived. However, a party can always choose to petition to a court to try to obtain a declaration that the arbitration tribunal lacks jurisdiction (see section 2 of the Arbitration Act and the Swedish Supreme Court's decision in *Russian Federation v RosInvestCo UK Ltd*, NJA 2010 p. 508), inter alia, because of an invalid arbitration agreement. If the arbitral tribunal has been formed, the tribunal can order a stay of the arbitral proceedings pending the court's decision or, as is normally the case, choose to continue the proceedings despite the parallel court process.

Jurisdiction of arbitral tribunal

25 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

The arbitral tribunal may decide on its own jurisdiction, but a party is still permitted to petition to a court to decide the question definitively although the arbitrators may continue the tribunal's proceedings awaiting the court's decision. A decision by the tribunal to dismiss a claim without prejudice owing to lack of jurisdiction may be altered by the Court of Appeal. Grounds to challenge the jurisdiction of the arbitral tribunal are considered to be waived if the party has participated in the proceedings without presenting the objection.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

In the absence of a party agreement, the arbitral tribunal may decide the place and language of the arbitral proceedings at its own direction. As explained in question 6, this applies also with regard to the determination of the substantive law of the dispute.

Notably, although the arbitral tribunal should determine the substantive law of the dispute at its discretion, it has been argued by legal scholars that the arbitral tribunal should still use normative reasoning and point to a jurisdiction or system of law that has relevant connection to the dispute from a legal perspective. The approach chosen if the parties have not agreed on the law applicable to their disputes is to apply the law of the seat, namely, Swedish law.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

The proceedings are initiated when the defendant party receives a request for arbitration, unless the parties have agreed otherwise. The request must be in writing and contain an express and unconditional request for arbitration, information about whether the question to be resolved is covered by the arbitration agreement and information about the claimant's choice of arbitrator.

If the SCC Rules apply, the proceedings are initiated when the SCC Institute receives a request for arbitration. The request must be in writing and contain information about the parties, their counsel and contact details, a summary of the dispute, preliminary information about the relief sought by the claimant, a copy or description of the arbitration agreement or arbitration clause, an indication of the arbitration agreement under which a certain claim is made in cases where claims are made under more than one arbitration agreement, any comments on the number of arbitrators and the seat of the arbitration; and, if applicable, information and contact details of the arbitrator appointed by the claimant. The claimant must also pay a registration fee.

There is no requirement of signature, and the request for arbitration does not have to be provided in more than one copy, neither under the Arbitration Act nor under the SCC Rules.

Hearing

28 | Is a hearing required and what rules apply?

No, but a party's request for a hearing must be granted unless the parties have agreed otherwise. According to the SCC Rules, a hearing must be held if one of the parties so requests or if the tribunal finds it suitable.

In 2020, following the covid-19 pandemic outbreak, nearly 40 per cent of hearings in SCC arbitration cases were conducted online. This suggests that the current pandemic may leave a permanent imprint on the international arbitration landscape, perhaps making virtual hearings the norm instead of in-person hearings.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Failing prior agreement of the parties, the arbitrators are free to assess all kinds of evidence, including written evidence, witness examinations, expert witnesses, legal opinions, inspections, etc. The parties shall provide the evidence and the arbitrators are prohibited from taking any own initiative in this respect with the exception of appointing expert witnesses.

Third persons, parties and party representatives, and employees may all testify. Witnesses cannot be sworn in by the tribunal. However, the tribunal can allow a party to petition to a court to hear a witness under oath. The IBA Rules on the Taking of Evidence in International Commercial Arbitration often serve as a guide in international arbitration proceedings.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

A court may also assist in the production of documents or other information that can be transferred in writing (eg, electronic information). A party must first have the arbitral tribunal's permission to petition the court. An order by the court to produce documents is enforceable. The courts have no general right to intervene in arbitral proceedings.

Confidentiality

31 | Is confidentiality ensured?

The parties have no imperative duty of confidentiality unless the arbitration agreement expressly contains such a duty. However, it is customary that the parties in arbitration uphold a high level of confidentiality, and it is often argued that this is part of the nature of the agreement (naturale negotii). Arbitral proceedings are private unless agreed otherwise and the arbitrators are obliged to handle the dispute confidentially. Counsel that are members of the Swedish Bar Association have a duty of confidentiality to their clients. Failing prior agreement, witnesses and experts have no duty of confidentiality.

If a duty of confidentiality exists, it extends not only to the proceedings, but also to materials handed in during the procedure and the award. However, if an award is challenged at a court it will usually become a public document, and the same applies in the case of enforcement.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

According to section 4(3) of the Arbitration Act, a court may decide on interim measures during and before the arbitral proceedings. Any such decision is enforceable. The court-imposed interim measures available include inter alia sequestration of specific property or property equal to the value of a claim, and injunctions or orders under penalty of a fine against undertaking actions harmful to the applicant party's interests or to take certain actions. A court decision made prior to the initiation of the proceedings will be reversed if the claimant does not initiate arbitration within 30 days.

An arbitral tribunal may also order interim measures; hence there is no exclusivity for the courts of law in that sense. However, such an order by the tribunal is not enforceable unless the parties have agreed in the arbitration agreement that the tribunal shall have the authority to render separate awards on interim measures. Also, the SCC Rules allow a party to request interim measures in a court. For interim measures prior to a request for arbitration, the SCC Rules offer a procedure with an emergency arbitrator.

Interim measures by an emergency arbitrator

33 Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Yes. The Arbitration Act does not provide any basis to appoint an emergency arbitrator, and a claimant that has a need for interim measures must apply for such measures at the courts under Chapter 15 of the Code of Judicial Procedure.

However, the SCC Rules have, since 2010, offered the possibility to request the appointment of an emergency arbitrator to deal with requests for interim measures. The procedure was implemented after a survey, where 82 per cent of counsel in SCC-administered arbitrations were of the opinion that interim measures should be available before the constitution of the arbitral tribunal or appointment of a sole arbitrator. The SCC received five applications for the appointment of an Emergency Arbitrator in 2020.

Parties cannot choose to opt out from the emergency arbitrator set of rules, which is distinctive from the ICC Rules of Arbitration, and others.

Interim measures by the arbitral tribunal

34 What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

An arbitral tribunal may order similar interim measures as a court, but not under penalty of a fine, and such orders are not enforceable if they are not given in the form of a separate award.

It is customary that the arbitrators demand that the parties give security for the arbitrator's costs and fees in advance, as does the SCC Institute. The parties normally pay half each. If a party fails to pay its share, the other party may decide to either pay the whole security amount to cause the commencement of the arbitral proceedings or petition its claim to the courts, since the non-paying party may not invoke the arbitration agreement as a bar to court proceedings.

Sanctioning powers of the arbitral tribunal

35 Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Neither Swedish arbitration law nor the SCC Rules provide for any explicit rules to take down guerrilla tactics. The arbitral tribunal must rely on its normal tool box, which is reduced to more common instruments such as, inter alia, setting time limits in procedural orders at the risk of the tribunal disregarding defaulting actions by a party (such as a late submission); drawing adverse inferences when assessing, for example, an unreasonable refusal of providing evidence or other kinds of counterproductive behaviour; and by taking regard to unnecessary or improper measures by a party when deciding on the allocation of costs. Counsels may not be subject to direct sanctions by the arbitral tribunal or the SCC Institute.

However, the SCC Rules provide a possibility for a summary procedure in article 39. Under this article, a party can request the arbitral tribunal to rule on one or more issues of fact without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration. The summary procedure is a case management tool intended to permit the quick dismissal of frivolous claims whereby, as an example, an allegation of fact or law material to the outcome of the case is manifestly unsustainable; 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 any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

AWARDS

Decisions by the arbitral tribunal

36 Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Failing prior agreement between the parties, it is sufficient that the decisions of the arbitral tribunal are made by a majority of the arbitrators. In the case of equal votes, the opinion of the chair prevails. If an arbitrator refuses to participate in a decision without valid cause, the other arbitrators can still decide on the matter.

It is enough that a majority of the arbitrators sign the award, on the condition that the cause of the failure of having the signature of all the arbitrators is given in the award. It can be agreed between the parties that the chair alone signs the award.

Dissenting opinions

37 How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are allowed and the majority could not normally prohibit the minority to express a dissenting opinion in the award or as an appendix to the award. However, this right is not unconditional and a dissenting opinion could be excluded, for example, if the award has already been rendered or if the rendering of the award would be delayed awaiting the dissenting opinion. A commonly presented reason in favour of allowing dissenting opinions is that an arbitrator should be given the opportunity to protect himself or herself from potential claims as a consequence of the majority's position.

A dissenting opinion has no direct consequence for the validity or enforceability of the award, but might provide the parties with insights on how to formulate a challenge of the award if the dissenting opinion deals with procedural faults.

Form and content requirements

38 What form and content requirements exist for an award?

The award must be in writing and the place of the arbitral proceedings and the date of the announcement must be specified. There is no legal requirement that the arbitrators give reasons for the award, but if the parties have not expressly renounced it, the arbitrators should presume that the parties want reasons and provide them.

Time limit for award

39 Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

No, the Arbitration Act does not provide for a certain time limit for rendering the award and the issue is subject to agreement between the parties. Under section 21 of the Arbitration Act, an agreement between the parties concerning the management of the arbitral proceedings, including any provision regarding the time limit for rendering the award, must be applied by the arbitral tribunal. However, if an obstacle can be

foreseen as to the application of the agreement, exceptions are allowed. Such an obstacle may be that the arbitral tribunal estimates that it will be impossible or unreasonable to render the award within the time limit owing to the scope or complexity of the dispute.

Under the SCC Rules, the award shall be rendered six months after the dispute was referred to the arbitral tribunal. If necessary, the board of the SCC Institute may extend the time limit.

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the announcement of the award is decisive in respect of the arbitrators' possibility to correct or supplement the award without a party's request. The arbitrators may correct obvious inaccuracies such as a slip of the pen, calculation errors or similar oversights. The date of delivery of the award is, among other things, decisive for the arbitrators' obligation to correct, supplement or interpret decisions in an award at a party's request. In both of the above-mentioned cases, the time limit is 30 days. A revision of the award shall be made within 60 days of the arbitrators' decision to correct or amend the award.

The date of delivery of the award is also decisive as to the time limits for challenging the award. A petition to a court to challenge the award should be made within three months from delivery or, if the award has been revised within three months, from the date of the delivery of the revised award. An award that does not examine an issue that has been brought forward during the arbitral proceedings may also be altered, wholly or partly, on the request of a party. Also, in such case, the time limit is three months from the date of delivery.

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may grant relief in respect of unlimited types of affirmative acts such as the payment of monies, but also payments in kind such as the delivery of goods or the fulfilment of a construction project. A request for a party to refrain from an act is also seen as a type of negative action that can be granted. Further, it is possible to grant declaratory relief, including, but not limited to, the existence of a fact or a legal requisite.

The arbitral tribunal can give final awards, including consent awards, and separate awards such as interlocutory, provisional and partial awards.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

None. According to section 27(1) of the Arbitration Act, the termination of an arbitral proceeding must always be made by means of an award, as well as in the case of a dismissal without prejudice because of, for example, lack of jurisdiction. In the case of withdrawal of a relief sought, the tribunal must try the cause on its merits if requested by the other party. If the other party makes no such request, the tribunal must give what is known as a 'termination award' to dismiss the case. The termination award appears to be a Swedish particularity. In most jurisdictions, the withdrawal of the parties' claims or an agreement to terminate the proceedings would result in a procedural order being issued (see article 32(2) of the Model Law).

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Normally, the losing party must pay the winning party's costs, but if the parties win and lose a proportion of a claim, the costs should be allocated on equity. As a rule, all kinds of costs attributable to the arbitral proceedings are recoverable provided that they are reasonable. Such costs include, but are not limited to, arbitrators' fees, counsels' fees, production of evidence, expenses and disbursements.

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

Yes. If requested by a party, interest may be awarded for both principal claims and costs. The rate depends on the applicable substantive law. The current rate according to the Swedish Interest Act is 8 per cent plus the reference interest rate as determined by the Swedish National Bank. The rate before maturity of a debt may be 2 per cent above the reference rate.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Yes. Any decision to revise or interpret an award should be preceded by an opportunity for the parties to provide comments.

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

The Arbitration Act makes a difference between grounds for invalidity and grounds for challenge. Grounds for invalidity can be invoked without time limit but are restricted to awards that violate Swedish public policy, awards that decide a matter that was not arbitrable or awards that were not delivered in written form or signed by a majority of the arbitrators. Grounds for challenge are broader in scope but must be raised within three months from receipt of the award. The grounds available for a challenge are exclusively related to procedural faults. Thus, faults related to substantial law, as the merits of the case, do not form ground for challenge. Procedural faults that make an award challengeable are as follows:

- the matter is not covered by a valid arbitration agreement;
- the arbitrators have announced the award after the expiration of a period decided on by the parties or the arbitrators otherwise exceeded their mandate;
- the arbitral proceedings should not have taken place in Sweden;
- an arbitrator has been appointed contrary to the parties' agreement or the Arbitration Act;
- an arbitrator was not authorised to try the case; or
- there otherwise occurred a procedural irregularity that is presumed to have affected the outcome of the case and the petitioning party is not at fault.

An award may be declared invalid or set aside in part.

Levels of appeal

47 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

A challenge of an award is made directly at the second instance at a competent court of appeal and must be made within two months from the date upon which the party received the award. If the court of appeal gives the parties permission to appeal its judgment and if the Supreme Court grants leave to appeal – thus if the case involves a question that needs to be clarified for future application of the law – the Supreme Court will try the case as the last instance. A party challenging an award would have to consider that it takes between one and two years depending on the complexity of the case for the court of appeal to reach a decision and another year or so for the handling of the case by the Supreme Court. The costs are very hard to foresee.

Recognition and enforcement

48 What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An award rendered in Sweden is enforceable according to section 3(1)(1)(4) of the Enforcement Code. Section 3(15) states that an enforceable award must be in writing and signed by a majority of the arbitrators. The bailiff must always give the adverse party the opportunity to comment on the enforcement application before taking any action.

Foreign awards that are covered by the Council Regulation (EC) No 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation), can be enforced by the Swedish Enforcement Agency directly. However, in most other cases, before a foreign award can be enforced in Sweden it is required that a court first decides that the judgment is enforceable in what is called a declaration of enforceability. The application for a declaration of enforceability shall be made in the competent district court where the opposing party is domiciled. As soon as the declaration of enforceability has been obtained, the foreign award may be enforced through the Enforcement Agency. The court only reviews that the award meets the formal requirements (which are largely the same as set out in the New York Convention); it does not review the merits or substance of the award. Normally the opposing party is not given the opportunity to respond before the court declares the award enforceable in Sweden. Generally, it is believed that Swedish courts take a pro-enforcement approach.

Time limits for enforcement of arbitral awards

49 Is there a limitation period for the enforcement of arbitral awards?

No, there is no limitation period to file a petition for the recognition and enforcement of an arbitral award as such. However, limitation periods under Swedish substantive law or under foreign substantive law may apply with regard to the claim arising from the award.

Enforcement of foreign awards

50 What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

As far as the authors know, there exist a couple of lower instance cases where Swedish courts have denied execution on the basis that the award had been set aside by the courts of the place of arbitration, but no case where the court has granted execution in such circumstances. Furthermore, it has been argued by scholars that the Swedish rule on execution of arbitral awards is non-discretionary and that the wording of the rule prohibits any execution of an award that has been set aside. It could also be argued that the Swedish rule on execution must be interpreted in accordance with article V(1)(e) of the New York Convention, which states that execution may be refused. While awaiting a precedent, there is the opinion that the open provision of the New York Convention would prevail over a narrow interpretation of the Swedish execution rule.

Enforcement of orders by emergency arbitrators

51 Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There are no special rules under Swedish arbitration law or enforcement law that allow for enforcement of decisions by an emergency arbitrator. However, the parties can agree (in the arbitration agreement) to give an emergency arbitrator the authority to render his or her decision in the form of a separate award, such as an interlocutory or provisional award. If the decision is in the form of an award, it can be enforced in the same way as an award that resolves the dispute.

The SCC Rules have incorporated provisions allowing emergency arbitrators to render separate awards (see article 37(1)-(3) of the SCC Rules in conjunction with Appendix II, article 1). Such an award would thus be enforceable.

Cost of enforcement

52 What costs are incurred in enforcing awards?

With regard to foreign awards, an application for recognition and enforcement involves no application fee, but there may be costs for translating the award as well as lawyers' fees. After the court's decision to permit enforcement, the bailiff will charge a fee of 600 kronor to execute the measures necessary for the enforcement, such as distraint. If property must be sold by way of public auction, the bailiff will charge a percentage on the sale. The percentage depends on what kind of property is sold.

A party is entitled to obtain a decision on costs in matters concerning enforcement of foreign awards (see *Sydsvensk Produktutveckling AB in bankruptcy and JA v American Pacific Corporation*, NJA 2001 p. 738 II).

Concerning awards rendered in Sweden, the bailiff will charge the same fee to enforce the award (including any measures to be executed).

OTHER

Influence of legal traditions on arbitrators

53 What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Since Sweden and its capital Stockholm have been among the most frequently chosen venues for international arbitration for more than half a century, arbitral proceedings in Sweden display very few particularities in relation to the judicial system. Swedish practice, however, recommends flexibility and party autonomy. As to the various procedural issues that may arise during the arbitral proceedings, the Code of Judicial Procedure exercises some influence and is not infrequently applied analogously. The Code of Judicial Procedure thus influences Swedish arbitral proceedings, but with important exceptions; for example, written witness statements are allowed and are frequently used – particularly in international proceedings. To this end, party officers may also testify before the arbitral tribunal. Likewise, although arbitrators from Sweden are generally opposed to the use of US-style

discovery, as in international arbitrations in general, it is often agreed to use Redfern schedules for document production requests.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

No formal requirements exist for counsels and arbitrators under the Arbitration Act, and there are no rules that would allow an arbitrator to reject an inappropriate counsel or other party representatives. However, general principles of contract law and procedural law may allow for an arbitrator to not accept the purported authority of a party representative, thus treating the party as being without representation and proceeding with the arbitration on that basis. Such general rules can, inter alia, be found in Chapter 11 and 12 of the Code of Judicial Procedure.

If the counsel is a member of the Swedish Bar Association, the Code of Conduct of the Bar Association applies. If an arbitrator is a member of the Swedish Bar Association, the rules on conflicts of interest set out in the Code of Conduct do not apply. Accordingly, a member of the Swedish Bar Association acting as an arbitrator is only subject to the particular conflict rules that apply by law and the relevant institutional rules.

The Code of Conduct is available at www.advokatsamfundet.se/Advokatsamfundet-engelska/Rules-and-regulations/Code-of-Conduct. Good practice in Sweden with regard to international arbitration could be described as a mix between general principles deriving from the Code of Judicial Procedure and the Bar Association's Code of Conduct. Good practice is sometimes in accordance with the IBA Guidelines on Party Representation in International Arbitration, but sometimes not. On a general note, the IBA Guidelines go somewhat further and give more power to the arbitral tribunal than good practice in Sweden. Full application of the IBA Guidelines would require the parties' consent.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no restrictions on third-party funding in Sweden, and although the concept is still a quite new phenomenon it is becoming increasingly common.

Although permitted, the effect that third-party funding could have on the distribution of costs and expenses in the arbitral proceedings should be noted. Costs normally follow the event, and the losing party pays for the winning party's costs and expenses. As a rule, all kinds of costs attributable to the arbitral proceedings are recoverable, and include, but are not limited to, arbitrators' fees, counsel's fees, production of evidence, expenses and disbursements. If the winner has external funding and the financier has incurred costs in the arbitration, such costs could be recoverable, although case law to that end is still to be seen.

However, if the losing side had external funding, it is uncertain whether the financier may be (jointly) liable for the winning side's costs and expenses in certain cases. Recent developments in case law suggest that the courts are willing to see beyond the principal party in the proceedings if that entity is just a vehicle for the underlying financiers or benefactors. It remains to be seen whether arbitral tribunals will move in the same direction and if such approach will hold up if challenged before the courts, given, for example, that arbitral proceedings are consensual by nature.

On 11 September 2019, the SCC adopted a policy encouraging the disclosure of the identity of 'any third party with a significant interest in the outcome' of an SCC arbitration (https://sccinstitute.se/media/1035074/scc-policy-re-third-party-interests-adopted.pdf).

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Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Arbitrators may be called upon to testify before a court in proceedings where the award is challenged, and this may include what has been said during deliberation. Attorney-client privilege is not protected under Swedish law to the same extent as, for example, in the Anglo-American legal systems.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The most recent legislative development was the passing of the new Arbitration Act on 1 March 2019. The revised act adds or revises provisions regarding, among other things, applicable substantive law, grounds for challenge, challenge procedure and leave to appeal (for further information see the SCC website: https://sccinstitute.com/about-the-scc/news/2019/revised-arbitration-act-enters-into-force/).

The SCC has launched a new tool in May 2021, the SCC Express, which provides for an alternative form of dispute resolution that offers a fast, consent-based and neutral legal assessment of the dispute in three weeks, for a fixed fee (for further information see the SCC website: https://sccinstitute.com/our-services/scc-express/).

Another debated topic at the moment is cybersecurity issues in arbitration. Certain new measures have been taken by the SCC to ensure the more secure transmission of documents and information in arbitrations, including the SCC Platform (a secure digital platform for file-sharing, set up by the SCC) and the use of case-specific tablets for uploading documents and communicating during the course of an arbitration.

Switzerland

Daniel Hochstrasser and Romana Brueggemann
Bär & Karrer

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Switzerland is a contracting party to the New York Convention. It entered into force on 30 August 1965. Switzerland originally made a reciprocity reservation pursuant to article I(3) of the New York Convention, but the Federal Council later formally withdrew it by Federal Decision dated 17 December 1992.

Switzerland is also a contracting party to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. However, according to article VII(2) of the New York Convention, these treaties cease to have effect between contracting states to the New York Convention. As a consequence, the Geneva Convention has had no effect since 2007. Today, the Geneva Protocol applies only in relation to Iraq.

Finally, Switzerland is also a contracting party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Switzerland has signed over 120 bilateral investment treaties.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Swiss law distinguishes between international and domestic arbitration. Chapter 12 of the Federal Statute on Private International Law applies to international arbitration (ie, where at least one of the parties has its domicile, regular place of residence or its corporate seat outside of Switzerland at the time it enters into the arbitration agreement). Part 3 of the Civil Procedure Code (articles 353 et seqq) applies to domestic arbitration (ie, where none of the parties has its domicile or regular place of residence outside Switzerland at the time the arbitration agreement is concluded).

The parties to a domestic (respectively international) arbitration are free to agree in the arbitration agreement or separately in writing or any other form allowing it to be evidenced by text that the provisions of Chapter 12 of the Federal Statute on Private International Law (respectively Part 3 of the Civil Procedure Code) shall apply to their arbitral proceedings (article 353(2) of the Civil Procedure Code and article 176(2) of the Federal Statute on Private International Law).

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Swiss arbitration law is not based on the UNCITRAL Model Law.

Chapter 12 of the Federal Statute on Private International Law, which was drafted around the same time as the UNCITRAL Model Law, does not substantially differ from the latter. It is, however, significantly shorter in comparison to the UNCITRAL Model Law.

Part 3 of the Civil Procedure Code is more detailed and goes back largely to the Inter-Cantonal Concordat on Arbitration of 1969.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Insofar as Chapter 12 of the Federal Statute on Private International Law is concerned, the following provisions are considered to be mandatory:

- objective arbitrability (article 177(1));
- subjective arbitrability of a state, or an enterprise held by or an organisation controlled by a state (article 177(2));
- the written form of the arbitration agreement (article 178(1));
- the independence and impartiality of arbitrators (article 180(1)(c));
- the possibility for a party to challenge the appointment of an arbitrator it has nominated based on grounds that come to its attention after such appointment (article 180(2));
- the principle of lis pendens (article 181);
- the equal treatment requirement and the right to be heard in an adversarial procedure (article 182(3)); and
- judicial assistance (article 185).

In addition, the action for the annulment of arbitral awards (article 190(2) of the Federal Statute on Private International Law) is considered mandatory in international arbitration if one of the parties is Swiss. If none of the parties to the arbitration agreement has its domicile, its habitual residence or its corporate seat in Switzerland, the parties can waive the right to appeal the decision according to article 192(1) of the Federal Statute on Private International Law. However, according to the revised article 192(1) of the Federal Statute on Private International Law, which entered into force on 1 January 2021, revocation pursuant to article 190(a)(1)(b) (ie, in case the award was influenced by a crime or a misdemeanour) cannot be waived.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties are free to choose the rules of law applicable to their conflict. According to article 187(1) of the Federal Statute on Private International Law, a dispute is decided according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

The parties can also authorise the tribunal to decide ex aequo et bono (article 187(2) of the Federal Statute on Private International Law).

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitration institutions situated in Switzerland are the following:

- Swiss Arbitration Centre (www.swissarbitration.org; 4, Boulevard du Théâtre, P.O. Box 5039, 1211 Geneva 11, Switzerland, with offices in Geneva, Zurich and Lugano);
- Court of Arbitration for Sport (CAS) (www.tas-cas.org; Château de Béthusy, Avenue de Beaumont 2, 1012 Lausanne, Switzerland); and
- Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) (www.wipo.int/amc/en/center/; 34, chemin des Colombettes, 1211 Geneva 20, Switzerland).

The Swiss Arbitration Centre administers arbitration proceedings under the Swiss Rules of International Arbitration. The revised Swiss Rules took effect on 1 June 2021 and are a flexible set of rules under which the parties are free to designate their arbitrator(s) and to select the applicable law, the seat of the arbitration and the language of the proceedings.

CAS arbitrations are governed by the Code of Sports-related Arbitration. CAS operates with a system of a closed list of arbitrators (for further details see www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html).

The Arbitration and Mediation Center of the WIPO administers arbitrations under the WIPO Arbitration Rules. The latter are, due to their provisions on confidentiality and technical and experimental evidence, of special interest to parties to intellectual property disputes.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

According to article 177(1) of the Federal Statute on Private International Law, any dispute of financial interest may be the subject of arbitration. This includes monetary claims relating to labour matters, marital property matters, disputes between heirs and intellectual property matters, as well as antitrust and competition law matters. Pursuant to article 354 of the Civil Procedure Code, any claim over which the parties may freely dispose may be the object of an arbitration agreement.

By contrast, claims that first and foremost affect a party's personal rights – such as marriage, paternity, child adoption, divorce or separation – are not arbitrable. Likewise, claims in bankruptcy law that are strictly part of the debt collection procedure, such as claims belonging to the bankruptcy estate, are considered to be non-arbitrable.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Swiss law distinguishes between formal and substantive validity.

With regard to formal validity, Swiss law requires the arbitration agreement to be in writing. Signature by the parties is not required. The written form requirement is considered to be met if the arbitration agreement is concluded in writing or in any other form allowing it to be evidenced by a text (see also revised article 178(1) of the Federal Statute on Private International Law, which entered into force on 1 January 2021; see also article 358 of the Civil Procedural Code). Accordingly, the form requirements can also be fulfilled for arbitration agreements in general terms and conditions (please note that the substantive validity will have to be assessed on a case-by-case basis). It is not settled whether both parties must adhere to the formal requirement of article 178(1) of the Federal Statute on Private International Law, or whether it is enough that a written offer to arbitrate by one party is accepted orally or tacitly by the other.

With regard to substantive validity, article 178(2) of the Federal Statute on Private International Law provides that an arbitration agreement is valid if it conforms to the law chosen by the parties, the law governing the subject matter of the dispute or Swiss law. It is sufficient if the arbitration agreement is valid under the substantive law of any of these three laws.

If substantive validity is examined under Swiss law, the parties must have the capacity to validly enter into an arbitration agreement (subjective arbitrability) and the subject matter of the dispute must be arbitrable (objective arbitrability).

In addition, the parties' consent with regard to the essential elements of the arbitration agreement is required. This requires that the parties express their intention to submit their dispute to arbitration and that the arbitration agreement specifies the object or the legal relationship subject to arbitration.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is valid and enforceable if it conforms either to the law chosen by the parties, the law governing the subject matter of the dispute, in particular the main contract, or Swiss law (article 178(2) of the Federal Statute on International Private Law).

Since the doctrine of separability applies in Swiss law (article 178(3) of the Federal Statute on Private International Law), the avoidance, rescission or termination of a contract will generally not affect the validity of an arbitration agreement contained therein. However, there may be instances in which the main contract as well as the arbitration agreement are subject to the same grounds for invalidity.

While the death of a party will usually not cause the arbitration agreement to become inoperative, legal incapacity to enter into an arbitration agreement may be a ground for the arbitration agreement to be invalid. In this context it is noted that, under Swiss law, a state or state-owned entity cannot invoke its own law to contest its capacity to arbitrate (article 177(2) of the Federal Statute of Private International Law).

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The principle of the separability of the arbitration agreement is set out in article 178(3) of the Federal Statute on Private International Law.

The validity of an arbitration agreement cannot be challenged on the grounds that the main contract between the parties is invalid.

However, this does not preclude the grounds for nullity of the main contract from also affecting the arbitration agreement.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

In general, an arbitration agreement is binding only on the parties to the original agreement. Deviating from that general rule, a third (non-signatory) party may nevertheless become bound by the arbitration agreement based on several legal extension theories under Swiss law, such as the principle of confidence (Vertrauensprinzip), assignment, assumption of a debt, agency or the piercing of the corporate veil (see eg, decision of the Federal Supreme Court 4A_124/2020 dated 13 November 2020, cons 3.3.1). In particular, the extension of arbitration agreements to non-signatories may be justified under Swiss law where the third party explicitly or implicitly expressed its intention to be bound by the arbitration agreement (eg, by interfering in the conclusion and execution of the relevant contract).

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The international arbitration law of Switzerland (ie, Chapter 12 of the Federal Statute on Private International Law) does not contain any provisions regarding third-party participation in arbitration.

By contrast, the domestic arbitration law provides that the intervention and the joinder of a third party require an arbitration agreement between the third party and the parties to the dispute, and that they are subject to the consent of the arbitral tribunal (article 376 of the Civil Procedure Code).

Under the Swiss Rules of International Arbitration, the arbitral tribunal shall decide on a request to join one or more third person(s) after consulting with all the parties, including the third person(s), taking into account all relevant circumstances of the case (article 6(4) of the Swiss Rules of International Arbitration 2021).

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

To date, the Swiss Federal Court has neither expressly rejected nor endorsed the group of companies doctrine. Whether or not the doctrine is recognised under Swiss law is thus a matter of scholarly debate. However, given that Swiss law is based on the concept that different legal entities form independent legal subjects, the mere existence of a group of companies is insufficient to extend the arbitration agreement to other companies within the same group. Rather, such extension would only be allowed in specific and exceptional circumstances.

In any event, when trying to apply the group of companies' doctrine to extend the scope of an arbitration agreement to non-signatory third parties, it is worth noting that there might be an overlap with the doctrine of implied intent to be bound by the arbitration agreement. This holds true, in particular, with respect to cases concerning the involvement of a non-signatory in the conclusion or performance of a contract.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Swiss law recognises multiparty arbitration agreements. Pursuant to the revised article 179(5) of the Federal Statute on Private International Law, which entered into force on 1 January 2021, in the case of a multi-party arbitration and in the absence of an agreement by the parties, the court at the seat of the arbitration may appoint all members of the arbitral tribunal (see also article 362(2) Civil Procedure Code). Other than that, no specific provisions of the Federal Statute on Private International Law deal with such situations.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Chapter 12 of the Federal Statute on Private International Law contains no rules on the consolidation of arbitration proceedings by an arbitral tribunal. Potentially applicable institutional rules may, however, contain provisions to this extent. For example, article 7(1) of the Swiss Rules of International Arbitration 2021 provides that the Court of the Swiss Arbitration Centre may – upon the request of a party and after consulting with all parties and any confirmed – consolidate arbitration proceedings pending under these rules.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Arbitrators must be impartial and independent of the parties (article 180(1)(c) of the Federal Statute on Private International Law). Beyond this, Chapter 12 of the Federal Statute on Private International Law imposes no additional requirements or restrictions on arbitrators. However, the parties are free to agree on any qualifications that the arbitrators must have (eg, regarding their legal qualification, experience of the subject matter or language skills) (article 179(1) of the Federal Statute on Private International Law). The parties are also free to choose the number of arbitrators.

While diversity is actively promoted in the Swiss arbitration community, the parties' autonomy to designate the arbitral tribunal is not limited by any non-discrimination laws.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

In Switzerland, parties most frequently designate practising attorneys and sometimes law professors.

Moreover, there is a tendency to provide for more (gender) diversity in institutional appointments. In 2016, the Swiss Chambers' Arbitration Institution (known today as the Swiss Arbitration Centre) signed the Equal Representation in Arbitration Pledge committed to improving the representation of women in arbitration. In 2019, 67 per cent of the arbitrators appointed by the Court of the Swiss Chambers' Arbitration Institution (known today as the Swiss Arbitration Centre) were male and 33 per cent were female.

Default appointment of arbitrators

19 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In the absence of an agreement or if the appointment or replacement of the arbitrators is impossible for other reasons, the parties may turn to the court of the place where the tribunal has its seat. Where a state court is called upon to appoint an arbitrator, it shall make the appointment (see articles 179(2)-(3) of the Federal Statute on Private International Law).

Under the Swiss Rules of International Arbitration, if the parties have not agreed on the number of arbitrators, the Court of the Swiss Arbitration Centre decides whether the case shall be referred to a sole arbitrator or to a three-member tribunal (article 9(1) of the Swiss Rules of International Arbitration 2021). Moreover, if a party fails to designate an arbitrator, the Court of the Swiss Arbitration Centre will appoint the respective arbitrator.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator may be challenged if he or she does not have the qualifications agreed on by the parties, if the rules of arbitration agreed on by the parties provide a ground for challenge, or if there are justifiable doubts as to his or her independence or impartiality (see articles 180(1)(a)-(c) of the Federal Statute on Private International Law).

A party may not challenge an arbitrator whom it nominated itself, unless the challenge is based on grounds that came to its attention after the appointment (article 180(2) of the Federal Statute on Private International Law).

The parties to the arbitration agreement can establish their own rules regarding the procedure for challenging the appointment of an arbitrator. Unless the parties have agreed otherwise (and if the arbitration proceedings have not yet been concluded), the procedure to follow is now detailed in article 180a of the revised Federal Statute on Private International Law, which entered into force on 1 January 2021: Unless the parties have agreed otherwise and if the arbitration proceedings have not yet been concluded, the request for challenge must be submitted in writing and with reasons to the challenged member of the arbitral tribunal within 30 days since the requesting party became aware or could be aware in the exercise of reasonable diligence of the ground for challenge, and must be communicated to the other members of the arbitral tribunal within the same time limit. The requesting party may, within 30 days of filing the request for challenge with the arbitral tribunal, submit the challenge to the state court. The decision of the state court shall be final.

In addition, if a member of the arbitral tribunal is unable to perform his or her duties within a reasonable period of time or with due diligence, and unless the parties have agreed otherwise, a party may request the state court in writing and with reasons to remove him or her. The decision of the state court shall be final (article 180(b)(2) of the revised Federal Statute on Private International Law, which entered into force on 1 January 2021).

The replacement of an arbitrator might become necessary if a challenge to the appointment of the arbitrator succeeds. In addition, a replacement might become necessary if an arbitrator is dismissed as a result of the corresponding declarations of the parties to the arbitration proceedings, or if an arbitrator resigns or is removed on the request of one of the parties.

According to article 179(1) of the Federal Statute on Private International Law, an arbitrator shall be replaced in accordance with the agreement of the parties. In the absence of such agreement, the court of the place where the tribunal has its seat may be seized with the question (article 179(2) of the Federal Statute on Private International Law).

Arbitrators in Switzerland have a tendency to seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration to avoid a challenge or replacement.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Under Swiss law, the parties and the arbitral tribunal are bound by an arbitral contract. By virtue of this contract, the arbitrators have to adjudicate the parties' dispute in person, with due care, independently and impartially. In turn, the arbitrators are entitled to compensation.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Under Swiss law, an arbitrator may be challenged if circumstances exist which give rise to justifiable doubts as to his or her independence or impartiality (article 180(1)(c) of the Federal Statute on International Private Law). The same standard of independence and impartiality applies to all members of the arbitral tribunal, including party-appointed (co-)arbitrators. Therefore, an arbitrator must disclose any circumstances which might raise reasonable doubts regarding his or her independence and impartiality. This duty applies throughout the entire arbitral proceedings.

Although the IBA Guidelines on Conflict of Interest in International Arbitration have no statutory value, the Swiss Federal Supreme Court held that they may serve as a valuable instrument to determine the independence and impartiality of arbitrators.

The Swiss Rules of International Arbitration also state that any arbitrator conducting an arbitration under said rules shall remain impartial and independent of the parties at all times, and that arbitrators shall disclose any circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence throughout the proceedings (article 12 of the Swiss Rules of International Arbitration 2021).

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The prevailing view is that the relationship between the parties to the arbitration proceedings and the arbitrators is contractual in nature. As a consequence, the question of an arbitrator's liability towards the parties will most likely be governed by Swiss law. Under Swiss law, a party is liable for a violation of its contractual duties. Thus, an arbitrator could become liable for a violation of his or her obligations. However, except for wilful intent and gross negligence, liability may be excluded or limited under Swiss law (such as under some institutional rules; see article 45 of the Swiss Rules of International Arbitration 2021).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 | What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The state courts will decline jurisdiction whenever there is a valid arbitration agreement between the parties, unless the parties proceed on the merits without reservation (article 7 of the Federal Statute on Private International Law; article II(3) of the New York Convention). A plea of lack of jurisdiction must be raised prior to any defence on the merits (article 186(2) of the Federal Statute on Private International Law).

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

Pursuant to article 186(1) of the Federal Statute on Private International Law the arbitral tribunal is competent to decide on its own jurisdiction (competence-competence principle). This applies even if an action on the same matter between the same parties is pending before a state court or another tribunal, unless there are serious reasons to stay the proceedings (article 186(1-bis) of the Federal Statute on Private International Law). A plea of lack of jurisdiction must be raised prior to any defence on the merits (article 186(2) of the Federal Statute on Private International Law). The tribunal shall, as a rule, decide on its jurisdiction by preliminary award (article 186(3) of the Federal Statute on Private International Law).

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Unless the parties have agreed otherwise, the seat will be determined by the arbitral institution designated by them or, in the absence of such designation, by the arbitrators (article 176(3) of the Federal Statute on Private International Law). The language will be chosen by the tribunal if the parties failed to make a choice in this regard (article 182(2) of the Federal Statute on Private International Law).

The parties are free to choose the rules of law applicable to their conflict. According to article 187(1) of the Federal Statute on Private International Law, a dispute is decided according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection. The parties can also authorise the tribunal to decide ex aequo et bono (article 187(2) of the Federal Statute on Private International Law).

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Under Swiss arbitration law, arbitration proceedings are considered to be pending as soon as one of the parties seizes the arbitrator(s) designated in the arbitration agreement with a claim. If no arbitrators are designated in the arbitration agreement, the proceedings are considered to be pending from the moment that one of the parties initiates the procedure for the appointment of the tribunal (article 181 of the Federal Statute on Private International Law and article 372(1) of the Civil Procedure Code).

Under the Swiss Rules of International Arbitration, arbitration proceedings are commenced by filing a notice of arbitration with the Secretariat of the Swiss Arbitration Centre. Article 3(3) of the Swiss Rules of International Arbitration 2021 sets out the minimum content of such notice.

Hearing

28 | Is a hearing required and what rules apply?

The Federal Supreme Court has decided that the right to be heard does not encompass the right to be heard orally. There is thus no requirement to hold a hearing under Swiss arbitration law. The Swiss Rules of International Arbitration regulate hearings in their article 27.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The procedure to be followed for taking evidence is a matter to be determined by the parties or, in the absence of any agreement, by the tribunal (article 182 of the Federal Statute on Private International Law). Under Chapter 12 of the Federal Statute on Private International Law, a tribunal is not obliged to follow the rules of state courts regarding the taking of evidence.

Chapter 12 of the Federal Statute on Private International Law contains no provisions on the kinds of evidence that are acceptable. However, a tribunal acting under Chapter 12 of the Federal Statute on Private International Law will usually stick to the commonly known evidentiary means, such as documents, fact and expert witnesses, and site or subject-matter inspections.

Pursuant to article 184(1) of the Federal Statute on Private International Law, the tribunal shall conduct the taking of evidence (ie, the parties and the arbitrators cannot delegate the taking of evidence to a third party, such as a state authority).

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

A tribunal acting under Chapter 12 of the Federal Statute on Private International Law has no coercive powers. Thus, article 184(2) of the Federal Statute on Private International Law provides that if the assistance of state judiciary authorities is necessary for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the state court judge at the seat of the arbitral tribunal; the judge shall apply his or her own law. Upon request, it may apply or consider other forms of procedure (see revised articles 184(2) and (3) of the Federal Statute on Private International Law, which entered into force on 1 January 2021).

Further, in case of non-compliance with any interim measures ordered, the tribunal lacks the power to enforce its interim decision. Thus, if a party does not voluntarily comply with any interim measures ordered against it, the tribunal may request the assistance of the state court judge (article 183(2) of the Federal Statute on Private International Law).

Lastly, article 185 of the Federal Statute on Private International Law provides that the court at the place of the seat of the tribunal has jurisdiction for any further judicial assistance. Such interventions of a Swiss court hardly ever occur in practice.

Confidentiality

31 | Is confidentiality ensured?

Chapter 12 of the Federal Statute on Private International Law contains no rules on confidentiality. By contrast, article 44(1) of the Swiss Rules of International Arbitration 2021 provides that unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts and the secretary of the tribunal. According to article 44(2) of the Swiss Rules of International Arbitration 2021, the deliberations of the tribunal are confidential.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

An arbitration agreement does not preclude a Swiss state court from granting any interim relief before or after the commencement of arbitration proceedings.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Swiss arbitration law does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. By contrast, the Swiss Rules of International Arbitration have adopted the possibility to seek emergency relief from an emergency arbitrator. A party requiring urgent interim measures before the arbitral tribunal is constituted may, unless otherwise agreed by the parties, submit to the Secretariat of the Swiss Arbitration Centre an application for emergency relief proceedings (article 43 of the Swiss Rules of International Arbitration 2021).

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Article 183(1) of the Federal Statute on Private International Law does not define the permitted content or types of interim measures. However, it is commonly accepted that, in principle, a tribunal can grant any interim measures it considers necessary to protect a party's right effectively during the arbitration proceedings. In other words, a tribunal to which Chapter 12 of the Federal Statute on Private International Law applies is not restricted to interim measures recognised under Swiss law. Thus, an arbitral tribunal also has the authority to grant security for costs, but this is not done frequently.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The issue of guerrilla tactics is not explicitly dealt with in Swiss arbitration law nor in the Swiss Rules. An arbitral tribunal may, however, sanction bad faith conduct of the parties when allocating costs (see article 40 of the Swiss Rules of International Arbitration 2021).

The question of whether an arbitral tribunal may sanction counsel is not a hotly debated issue in Switzerland.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The parties are free to establish their own rules on how the tribunal should reach its decision (article 189(1) of the Federal Statute on Private International Law). If they fail to do so, the default rule of article 189(2) of the Federal Statute on Private International Law provides that the arbitral award shall be made by a majority or, in the absence of a majority, by the presiding arbitrator alone.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Chapter 12 of the Federal Statute on Private International Law does not address whether dissenting opinions are permitted. However, according to the Swiss Federal Supreme Court, a dissenting opinion may be expressed if the parties agreed to allow dissenting opinions or the majority of the tribunal decides to allow a dissenting opinion.

Form and content requirements

38 | What form and content requirements exist for an award?

Any award rendered by an international arbitral tribunal in Switzerland is final from its notification (article 190(1) of the Federal Statute on Private International Law). The term 'final' means both that the award is enforceable and that it has binding effect by operation of law. Thus, no additional state court scrutiny is needed for an award rendered by an international tribunal with seat in Switzerland to be enforceable and have binding effect.

According to article 189(1) of the Federal Statute on Private International Law, the arbitral award shall be rendered in conformity with the procedure and in the form agreed upon by the parties.

In the absence of such agreement, the arbitral award shall be made by a majority or, in the absence of a majority, by the chairman. The award shall further be in writing, supported by reasons, dated and signed. The signature of the chairman is sufficient (article 189(2) of the Federal Statute on Private International Law).

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Swiss law imposes no time limit on the arbitrators within which they must render their award.

The Swiss Rules of International Arbitration do not impose a time limit on the arbitrators to render the final award either, except for arbitral proceedings conducted under the Expedited Procedure provisions (ie, due to party agreement or if the total amount in dispute does not exceed 1 million Swiss francs and the Court does not decide otherwise; article 42(1) of the Swiss Rules of International Arbitration 2021). In case of an Expedited Procedure, the award must be rendered within six months from the date on which the tribunal received the file from the Secretariat, save for exceptional circumstances (article 42(1)(e) of the Swiss Rules of International Arbitration 2021).

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

To set aside a final award in Switzerland, the date of notification of the respective award (as opposed to the date of the award itself) is decisive (article 100(1) of the Federal Statute on the Swiss Federal Supreme Court). This is also codified in the revised article 190(4) of the Federal Statute on Private International Law, which entered into force on 1 January 2021. The same applies with regard to preliminary awards (article 190(3) of the Federal Statute on Private International Law). The mode of notification is determined by the parties' explicit agreement or their choice of institutional rules. Absent such agreement or choice, the electronic receipt of the award may constitute sufficient notification.

Pursuant to the revised article 189(a)(1) of the Federal Statute on Private International Law, which entered into force on 1 January 2021, unless otherwise agreed by the parties, every party may file an application to the arbitral tribunal, within 30 days from notification of the award, for the correction and interpretation of the award. Within the same time frame, the arbitral tribunal, on its own initiative, may correct, interpret or complete the award.

As regards the interpretation or correction of an award, or the request of an additional award, the Swiss Rules of International Arbitration consider the date of receipt of the award as decisive (article 37 of the Swiss Rules of International Arbitration 2021).

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

Besides a final award, arbitral tribunals may render preliminary awards and, unless agreed otherwise by the parties, partial awards (article 190(3) and article 188 of the Federal Statute on Private International Law).

The Federal Statute on Private International Law is silent on the issue of how arbitral tribunals should proceed in case the parties settle their dispute amicably. Subject to the parties' agreement or choice of institutional rules, arbitral tribunals may either issue a consent award or a termination order (both explicitly provided for in article 36 of the Swiss Rules of International Arbitration 2021).

Unless agreed otherwise by the parties, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures (article 183(1) of the Federal Statute on Private International Law).

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

Under the Swiss Rules of International Arbitration, arbitral proceedings can also be terminated by means of a consent award or a termination order (as opposed to a final award), for example if the parties reach a settlement agreement or a party withdraws its claim(s) without prejudice.

If a consent award is requested by the parties and accepted by the arbitral tribunal, the arbitral tribunal shall record the settlement in the form of an arbitral award on agreed terms (article 36(1) of the Swiss Rules of International Arbitration 2021).

If the continuation of the arbitral proceedings becomes unnecessary or impossible for reasons other than a settlement, the arbitral tribunal shall give advance notice to the parties that it may terminate the proceedings. Unless a party raises justifiable grounds for objection, the arbitral tribunal then has the power to issue such an order (article 36(2) of the Swiss Rules of International Arbitration 2021).

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Chapter 12 of the Federal Statute on Private International Law contains no rules on the costs of arbitration proceedings, including their estimation and allocation.

By contrast, the Swiss Rules of International Arbitration contain detailed provisions on costs (articles 38 et seqq of the Swiss Rules of International Arbitration 2021). They provide, in particular, that the following costs are recoverable:

- fees of the arbitral tribunal;
- expenses incurred by the tribunal and secretary, if any;
- costs of expert advice;
- expenses incurred by witnesses to the extent approved by the tribunal;
- reasonable costs for legal representation;
- registration fee and administrative costs; and
- fees and expenses incurred in emergency arbitration proceedings.

The costs of the arbitration shall in principle be borne by the unsuccessful party. The tribunal may apportion any of the costs of the arbitration among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case, including the parties' contributions to the efficient conduct of the proceedings and the avoidance of unnecessary costs and delays (article 40 of the Swiss Rules of International Arbitration 2021).

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

The answer to this question depends on the applicable substantive law. Swiss substantive law allows for the award of interest. Under the Swiss Code of Obligations, where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5 per cent per annum (article 73(1) of the Swiss Code of Obligations).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Pursuant to the revised article 189(a)(1) of the Federal Statute on Private International Law, which entered into force on 1 January 2021, unless otherwise agreed by the parties, every party may file an application to the arbitral tribunal, within 30 days from notification of the award, for the correction and interpretation of the award. Within the same time frame, the arbitral tribunal, on its own initiative, may correct, interpret or complete the award.

The rules for domestic arbitration (ie, Part 3 of the Civil Procedure Code) also provide for the possibility of a correction or interpretation of an award (articles 388(1)(a) and (b) of the Civil Procedure Code). The application must be made to the arbitral tribunal within 30 days from the discovery of the error or the parts of the award that need to be explained or amended, but no later than one year from receiving notice of the award (article 388(2) of the Civil Procedure Code).

Pursuant to the Swiss Rules of International Arbitration, within 30 days of the receipt of the award, a party, with notice to the Secretariat and to the other parties, may request the arbitral tribunal to give an interpretation of the award or to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature, or make an additional award as to claims presented in the proceedings but omitted from the award (article 37(1) of the Swiss Rules of International Arbitration 2021).

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

The rules on international arbitration allow the parties to challenge an arbitral award, that must be filed within 30 days of the communication of the award, by way of annulment proceedings on the basis of one of the grounds exhaustively listed in article 190(2) of the Federal Statute on Private International Law as follows:

- the tribunal was irregularly constituted or the sole arbitrator was improperly appointed (article 190(2)(a) of the Federal Statute on Private International Law);
- the tribunal wrongly accepted or declined jurisdiction (article 190(2)(b) of the Federal Statute on Private International Law);
- the tribunal's decision went beyond the claims submitted to it or failed to address one of the items of the claim (article 190(2)(c) of the Federal Statute on Private International Law);
- the principle of equal treatment of the parties or the right of the parties to be heard was violated (article 190(2)(d) of the Federal Statute on Private International Law); or
- the award is incompatible with public policy (article 190(2)(e) of the Federal Statute on Private International Law).

According to article 190(3) of the Federal Statute on Private International Law, interim (or preliminary) awards (as opposed to final awards) may be challenged only on the basis of a violation of article 190(2)(a) of the Federal Statute on Private International Law (irregular constitution of the tribunal) or article 190(2)(b) of the Federal Statute on Private International Law (incorrect ruling on jurisdiction).

If the Swiss Federal Supreme Court decides that one of the grounds listed in article 190(2) of the Federal Statute on Private International Law is fulfilled, it will set aside the award. The Federal Supreme Court will generally not issue its own decision replacing the award, and will instead refer the matter back to the same tribunal for reconsideration. An exception is where the Federal Supreme Court decides on the constitution of the tribunal or the jurisdiction of the tribunal.

As case law shows, the Swiss Federal Supreme Court is reluctant to set aside arbitral awards and the success rate of appeals brought before the Swiss Federal Supreme Court is very low.

Levels of appeal

47 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Under Swiss law, an arbitral award may be challenged only before the Swiss Federal Supreme Court (article 191 of the Federal Statute on Private International Law). The proceedings are governed by the Federal Statute on the Swiss Federal Supreme Court of 17 June 2005. Appeals against arbitral awards may be brought before the Swiss Federal Supreme Court with the uniform appeal in civil matters (article 77(1) of the Federal Statute on the Swiss Federal Supreme Court). Set-aside proceedings before the Swiss Federal Supreme Court last approximately six to nine months on average.

The court costs of a setting aside proceeding depend on the amount in dispute, scope and difficulty of the case and are limited to a maximum of 200,000 Swiss francs. The petitioner will be required to pay an advance on costs, and if the petitioner does not have a permanent residence in Switzerland it may be obliged, at the request of the other party, to pay a security for party costs. As a rule, the losing party will be obliged to reimburse the winning party for its necessary costs for legal representation.

Recognition and enforcement

48 What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Any award rendered by an international arbitral tribunal in Switzerland is final from its notification (article 190(1) of the Federal Statute on Private International Law). The term 'final' means both that the award is enforceable and that it has binding effect by operation of law. Thus, no additional state court scrutiny is needed for an award rendered by an international tribunal with seat in Switzerland to be enforceable and have binding effect.

The recognition and enforcement of a foreign arbitral award is governed by the New York Convention. This also applies to awards rendered in a non-member state of the New York Convention (article 194 of the Federal Statute on Private International Law).

Time limits for enforcement of arbitral awards

49 Is there a limitation period for the enforcement of arbitral awards?

Swiss arbitration law does not provide for a limitation period with regard to the enforcement of awards, as from a Swiss law perspective limitation periods are issues of substantive law.

Enforcement of foreign awards

50 What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The recognition and enforcement of a foreign arbitral award is governed by the New York Convention. According to article V(1)(e) of the New York Convention recognition and enforcement can be refused if the award has

been set aside by a competent authority of the country of which, or under the law of which, that award was made.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

According to article 43(8) of the Swiss Rules of International Arbitration 2021, decisions of emergency arbitrators shall have the same effects as interim measures. According to article 183(2) of the Federal Statute on Private International Law, an arbitral tribunal or a party may request the assistance of the state court judge if a party does not voluntarily comply with any interim measures ordered against it.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The enforcement proceedings of monetary awards are governed by the statutory tariffs on debt enforcement and bankruptcy. The fees for the proceedings in which the domestic award is recognised depend on the value of the amount at stake.

Court fees for the enforcement of non-monetary awards are dealt with in the cantonal court fee ordinances and may vary within Switzerland from canton to canton.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Switzerland being a civil law jurisdiction, the Civil Procedure Code does not provide for a discovery phase. That said, Swiss arbitrators will usually be reluctant to allow US-style discovery, but will rather request the production of specific documents that seem relevant and material to the outcome of the case. Written witness statements, on the other hand, are very common among Swiss arbitrators.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Counsel and arbitrators admitted to the bar in Switzerland appearing in an international arbitration are in principle subject to the Swiss rules on professional and ethical conduct. These rules are significantly less detailed than the IBA Guidelines on Party Representation in International Arbitration.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no regulatory restrictions on third-party funders.

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Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Switzerland, being an arbitration-friendly jurisdiction, does not entail any adverse particularities of which one should be aware of.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

On 19 June 2020, the Swiss legislator adopted a revision of Chapter 12 of the Federal Statute on Private International Law, which governs international arbitration proceedings seated in Switzerland. The revised provisions entered into force on 1 January 2021. This revision was deliberately kept 'light' to maintain the current structure and framework of Chapter 12 of the Federal Statute on Private International Law, which has been successful to date. The new provisions are intended to strengthen Switzerland's already recognised attractiveness as a place for international arbitration.

In this respect, the revision:

- strengthens the autonomy of the parties, in particular by allowing them to seize a state court judge in Switzerland (juge d'appui) when the seat of the arbitral tribunal is not determined in the arbitration agreement to assist with the constitution of the arbitral tribunal (article 197(2)), or by expressly recognising the validity of arbitration clauses in unilateral legal acts (article 178(4));
- codifies certain principles of case law of the Swiss Federal Supreme Court, such as the obligation to immediately raise any procedural

violation (article 182(4)) or the possibility to request the rectification, interpretation or an additional award from the arbitral tribunal (article 189a(1)) or file a request for revision before the Swiss Federal Supreme Court (article 190(a));
- clarifies other questions raised by case law, such as the scope of application of Chapter 12 of the Federal Statute on Private International Law (article 176) or the admissibility of an appeal against an arbitral award to the Federal Supreme Court regardless of the amount in dispute (article 177(1) of the revised Federal Statute on the Swiss Federal Supreme Court);
- contributes to facilitating the application of the law, for example by removing references to domestic arbitration law and by allowing parties to directly request the assistance of the juge d'appui for the enforcement of provisional measures or the administration of evidence (article 185(a)); and
- allows the parties to submit their pleadings to the Federal Court in appeal or review proceedings against an arbitral award in English (article 177(2-bis) of the revised Federal Statute on the Swiss Federal Supreme Court).

The Swiss Rules of International Arbitration were also recently revised; the 2021 version entered into force on 1 June 2021. The amendments:
- support digitalisation by allowing electronic submissions of the Notice and the Answer to the Notice of Arbitration and hearings to be held by videoconference;
- contain new rules on multi-party, multi-contract arbitration, such as further detailing the process of counter-claims, joinder and intervention;
- give the Swiss Arbitration Centre and the Secretariat an enhanced role, such as to hold the deposits paid by the parties; and
- adjusted the schedule of costs.

Turkey

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CETINKAYA

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Turkey is a contracting state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention has been in force since 1992. Turkey has made two reservations to the New York Convention, namely, the reciprocity reservation and commercial reservation. Accordingly, the New York Convention shall only apply to disputes arising from commercial relationships and to awards rendered in the territory of another contracting state.

Also, Turkey is a party to the European Convention on International Commercial Arbitration and to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

There are 81 bilateral investment treaties (BITs) in force. The countries with which Turkey has entered into BITs are Afghanistan, Albania, Arge ntina, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, B LEU (Belgium-Luxembourg Economic Union), Bosnia and Herzegovi na, Bulgaria, China, Croatia, Cuba, Czechia, Denmark, Djibouti, Egypt, Estonia, Ethiopia, Finland, France, Gambia, Georgia, Germany, Greece, Guatemala, Guinea, Hungary, Iran, Israel, Italy, Japan, Jordan, Kazakhst an, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Lithuania, Malaysia, Mal ta, Mauritius, Mexico, Moldova, Mongolia, Morocco, Netherlands, North Macedonia, Oman, Pakistan, Philippines, Poland, Portugal, Qatar, Rom ania, Russia, Saudi Arabia, Senegal, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Tanzania, Thail and, Tunisia, Turkmenistan, Ukraine, United Arab Emirates, theUnited Kingdom, the United States, Uzbekistan, Vietnam, Yemen and Zambia.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Under Turkish law, arbitral proceedings seated in Turkey are regulated under Civil Procedure Law No. 6100 (CPL), whereby Turkey-seated arbitral proceedings with a foreign element are governed under International Arbitration Law No. 4686 (IAL).

As per the IAL, a foreign element exists:

- if the parties to the arbitration agreement have their domiciles or regular residences or places of business in different states;
- if the parties to the arbitration agreement have their domiciles or regular residences or places of business in a state other than the one indicated in the arbitration agreement or than the seat of arbitration;
- if the parties to the arbitration agreement have their domiciles or regular residences or places of business in a state different than the one indicated in the arbitration agreement or than the seat of arbitration;
- if the parties to the arbitration agreement have their domiciles or regular residences or places of business in a state different than the place where a substantial part of the obligations arising from the main agreement is performed or than the place where the dispute has the closest connection;
- if a shareholder of the company which is a party to the main agreement has brought foreign capital to Turkey as per foreign capital incentive legislation or if a loan or guarantee agreement needs to be executed for the performance of the main agreement; or
- if the main agreement or legal relationship causes the movement of capital or of goods from one country to another.

As for the recognition and enforcement of awards, the New York Convention and the Turkish International Private and Procedural Law (IPPL) No. 5718 are the primary legislation. Awards that fall outside the scope of application of the New York Convention are to be enforced pursuant to IPPL.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Both the CPL and IAL are based on the UNCITRAL Model Law. The major differences between domestic arbitration law and UNCITRAL Model Law are as follows:

- Under domestic arbitration law, unless agreed otherwise by the parties, the arbitral tribunal should render its decision on the merits within one year as of the selection of the sole arbitrator or of the date of the first meeting minutes of the arbitral tribunal.
- Under the CPL and the IAL, the application for setting aside award must be made within one month and 30 days, respectively.
- As per the CPL and the IAL, arbitral tribunal's decision on its jurisdiction can be a ground for setting aside the award but it cannot be appealed.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The CPL and the IAL include the following similar mandatory provisions on procedure from which parties may not deviate:

- applying to the court for the extension of the period of arbitration;
- non-arbitrable disputes;
- the principle of equal treatment (ie, equality of arms); and
- the preliminary objection procedure on applying to the court regarding non-existence of arbitration agreement.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The CPL does not contain any provision regarding the substantive law applicable to the merits of the dispute. To the extent they are allowed under the IPPL, the parties to an arbitration under the CPL can freely determine the law applicable to the merits of the case. If no such agreement between the parties exists, the arbitral tribunal can apply Turkish law or foreign law to the merits of the case.

In parallel, under the IAL, the parties are free to decide on the law applicable to the merits of the case. If parties are silent, the arbitral tribunal determines the law applicable to the merits of the dispute. While making such determination, the arbitral tribunal shall apply the substantive law of the state that has the closest connection with the dispute.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitral institutions are the Istanbul Arbitration Center (ISTAC) (http://istac.org.tr/en/) and theIstanbul Chamber of Commerce Arbitration and Mediation Center (www.itotam.com/en/), both located in Istanbul.

As per ISTAC arbitration rules, unless otherwise agreed by the parties, the seat of arbitration shall be Istanbul and the parties can determine the language of the arbitration. In the absence of such agreement between the parties, the sole arbitrator or arbitral tribunal shall determine the language or languages of the arbitration considering all circumstances and conditions. The parties are free to agree on the number of arbitrators, which must be an odd number. In cases where the parties have not agreed on the number of arbitrators, the Board of Arbitration shall decide that the dispute be resolved by either a sole arbitrator or by an arbitral tribunal consisting of three arbitrators. As for applicable law, the arbitral tribunal shall make their decision in accordance with the rules of law chosen by the parties as applicable to the merits of the dispute. In the absence of such agreement, the sole arbitrator or the arbitral tribunal shall apply the rules of law that is deemed to be appropriate.

The Istanbul Chamber of Commerce Arbitration and Mediation Center has similar provisions regarding seat of arbitration, language and number of arbitrators. As for the applicable law, the arbitral tribunal must render the award in accordance with the provisions of the agreement entered into by and between the parties and with the applicable rules of law chosen by the parties. Where the parties fail to agree upon the rules of law to be applied to the merits of the dispute, the arbitral tribunal must apply the rules of substantive law that it finds to be most closely related with the dispute.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Under International Arbitration Law No. 4686 (IAL) and Civil Procedure Law No. 6100 (CPL), disputes related to in rem rights in immovable properties and disputes that are not subject to the will of the parties are not arbitrable. To that effect, in general, disputes relating to family law, bankruptcy law, criminal law or administrative law, as a rule, are not arbitrable.

In terms of IP disputes, the Court of Appeal's interpretation is that such disputes are arbitrable.

The disputes relating to cancellation of a general assembly meeting and dissolution of company are considered as non-arbitrable by the Court of Cassation. Istanbul Chamber of Commerce has recently sent its members an email containing a model arbitration clause that companies may insert in their articles of association for the settlement of intra-corporate disputes. However, the Court of Cassation's position on the issue has not yet changed.

As for the arbitrability of disputes regarding competition law, the issue remains controversial as there are no court decisions explicitly allowing or prohibiting arbitrability of competition law disputes.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

In parallel with New York Convention, as per the CPL and the IAL, the arbitration agreement must be in writing.

Pursuant to the IAL and the CPL, if the agreement is included in a document signed by the parties or is made by an exchange of letters, fax or other means of telecommunication or in electronic form, it will be deemed as a written arbitration agreement. Also, if the plaintiff argues for the existence of an arbitration agreement in its statement of claimand the defendant does not object to the arbitration agreement in its response petition, the lack of an agreement in-writing will be considered cured.

The arbitration agreements governed under the CPL shall either be manually signed or signed by means of e-signature in accordance with Law on Electronic Signature No. 5070.

Law No. 805 mandates parties seated in Turkey to execute commercial contracts and transactions in the Turkish language. Despite the outdated character of the Law, there have been instances where the Court of Cassation has denied enforcement of an arbitral award as violation of Law No. 805. Despite the recent pro-arbitration decision, such matters should be handled with care.

If the parties agree on general terms and conditions and refer explicitly to the arbitration clause included in the general terms and conditions, the existence of an arbitration agreement will be undisputable. However, the existence of an arbitration agreement is controversial in the case of a simple reference by the parties to general terms and conditions without referring explicitly to the arbitration clause.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

As a general rule the arbitration agreement must display parties' will to arbitrate clearly and explicitly.

Apart from the formal requirements, the violation of general principles on the validity of agreements such as error, deception, coercion

and legal incapacity will result in the non-enforceability of the arbitration agreement.

On a separate but related note, as per the CPL, the principal must specifically authorise the attorney to execute an arbitration agreement.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The separability of arbitration agreement from the main agreement is regulated under the IAL and CPL according to which the arbitration agreement is separate from the main agreement. Therefore, it is not possible to challenge the arbitration agreement arguing the invalidity of the main agreement.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

In principle, an arbitration agreement is only binding for the parties who have signed it. If the contractual rights are transferred as a whole, the transferee will be bound by the arbitration agreement.

In terms of agency, the courts interpret that third parties cannot be bound by an arbitration agreement through agency relationship.

In cases of succession and insolvency, third parties will be bound by the arbitration agreement.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

In the CPL and the IAL, there is no specific regulation on the involvement of third-party participation in arbitration.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Under the CPL and IAL, there is no specific regulation regarding 'group of companies' doctrine', nor is it recognised by the dominant opinion in the doctrine.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

There are no specific requirements regarding the validity of multiparty arbitration agreements under Turkish Law. However, upon the consent of the parties, the multiparty arbitration agreement can be executed.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Although consolidation of separate arbitral proceedings is not regulated under the CPL or the IAL, upon the consent of parties to arbitration, the arbitral tribunal may – at its own discretion – decide for the consolidation of the proceedings as long as the principles enshrined in the IAL (or the CPL) are followed.

Also, ISTAC rules provide for the consolidation of separate arbitral proceedings pending under the ISTAC rules, provided that the following conditions are satisfied: (1) if the parties to the arbitrations that are requested to be consolidated are different, and all parties have agreed to the consolidation; or (2) if the parties to the arbitrations thatare requested to be consolidated are the same; and the parties have agreed to consolidation; all of the claims in the arbitrations are based on the same arbitration agreement; or if the claims in the arbitrations are based on more than one arbitration agreement, the disputes in the arbitrations arise in connection with the same legal relationship and the arbitration agreements are compatible.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

In principle, there is no specific condition stated under under International Arbitration Law No. 4686 (IAL) and Civil Procedure Law No. 6100 (CPL) imposing restrictions as to who may act as an arbitrator.

As per the Turkish Constitution, active judges and public prosecutors are prohibited from performing duties other than the official ones stated in law and therefore cannot act as arbitrators, whereas retired judges and public prosecutors can act as arbitrators.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Generally, law professors and senior lawyers sit as arbitrators in Turkey.

ISTAC has been promoting gender diversity. Around 30 per cent of ISTAC arbitrations were chaired by female arbitrators.

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

As per the IAL and the CPL, if the parties to the agreement have not included a provision on the number and appointment of arbitrators, the arbitral tribunal will consist of three arbitrators. In such a case, as per the IAL and CPL, the claimant will appoint an arbitrator, notify respondent and the respondent will appoint an arbitrator within 30 days and one month respectively. If the respondent does not appoint an arbitrator, the court will intervene and appoint an arbitrator on behalf of the respondent.

If the parties have agreed on the appointment of sole arbitrator but have not designated the arbitrator, the court will intervene upon the request of one of the parties.

Challenge and replacement of arbitrators

20 | On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

As per the IAL, the arbitrator can be dismissed:

- if the arbitrator does not bear the qualifications agreed by the parties;
- if a reason of dismissal specified under the arbitration procedure agreed by the parties exists; or
- impartiality or independency of the arbitrator is impaired.

The parties are free to determine the procedure of dismissal of the arbitrators. In the case of the silence of the parties on the procedure, the parties to the agreement must request the dismissal within 30 days as of the date of being aware of occurrence of the reason of dismissal. The request of dismissal should be notified to the other party in writing. If one of the party's request of dismissal is not accepted, the party is entitled to apply to the court of first instance within 30 days as of the date of refusal.

The reasons for dismissal and its procedure stated in the CPL are similar to the above apart from the period of times to apply for dismissal.

As for the replacement of arbitrators, the IAL and the CPL stipulate that the procedure for appointment of arbitrators will also be applied for the replacement.

The IBA Guidelines on Conflicts of Interest in International Arbitration will be applied with the agreement of the parties. If there is no such agreement between the parties, the tribunal may at its discretion follow the principles enshrined in the IBA Guidelines on Conflicts of Interest in International Arbitration.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Neither the CPC nor the IAL define the relationship between parties and arbitrators. There are diverging opinions as to classification of the relationship between parties and arbitrators. A group of scholars argue that it is a service agreement while others classify it as a freelance agreement. There is a third group that defines it as a sui generis agreement.

The impartiality and independence of arbitrators is an essential requirement for having a valid and enforceable award.

The parties are free to agree on the remuneration of arbitrators. If it is not agreed by the parties, the arbitrator and the parties will determine it by taking into consideration the quantum, the duration of the proceeding and nature of the dispute.

In the case of absence of such an agreement, the tariff published by the Ministry of Justice applies.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Under the IAL and the CPL, the arbitrator is obliged to disclose any reasons causing any justifiable doubt of his or her impartiality and independence before accepting the appointment. This obligation of disclosure continues throughout the arbitral proceedings.

A similar obligation of disclosure is also enshrined in the ISTAC arbitration rules.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Under the IAL and the CPL, unless otherwise agreed by the parties, an arbitrator is obliged to compensate the parties for the loss caused due to his or her failure to carry out his or her duties.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If court proceedings are initiated despite an existing arbitration agreement, the respondent is entitled to raise a preliminary objection (ie, the arbitration objection) as a rule, within two weeks from receiving the claimant's complaint.

Unless the arbitration agreement is invalid or its application is impossible, the court will dismiss the case on procedural grounds. It should be noted that such objection is necessary for the dismissal of the claim. The courts do not examine arbitration clauses ex officio.

Jurisdiction of arbitral tribunal

25 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

The principle of competence-competence exists under International Arbitration Law No. 4686 (IAL) and Civil Procedure Law No. 6100 (CPL). Accordingly, the arbitral tribunal is entitled to rule on its own jurisdiction. The preliminary objection must be included in the statement of defence.

As per the IAL and the CPL, parties cannot apply to the courts for challenging an arbitral tribunal's ruling on its jurisdiction. Instead, jurisdictional objection can be a ground for setting aside the award.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

As per International Arbitration Law No. 4686 (IAL) and Civil Procedure Law No. 6100 (CPL), failing prior agreement of the parties, the place of arbitration will be determined by the sole arbitrator or the arbitral tribunal depending on the specifics of the case.

Under the IAL, if the parties have not agreed on the language of the arbitral proceedings, the language will be determined by the sole arbitrator or the arbitral tribunal.

CPL does not stipulate a provision regarding the substantive law to apply to the merits of the dispute. The parties to an arbitration can freely decide on the law applicable to the merits of the case. If no such agreement between the parties exists, the arbitral tribunal can apply Turkish law or a foreign law to the merits of the case.

Under the IAL, the parties are free to decide on the law applicable to the merits of the case. In the case of the silence of parties, the sole

arbitrator or the arbitral tribunal will apply the substantive law, which has the closest connection with the dispute.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

As per the IAL and the CPL, unless the parties agree otherwise, arbitral proceedings are deemed to be initiated in the following cases:

- when the claimant applies to the court, person or institution which will select the arbitrator and notifies the respondent;
- when the claimant appoints his or her arbitrator and notifies the respondent; or
- if the name of the arbitrator is indicated in the agreement, the date when the respondent receives the request of arbitration.

Under the CPL, the request for arbitration will include arbitration clause or arbitration agreement, main agreement, the facts upon which relief sought by the claimant is based and its request whereas under the IAL, the request of arbitration shall include full names, titles, addresses of each of the parties and, if any, of their representatives, the agreement or legal relationship related to the dispute, the facts leading to the claims, the subject of the dispute and the quantum in addition to the above.

As per ISTAC arbitration rules, any party wishing to commence an arbitration will submit its request for arbitration to the Secretariat along with one copy for each party, arbitrator and one copy for the Secretariat. The Secretariat will notify the claimant and the respondent of the receipt of the request and the date of such receipt. The request for arbitration will include the following:

- full names, titles, addresses, telephone and facsimile numbers and email addresses of each of the parties and, if any, of their representatives;
- brief explanations on the subject matter, nature and circumstances of the dispute;
- general information of the facts upon which relief sought by the claimant is based;
- along with the relief sought, the amount of any quantified claims, and for the claims for which the amount cannot be determined, an estimate of their monetary value;
- a copy of the arbitration agreement and any other relevant documents that are considered necessary; and
- statements concerning the number of arbitrators, the choice of arbitrators, the seat of arbitration, the language of arbitration and the applicable law.

Hearing

28 | Is a hearing required and what rules apply?

Under both the IAL and the CPL, the arbitral tribunal can decide to conduct the proceedings through file examination or to hold hearings for submission of evidence, statements or expert explanations. In other words the arbitral tribunal is under no obligation to hold a hearing. Also, unless otherwise agreed by the parties, the arbitral tribunal may decide to hold a hearing upon the request of one of the parties at an appropriate stage of the proceeding.

The law does not provide a rule specific for hearings; however, the hearings should be held in line with general principles applicable to arbitral procedure, in particular principle of due process and equality of arms.

In April 2020, ISTAC introduced online hearing rules and procedures. The rules regulate main issues of online hearings. Live court online hearings using video or telephone conferencing technology may be instigated at the request of a party or at the discretion of the arbitrator or arbitral tribunal.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

As per article 12 of IAL, the arbitral tribunal may appoint an expert and carry out on-site inspection. It is also common practice for an arbitral tribunal to order 'document production' and 'cross/direct examination of witnesses' to establish the facts of the case.

Generally, the procedure for taking evidence can be determined by the parties referring to the procedural rules underdomestic law or institutional rules. Often the parties apply or seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

The intervention of courts is possible in the following instances:

- appointment or disqualification of arbitrator;
- extension of the arbitration period;
- evidence collection or witness statement; and
- enforcement of provisional injunction or attachment.

Confidentiality

31 | Is confidentiality ensured?

The confidentiality of arbitration is not regulated under the CPL and the IAL. It is useful that the party who would like to ensure the confidentiality of the arbitral proceeding adds a confidentiality clause in the arbitration agreement.

As per the ISTAC Arbitration Rules, unless otherwise agreed by the parties, the arbitral proceedings are confidential.

The confidentiality of the award may be compromised at enforcement or annulment stage as the hearings are held publicly and the physical case file are available to other attorneys qualified in Turkey.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Under the International Arbitration Law No. 4686 (IAL), the courts may order provisional injunction or attachment decisions before or during the arbitration proceedings upon the request of one of the parties. If the request is made prior to the arbitration proceedings, the applicant is obliged to start the arbitration proceedings in 30 days to prevent its cancellation.

As per the Civil Procedure Law No. 6100 (CPL), the courts may order provisional injunction or attachment decisions before or during the arbitration proceedings only with the consent of the arbitral tribunal or with the agreement of the parties. The deadline for starting arbitration proceedings is two weeks.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

ISTAC arbitration rules provide for an emergency arbitrator prior to the constitution of the arbitral tribunal except for the cases where the

parties have agreed in writing that the emergency arbitrator rules will not apply.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

As per the IAL and the CPL, unless otherwise agreed by the parties, the arbitral tribunal may order interim measures provided that the measures not to be enforced through execution offices or to be executed through other official authorities or that bind third parties.

As for the security for costs, under the IAL, the arbitral tribunal may ask the claimant to deposit security for costs. In case the claimant does not pay security for costs within 30 days as of the stay of proceedings, the arbitral proceedings will be terminated. As per the CPL, the claimant has one month as of the stay of proceedings to pay the security costs determined by the arbitral tribunal. In case of failure, the arbitral proceedings will be terminated.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

In the IAL, the CPL or the ISTAC rules, there are no specific provisions giving the arbitral tribunal the authority to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration. In such case, the arbitral tribunal may resort to general provisions of the law or arbitration rules and may request for an interim measure to put in place in order to refrain a party using 'guerilla tactics'.

Bar complaints and filing of criminal complaints are options available for those who are seeking sanctions against guerrilla tactics.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

As per International Arbitration Law No. 4686 (IAL) and Civil Procedure Law No. 6100 (CPL), unless agreed otherwise, the decisions by the arbitral tribunal are made by a majority of all its members. Also, certain procedural issues may be decided by the presiding arbitrator, if so authorised by the parties or the members of the arbitral tribunal.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Under the IAL and the CPL, it is possible that an award is rendered by majority of votes and that the dissenting opinion is included in the award. In practice, it is sometimes seen that the dissenting arbitrators do not sign the award or resign at the last stage of the proceedings. It is generally accepted that this would not affect the validity of the award.

Form and content requirements

38 | What form and content requirements exist for an award?

As per the CPL and the IAL, names of the members of arbitral tribunal rendering the award; names, titles and addresses of the parties and their representatives, if any; legal reasons of the award and its reasoning; the parties' rights and obligations, arbitration costs stated by the award; the period of time for cancellation; the seat of arbitration and the date of the award; the signatures and dissenting votes of arbitrators, if any are included in the award.

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

As per the IAL and the CPL, unless agreed otherwise by the parties, the arbitral tribunal should render its decision on the merits within one year as of the selection of the sole arbitrator or the date of the first meeting minutes of the arbitral tribunal. The time limit can be extended by the parties' consent or by a court decision upon the request of one of the parties. The time extension to be granted by the court shall be final.

Under the ISTAC arbitration rules, the sole arbitrator or arbitral tribunal should render the award on the merits within six months from the date upon which the completion of the signatures on the terms of reference or, the date of notification to the sole arbitrator or arbitral tribunal by the secretariat of the approval of the terms of reference. The time limit can be extended either upon the agreement of the parties or if the parties fail to agree, the Board may extend the time limit upon the sole arbitrator or arbitral tribunal's request or in cases where it deems necessary on its own initiative.

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

As per the IAL and the CPL, the time limits for a challenge or a request for correction of the award commence with the notification of the award to the parties. As per the IAL and CPL, for setting aside the award, the period of time of 30 days and one month, respectively, commences as of the notification of the award to the parties.

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under the IAL and the CPL, final award and, unless otherwise agreed by the parties, partial awards are possible.

The arbitral tribunal may rule for damages; performance; declaratory judgment; costs; establishment; modification or termination of a legal relationship.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

As per the IAL and the CPL, the proceedings can be terminated in the following cases:

- settlement of the parties;
- claimant withdraws its claims, in principle;
- parties' agreement on termination of the proceeding;

- arbitral tribunal decides that it is impossible or unnecessary to continue the arbitral proceeding;
- the court decides not to extend the arbitration period;
- the arbitral tribunal cannot render an award unanimously despite the parties' agreement on rendering the award unanimously;
- the incapacity of a party preventing continuation of the arbitral proceeding; and
- non-payment of the advance costs.

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Under the IAL and the CPL, unless otherwise agreed by the parties, the losing party will pay the costs for arbitral proceedings. If the award is in favour of both parties, the costs will be allocated proportionally. As a rule, the recoverable costs include remuneration of arbitrators, expert fees and attorney fees.

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

The interest is not stipulated in the IAL and the CPL; however, the arbitral tribunal can decide for an interest subject to applicable law.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

As per both International Arbitration Law No. 4686 (IAL) and Civil Procedure Law No. 6100 (CPL), the arbitral tribunal has the power to correct and interpret an award on its own or at the parties' initiative within two weeks or 30 days as of the notification of the award, respectively.

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

Under the CPL and the IAL, the grounds for setting aside an award are as follows:

- the incapacity of one of the parties or invalidity of the arbitration agreement;
- non-compliance with the procedure of appointment of arbitrators stipulated under the arbitration agreement or the law;
- non-issuance of an award within the time limits;
- non-competence of the arbitral tribunal;
- non-arbitrability; and
- an award violating public order.

Under the IAL, the grounds that can be examined ex-officio by the court are non-arbitrability and violation of public order. Unlike the IAL, the CPL grants a broader authority to courts allowing them to examine all the aforementionedgrounds ex-officio.

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Under the IAL, to set aside an award, a party must apply to the regional court of justice within 30 days as of the notification of the award. The decision on annulment can take approximately two years. The decision to be rendered by the regional court can be appealed as per the CPL which can take one and a half years. At each level, the losing party will bear the costs.

As per the CPL, to set aside an award, a party must apply to the regional court of justice within one month as of the notification of the award which can take approximately two years. The decision to be rendered by the regional court can be appealed within one month which can take approximately one and a half years. Following the appeal, retrial by the court can be applied to the extent possible which can take two years.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Foreign arbitral awards are subject to recognition and enforcement proceedings that are initiated either pursuant to New York Convention or the Turkish International Private and Procedural Law (IPPL). If the requirements under New York Convention or IPPL (which reflects principles almost identical to those enshrined in New York Convention) are met, then the foreign arbitral awards are recognised or enforced (depending on the character of the award) by Turkish courts.

Domestic awards are not subject to recognition and enforcement proceedings.

In line with the framework set by UNCITRAL Model Law, New York Convention, the grounds for refusing enforcement of foreign awards are invalidity of the arbitration agreement or incapacity of one parties, violation of the principle of due process, the award being out of the scope the arbitration agreement and the request of the parties, non-binding award or an award that has been set aside, non-arbitrability, violation of public policy.

As the enforcement of arbitral awards is subject to a simple procedure according to the CCP, as a rule there will be only one round of exchange of petitions and parties will be allowed to submit their petition until the preliminary hearing.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Under the CPL, the time limit for enforcement of arbitral awards is 10 years as of the date of the award. As for the enforcement of foreign arbitral awards, a time limit of 10 years will commence as from the date of finalisation of the enforcement decision by the court.

The New York Convention does not dictate a time limit for the enforcement of foreign arbitral awards. Case law is also silent on the issue. The issue remains controversial in legal circles.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

As per article 62 of Turkish International Private and Civil Procedure Law, foreign awards set aside by the courts at the place of arbitration cannot be enforced in Turkey.

However, the vast majority of arbitral awards whose enforcement are sought in Turkey fall within the scope of the New York Convention. The wording of the New York Convention does not oblige the Turkish courts to refuse enforcement of foreign arbitral awards set aside at their seats. The issue remains controversial in legal circles.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There is no specific regulation in the domestic arbitration stipulating the enforcement of orders by emergency arbitrators. The issue remains controversial in legal circles.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Apart from contractual and statutory attorney fees, claimants in enforcement proceedings incur the following costs.

Court fees

A claimant seeking the enforcement of a foreign arbitral award in Turkey will have to deposit court fees. There are two types of court fees in Turkey, namely the proportional fee and the fixed fee. The fee applicable to enforcement proceedings remained controversial for a long time. However, the enactment of the Code Amending Related Codes for the Improvement of the Investment Environment No. 6728 and the consequent judgment of the General Assembly of the Civil Chambers of the Court of Cassation brought the controversy to an end. Fixed fees apply to enforcement proceedings.

Collateral

Pursuant to article 48 of the IPPL, foreign plaintiffs – be they individuals or legal entities – initiating a lawsuit (including enforcement proceedings) before a Turkish court are required to provide collateral. The amount of collateral is to be determined by the court. The court may hold the plaintiff exempt from providing collateral on a reciprocity basis. Reciprocity can be established via bilateral or multilateral agreements on mutual judicial assistance in civil matters between the countries.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Under Turkish law, US-style discovery does not exist.

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Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules applicable to counsel in international arbitration in Turkey. However, the attorneys registered before the Bar Associations in Turkey are bound with the ethical and professional rules stated in the Attorneyship Law and Professional Rules of the Union of Turkish Bar Associations.

Parties are free to agree on the application of the IBA Guidelines on Party Representation in International Arbitration. In the absence of the agreement, the arbitral tribunal may at its own discretion follow these rules as non-binding guidelines.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Under Turkish law, there are no regulatory restrictions regarding third-party funding of arbitral claims.

Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Citizens of certain countries are required to obtain a visa. Attorneys who are not qualified practitioners under Turkish law are allowed to represent their clients in arbitration proceedings.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The Court of Cassation has rendered a decision on the issue of agreements executed between two Turkish parties and the law on the compulsory use of Turkish. Accordingly, the court has decided that if an arbitration proceeding involves a foreign element, the foreign language would not constitute a violation of Law No. 805 and thus the violation of public policy. The 12th Chamber of Istanbul Regional Court, in its decisions in 2020 and 2021, followed thisapproach.

Although there are still contradictory opinions on the issues, the recent decision of the Court of Cassation is considered as a pro-arbitration approach.

In 2021, Turkey signed BITs with the Democratic Republic of the Congo and Angola. Turkey ratified its new BIT with Georgia in 2021.

A new BIT with China entered force in November 2020.

United Arab Emirates

Chatura Randeniya and Mevan Bandara

Afridi & Angell

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The UAE is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The convention was ratified without any amendments in 2006 by Federal Decree No. 43 of 2006.

The UAE is also a signatory to the ICSID Convention, which was ratified in December 1981.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

The UAE is a signatory to 90 bilateral investment treaties.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

If the arbitration is seated in any emirate in the United Arab Emirates (other than in a financial free zone), the Federal Arbitration Law 6 of 2018 (the Arbitration Law) will apply. The Arbitration Law is largely based on the UNCITRAL Model Arbitration Law.

There are currently two financial free zones established in the United Arab Emirates that have separate arbitration legislation. The financial free zone in Dubai is under the Dubai International Financial Centre (DIFC) and the financial free zone in Abu Dhabi is under the Abu Dhabi Global Market.

The Arbitration Law considers arbitration to be international, even if conducted in the UAE, in the following circumstances:

- the head offices of the parties are located in two different countries;
- the subject of the dispute is related to more than one country;
- if the parties expressly agree that subject of arbitration is related to more than one country; or
- if either of the following places is located outside the country where the head office of a party is located:
  - the seat of arbitration indicated in the arbitration agreement; or
  - the place of performance of the contract.

This guide covers arbitrations seated in the United Arab Emirates (onshore) where the Arbitration Law is applicable.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Arbitration Law is largely based on the UNCITRAL Model Law. However, there are some differences between the Arbitration Law and the UNCITRAL Model Law, including, but not limited to:

- the Arbitration Law provides that the signatory of the agreement must be authorised to enter into the arbitration agreement;
- the date of the commencement of arbitration differs between the Arbitration Law and the UNCITRAL Model Law;
- the Arbitration Law contains provisions regarding the use of technology in arbitration; and
- the Arbitration Law expressly protects the confidentiality of arbitration hearings and awards.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

There are no mandatory provisions on procedure. The Arbitration Law gives parties the freedom to agree on the applicable procedural steps, subject to any procedural requirements that may exist in the agreed rules.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

If the parties have not agreed on the substantive law governing the dispute, the tribunal is required to apply the law that it deems to be most closely connected to the dispute. In determining this issue, the tribunal should take into consideration the following:

- the terms of the contract;
- the subject matter of the dispute;
- the usages of the trade applicable to the transaction; and
- past practices between the parties.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The UAE hosts a number of arbitral institutions, including:

The Dubai International Arbitration Centre (DIAC)
Dubai Chamber of Commerce & Industry
Baniyas Road, Deira
PO Box 1457
Dubai
United Arab Emirates
www.diac.ae/idias/

DIFC-LCIA Arbitration Centre
Dubai International Financial Centre
Al Fattan Currency House, Tower 2, Level 8
PO Box 506870
Dubai
United Arab Emirates
www.difc-lcia.org

This centre is a partnership between the London Court of International Arbitration (LCIA) and the DIFC Arbitration Institute (DAI). The Registrar and case managers of the DIFC-LCIA Arbitration Centre were employed by the DAI; however, by Dubai Decree No. 34 of 2021, the DAI was abolished and all assets and liabilities of the DAI were transferred to the DIAC. Therefore, there is uncertainty as to whether the DIFC-LCIA Arbitration Centre will continue to function. At the time of writing, the DIFC-LCIA Secretariat continues to administer ongoing arbitrations under the DIFC-LCIA Rules. More clarity on this is expected in the near future.

Emirates Maritime Arbitration Centre
Dubai International Financial Centre
Level 3, Precinct Building 5 (South) Dubai
United Arab Emirates
www.emac.org.ae

Dubai Decree No. 34 of 2021 abolished EMAC and all assets and liabilities of EMAC were transferred to the DIAC.

Sharjah International Commercial Arbitration Centre (Tahkeem)
Expo Centre Sharjah
Al Khan Area
Al Taawun St
Sharjah
www.tahkeem.ae/en

There is no uniformity in how fees are calculated. For example, the DIFC-LCIA operates on the basis of hourly rates, and the DIAC charges its fees and fees of arbitrators based on the value of the dispute.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Certain types of disputes are not arbitrable, including:
- labour disputes;
- disputes relating to registered commercial agencies; and
- matters relating to public policy.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The following requirements apply to arbitration agreements:
- the arbitration agreement must be in writing, which includes written or electronic correspondence;
- an arbitration agreement can be incorporated by reference to another document containing an arbitration clause, provided that the reference is clear in that the arbitration clause is being incorporated;
- the person agreeing to arbitration on behalf of a body corporate must have specific authority to agree to arbitration. Ordinarily, this authority must be evidenced by a shareholders' resolution or by the articles of association of a company; and
- if the agreement is entered into by a natural person, such person must have the legal capacity to dispose of his or her rights.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement will not be enforceable in the following circumstances:
- if the arbitration agreement does not fulfil the requirements for an arbitration agreement; and
- if it relates to a type of dispute that is not arbitrable.

An arbitration agreement does not expire or terminate upon the death of either party unless agreed to by the parties.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The Arbitration Law provides that an arbitration agreement must be treated as an agreement independent from the other terms of a contract. The Arbitration Law also provides that the termination or nullification of a contract in which an arbitration agreement is incorporated does not affect the validity of the arbitration agreement.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

A third party cannot be bound by an arbitration agreement or an award under UAE law.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The arbitral tribunal may permit the intervention of a third party only if such party is a party to the arbitration agreement.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

No.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Law does not specifically recognise or disallow multi-party arbitration agreements. Certain institutional rules, however, recognise multi-party arbitration agreements, which will be applicable if such institutional rules are adopted (eg, the Dubai International Arbitration Centre Rules, the Dubai International Finance Centre-London Court of International Arbitration (DIFC-LCIA) Rules and the International Chamber of Commerce (ICC) Arbitration Rules).

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Arbitration Law does not provide for the consolidation of separate arbitral proceedings. In so far as the relevant institutional rules permit consolidation, consolidation of separate arbitral proceedings may be possible. For example, the DIFC-LCIA Rules and the ICC Arbitration Rules specifically provide for the consolidation of separate arbitral proceedings. Although there is no concept of binding precedent in the onshore UAE, there are a number of judgments issued by the Dubai Court of Cassation recognising consolidation of arbitrations in certain circumstances.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The following arbitrator restrictions apply:

- an arbitrator must be a natural person who is not:
  - a minor;
  - under a court interdiction order; or
  - deprived of civil rights due to bankruptcy, committing a felony, misdemeanour or conviction for a crime involving moral turpitude or breach of trust; and
- an arbitrator cannot be a member of the trustees or the administrative body of the institution administering the arbitration (the arbitral institution).

In addition, the Arbitration Law allows for the parties to agree on the gender and nationality of an arbitrator.

Background of arbitrators

18 Who regularly sit as arbitrators in your jurisdiction?

Arbitrators in the UAE come from varying backgrounds and fields of work. Lawyers are frequently appointed while professionals with an engineering or construction industry background are also frequently appointed, particularly in construction disputes.

Default appointment of arbitrators

19 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In the absence of an agreement between the parties, the Arbitration Law provides that an arbitration should be heard by three arbitrators. Each party is required to nominate an arbitrator and the chairperson of the tribunal will be nominated by the parties' nominated arbitrators. If the party-nominated arbitrators are unable to agree on the chairperson, the appointment will be made by the arbitral institution.

In certain institutional rules, the institution is permitted to appoint arbitrators.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The appointment of an arbitrator can be challenged under the Arbitration Law if:

- circumstances exist that give rise to justifiable doubts about the impartiality or independence of the arbitrator; or
- the arbitrator does not possess the required qualifications agreed on by the parties.

The procedure to challenge an arbitrator is as follows:

- a challenge to the appointment of an arbitrator must be made in writing within 15 days of becoming aware of the appointment of the arbitrator or within 15 days of becoming aware of any circumstances justifying the challenge. The challenge must be addressed to the challenged arbitrator and copies must be sent to the arbitration counterparties and the other members of the tribunal;
- if the challenged arbitrator does not withdraw or if the arbitration parties do not agree with the challenge within 15 days, the challenging party may require the arbitral institution to make a decision; and
- the arbitral institution must provide its decision within 10 days.

In addition to the above, there may be separate or different procedures applicable under the institutional rules.

The Arbitration Law provides that an arbitrator can be removed and replaced:

- following the death or incapacity of an arbitrator;
- following a challenge of appointment; or
- if the arbitral institution finds that the arbitrator:
  - is unable to perform their functions or ceases to perform their functions;
  - acts in a manner that leads to unjustifiable delays in the arbitral proceedings; or
  - deliberately fails to act in accordance with the arbitration agreement.

The IBA Guidelines are also considered and sometimes applied by the tribunal in an arbitration. However, these are not applied or considered by the courts.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

There is no contractual relationship between parties and arbitrators. The arbitrators are remunerated by the institution administering the arbitration from funds received as arbitration costs from the parties. Arbitrators, whether appointed by parties or otherwise, are expected to be neutral.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

An arbitrator, once notified of his or her nomination, must disclose in writing everything that may raise doubts about their impartiality or independence. This obligation continues throughout the proceedings; therefore, an arbitrator is obliged to notify the parties of any condition that arises throughout the arbitration proceedings that may impact their impartiality and independence.

Immunity of arbitrators from liability

23 | To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Previously under the UAE Penal Code, arbitrators and certain others (experts, translators, etc) were criminally liable for decisions, opinions, reports or the presentation of a case or proving an incident in favour of or against a person, in contravention of the requirements of the duty of neutrality and integrity. However, this article was amended in 2018 to exclude arbitrators. The Arbitration Law and most institutional rules provide specific provisions exempting arbitrators from liability.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 | What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If a dispute in respect of an arbitration agreement is initiated before the courts, the court will decline jurisdiction if the defendant asserts a jurisdictional objection prior to submitting its plea on the merits of the dispute. In practice, the jurisdictional objection is asserted at the first hearing in which the defendant appears.

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

A jurisdictional objection should be raised no later than with the submission of the respondent's statement of defence. The fact that the party seeking to assert a jurisdictional objection appointed or was involved in the appointment of an arbitrator will not preclude it from asserting a jurisdictional objection.

The principle of competence-competence is recognised in the United Arab Emirates. A tribunal's decision on its own jurisdiction and competence may be appealed to the Court of Appeal within 15 days of the date of being notified of the decision.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Under the Arbitration Law, the default language for arbitration is Arabic and the location of the arbitration will be determined by the tribunal having regard to the circumstances of the case, including the convenience of the parties. The institutional rules also provide the default language and the seat of arbitration in the event that there is no agreement between the parties. For example, the default seat under the Dubai International Finance Centre-London Court of International Arbitration Rules and the Dubai International Arbitration Centre Rules is the Dubai International Financial Centre.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Arbitration is commenced following the filing of a request for arbitration. The requirements for the request are generally contained in the applicable institutional rules. If arbitration is to be commenced by lawyers, evidence of authority by way of a power of attorney is usually required.

Other procedures apply in initiating proceedings, depending on the arbitration rules being used.

Hearing

28 | Is a hearing required and what rules apply?

The arbitral tribunal may decide whether oral pleadings shall be held or to continue on the basis of producing documents and other material evidence. Generally, if any witness or expert evidence is adduced, a hearing is required to administer the oath, which is a requirement under the UAE Evidence Law.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

An adversarial approach is generally used in arbitrations where parties are required to adduce their evidence to establish the facts of the case. Depending on the subject matter of the dispute, party-appointed experts are often engaged.

The IBA Rules on the Taking of Evidence in International Arbitrations are the most commonly used rules, and witnesses must be sworn in.

The arbitral tribunal may decide to appoint one or more experts, unless otherwise is agreed by the parties. These experts are not party-appointed; instead, they are appointed by the tribunal. The parties may object to the appointment of an expert, but the tribunal will decide whether to accept the objection.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Local courts can intervene in limited circumstances, including:

- to assist in the taking of evidence;
- to compel a witness to give evidence; and
- to direct a third party to produce documents.

Local courts can also assist in choosing arbitrators only if the court is the institution administering arbitration or if the parties have agreed to seek the assistance of the court.

Confidentiality

31 | Is confidentiality ensured?

Unless the parties agree otherwise, arbitration proceedings are confidential. Information cannot be disclosed in subsequent proceedings without the consent of the parties.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Local courts can issue interim measures (such as attachment orders) before or after arbitration proceedings have been initiated. Interim measures are granted at the discretion of the court.

The measures below can also be granted by a local court through an application to the chief judge of the Court of Appeal:

- preserve evidence;
- preserve goods which constitute part of the subject matter of the dispute;
- preserve assets and funds;
- maintain or restore the status quo; and
- take action that would prevent or refrain from taking action that is likely to cause imminent harm or prejudice to the arbitration process.

Interim measures by an emergency arbitrator

33 Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Arbitration Law does not provide for an emergency arbitrator. However, certain institutional rules, such as the Dubai International Finance Centre-London Court of International Arbitration Rules and the International Chamber of Commerce Rules, provide for a mechanism for the appointment of an emergency arbitrator.

Interim measures by the arbitral tribunal

34 What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The Arbitration Law empowers the tribunal to grant interim or conservatory measures that it considers necessary given the subject matter of the dispute, including orders to:

- preserve evidence;
- preserve goods that constitute part of the subject matter of the dispute;
- preserve assets and funds;
- maintain or restore the status quo; and
- take action that would prevent or refrain from taking action that is likely to cause imminent harm or prejudice to the arbitration process.

Sanctioning powers of the arbitral tribunal

35 Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

No.

AWARDS

Decisions by the arbitral tribunal

36 Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

It is sufficient if the decisions made by the arbitral tribunal are made by a majority of its members. It is common for the parties and the tribunal to agree that the chairman of the tribunal may issue procedural decisions on his or her own.

Dissenting opinions

37 How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are permitted. However, unless the parties agree otherwise, the majority opinion will prevail.

Form and content requirements

38 What form and content requirements exist for an award?

The following legal requirements apply for the recognition of an award:

- the award must be in writing and signed by the arbitrators. The signatures of the majority of the arbitrators are sufficient, provided that the reason for any omitted signature is stated;
- unless the parties have agreed to the contrary, the award must include the reasons for the decision; and
- the award must include specific information, including:
  - the names and addresses of the parties;
  - the names, nationalities and addresses of the arbitrators;
  - the text of the arbitration agreement;
  - a summary of the parties' claims, statements and documents; and
  - the date and place of issue of the award.

Time limit for award

39 Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Yes, the final award must be issued within the period agreed by the parties. If there is no such agreement, the final award must be issued within six months from the date of the first hearing of the arbitration (which is generally the preliminary hearing). The tribunal may extend this period by up to six additional months, unless the parties agree to a longer extension.

Date of award

40 For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of serving the arbitral award is decisive, as any application to set aside the award or a request for correction of the award must be made before the lapse of 30 days following the serving of the award.

Types of awards

41 What types of awards are possible and what types of relief may the arbitral tribunal grant?

Tribunals may grant final awards, partial awards, interim awards and consent orders.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

The Arbitration Law provides that arbitration proceedings may be terminated in the following events:

- the parties agree to terminate;
- the claimant discontinues the arbitration proceedings (unless the respondent requests for this to be continued); or
- if the tribunal deems the proceedings useless or impossible.

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The successful party will ordinarily be able to recover its costs in arbitration. The allocation of costs is at the tribunal's discretion. Generally, the percentage of costs recovered is commensurate with the success of the claims asserted. Costs are not recoverable in the municipal courts of the UAE (as opposed to the courts in the financial free zones). Arbitration costs are recoverable, and legal costs are recoverable subject to there being an agreement between the parties for recovery of legal costs.

A party's management costs are generally not recoverable.

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

Interest may be awarded. If the interest rate is not agreed between the parties, UAE law permits a maximum rate of 12 per cent under the Commercial Transactions Law. The courts generally award interest at a rate of 9 per cent and this is usually adopted in arbitrations. In Dubai, the interest rate awarded by the court was recently revised to 5 per cent, and it is expected that arbitrations seated in Dubai will follow suit.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The tribunal may correct any material errors in the award that are clerical or computational on its own initiative or following the request of a party. A request to correct such errors should be made within 30 days from receiving the award.

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

Awards can be set aside on the following grounds:

- there is no arbitration agreement or the agreement is void or has lapsed;
- a party agreeing to arbitration does not have the capacity to agree to arbitration;
- a party fails to present its case in the arbitration because it was not given proper notice of the appointment of an arbitrator, of the arbitral proceedings or for any other reason beyond its control;
- the award excludes the application of the parties' choice of law for the dispute;
- the composition of the tribunal or the appointment of the arbitrator was not in accordance with the law or the agreement between the parties;
- the arbitral proceedings were marred by procedural irregularity or the arbitral award was not issued within the specified time frame;
- the award goes beyond the arbitrator's scope;
- the subject matter of the dispute cannot be settled by arbitration; or
- the arbitral award conflicts with the public order and morality of the state.

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There are only two levels of appeal when challenging an arbitral award. Note, however, that no appeal is available on the merits of the award, and, an award can be challenged on limited grounds.

An application to set aside an award must be brought before the Court of Appeal within 30 days from receiving notice of the award. Any appeal must be filed before the Court of Cassation.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

A party seeking ratification and enforcement of a domestic award is required to file suit in the Court of Appeal to ratify the award. On ratification, it can be enforced through the local enforcement courts. Since the UAE has ratified the New York Convention, a foreign award may be enforceable in the country provided that the award was rendered in a country that has ratified the New York Convention. The UAE courts generally apply the provisions of the New York Convention in the enforcement of a foreign arbitral award. New regulations have recently been introduced for the recognition and enforcement of foreign arbitral awards, which make the enforcement of foreign arbitral awards faster and easier than the enforcement of local arbitral awards. The UAE courts, and in particular the Dubai courts, tend to look favourably on enforcement of awards.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

No.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

It is unlikely that a local court will enforce an award if it has been set aside by the courts in the seat of arbitration. Article V(e) of the New York Conventions states that the recognition or enforcement of an award can be refused if the award has been set aside.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Arbitration Law does not specifically provide for such a mechanism. In theory, however, the enforcement of an order by an emergency arbitrator is possible under the same procedure to enforce interim orders.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The costs involved in enforcing awards depend on the court where enforcement proceedings are initiated. Such costs are not recoverable (other than the court fees).

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

With the exception of the laws and regulations that govern the Dubai International Financial Centre and Abu Dhabi Global Market free zones, there is no process of discovery and inspection of documents in the UAE judicial system. Each party is expected to produce the documents that it wishes to rely on for its case. There is no obligation on a party to file a document that is damaging to its case, and thus discovery is limited. Therefore, the IBA Rules on the taking of evidence are often used in the UAE for matters concerning production of documents. It is common to have expert and witness evidence.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The Arbitration Law provides that a code of conduct for arbitrators will be issued by the Ministry of Economy, although this has not yet been issued. Counsel will be subject to the relevant codes of conduct that apply in the jurisdictions in which they are licensed to practise. The Dubai Legal Affairs Department has a draft charter for the conduct of advocates and legal consultants.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no rules on third-party funders in onshore United Arab Emirates. Both the Dubai International Finance Centre and the Abu Dhabi Global Market have specific rules on third-party funding. The recently issued Dubai Decree No. 34 of 2021 contains a new statute of the Dubai International Arbitration Centre (DIAC), which refers to the board of directors of the DIAC being empowered to issue rules regarding arbitration funding.

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Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

The UAE is an Islamic country and adheres to the teaching of Islam. Expatriates are reminded to be respectful to the religion when visiting, working and living in the UAE.

An arbitrator must hold a valid work visa to work in the UAE. In the event that the arbitrator maintains another profession, a no objection certificate must be provided by their employer to work as an arbitrator.

Arbitrators must follow the rules applicable to the specific arbitration proceedings they are involved in, and remain impartial and independent.

On 1 January 2018, the UAE introduced 5 per cent VAT.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The sweeping changes introduced by Dubai Decree No. 34 of 2021 and the resulting uncertainty regarding arbitrations conducted under the Dubai International Finance Centre-London Court of International Arbitration Rules, in particular, has dominated recent discussions in arbitration. There are still issues of uncertainty, and clarifications are expected. Dubai Decree No. 34 of 2021 also provides that the Dubai International Arbitration Centre will publish new rules, which is expected in the near future.

United Kingdom

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

England and Wales form part of the United Kingdom. The UK is a signatory to the New York Convention, which entered into force on 23 December 1975.

The UK has made what is known as the 'reciprocity reservation'. By virtue of this, the UK's New York Convention obligations will therefore apply only to the recognition and enforcement of awards made in the territory of another contracting state. The UK has also extended the convention's territorial application, including to certain of its overseas territories and crown dependencies.

The UK is party to:

- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (the ICSID Convention);
- the Energy Charter Treaty (which came into force on 16 April 1998); and
- the Geneva Convention on the Execution of Foreign Arbitral Awards 1927.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

According to the UNCTAD Investment Policy Hub as at January 2021, the UK is party to 110 bilateral investment treaties, of which 97 are in force and 13 have been signed, but not yet entered into force. The UK is also a party to a number of other treaties (bilateral or multilateral) which contain investment provisions.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to domestic and foreign arbitral proceedings and the recognition and enforcement of awards is the Arbitration Act 1996 (the Act).

The Act applies to both domestic and international arbitrations where the seat of arbitration is England and Wales or Northern Ireland (section 2). In addition, under section 2.2, certain sections of the Act will apply even if the seat of arbitration is outside the jurisdiction or where no seat has been designated or determined. Part III of the Act addresses the recognition and enforcement of foreign arbitral awards.

Common law may also be relevant in interpreting the Act or placing additional obligations on parties and arbitrators (eg, confidentiality).

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The UK has not adopted the UNCITRAL Model Law, although the Arbitration Act does incorporate many of the principles set out within it. Because the Act came into force in 1996 and has not been amended, its similarities to the Model Law relate to the 1985 version, rather than the more recent amendments.

Important differences (non-exhaustive) to be aware of between the 1985 Model Law and the Act include:

- section 69 of the Act provides for a party to arbitration proceedings to appeal to the court on a question of English law arising out of the award;
- under the Act a party has only 28 days from the date of the award to challenge it, while the Model Law provides for three months; and
- under section 30 of the Act, the parties may agree to limit the tribunal's power to rule on its own substantive jurisdiction (competence-competence). The Model Law does not contain a similar opt-out.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Section 4 of the Act identifies that certain provisions of the Act are mandatory and others non-mandatory. It then points to Schedule 1 of the Act to set out the mandatory provisions in full. These include:

- sections 9 to 11 (provisions related to the stay of court proceedings);
- section 12 (power of court to extend agreed time limits for commencing arbitration);
- section 13 (application of Limitation Acts to arbitral proceedings);
- section 24 (power of court to remove arbitrator);
- section 26(1) (effect of death of arbitrator);
- section 28 (joint and several liability of parties for fees and expenses of arbitrators);
- section 29 (immunity of arbitrator);
- section 31 (objection to substantive jurisdiction of tribunal);
- section 32 (determination of preliminary point of jurisdiction);
- section 33 (general duty of tribunal);
- section 37(2) (items to be treated as expenses of arbitrators);
- section 40 (general duty of parties);
- section 43 (securing the attendance of witnesses);

- section 56 (power to withhold award in case of non-payment);
- section 60 (effectiveness of agreement for payment of costs in any event);
- section 66 (enforcement of award);
- sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity), and sections 70 and 71 (supplementary provisions; effect of order of court) so far as relating to sections 67 and 68;
- section 72 (saving for rights of person who takes no part in proceedings);
- section 73 (loss of right to object);
- section 74 (immunity of arbitral institutions); and
- section 75 (charge to secure payment of solicitors' costs).

Substantive law

6 Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Under section 46 of the Act the tribunal shall decide the dispute either:

- in accordance with the law chosen by the parties as applicable to the substance of the dispute; or
- if the parties so agree, in accordance with considerations as agreed by them or determined by the tribunal.

Where the parties have not chosen or agreed an applicable law, the tribunal should apply the law determined by the conflict of laws rules that it considers applicable (section 46(3)).

Arbitral institutions

7 What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitral institution based in England and Wales is the London Court of International Arbitration (LCIA).

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Tel: +44 20 7936 6200
Fax: +44 20 7936 6211
lcia@lcia.org
www.lcia.org

In 1883, the City of London set up a committee to establish a tribunal for the arbitration of domestic and transnational commercial disputes arising within the City. Initially called the Chamber, it was renamed the London Court of Arbitration in 1903 and in 1981 the London Court of International Arbitration to reflect the nature of its predominantly international workload.

The LCIA issues an annual casework report. In 2020, 444 arbitrations were referred to the LCIA, of which 407 were under the LCIA Rules. Parties referring their disputes to the LCIA come from a diverse range of jurisdictions, although the number of UK parties remains significant at 13.4 per cent. Disputes in energy and resources, transport and commodities and the banking and finance sectors dominate the LCIA's caseload.

The LCIA is formed of a Secretariat and a court. The Secretariat administers cases submitted to the LCIA, with the LCIA Court overseeing the proper application of the LCIA Rules.

The LCIA's current rules came into force on 1 October 2020, replacing the 2014 LCIA Rules. In line with other leading arbitral institutions, the LCIA Rules contain provision for joinder and consolidation, Emergency Arbitrators and for the Expedited formation of the arbitral tribunal. Key distinguishing features of the LCIA Rules include:

- annex of general guidelines on the conduct of party representatives and powers for the tribunal to impose sanctions for breach of those conditions;
- rigorous provision on confidentiality;
- in default of agreement, the seat of arbitration will be London unless the LCIA Court determines another seat is more appropriate;
- nomination of arbitrators by the parties for appointment by the LCIA;
- provision for Early Determination of claims or defences;
- the ability to issue a 'composite' request and response to commence multiple arbitrations;
- confirmation that a tribunal may order a remote or virtual hearing (in whole or in part); and
- an hourly rate fee structure rather than being based on a percentage of the value of the dispute.

The Chartered Institute of Arbitrators (CIArb) is an international body for the practice and profession of alternative dispute resolution. It also offers international arbitration services, which include having its own arbitration rules and acting as an appointing authority. The CIArb is based in London, but has a global network, supporting members and practitioners around the world.

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The CIArb Arbitration Rules currently in force are dated 1 December 2015. These rules were based on the 2010 version of the UNCITRAL Arbitration Rules, with the CIArb as the appointing authority. In addition, the CIArb has included provisions on waiver of the parties' right of appeal, provision for emergency arbitrators and a checklist of suggested matters to be considered at the first procedural conference.

London has a flourishing commodities and sector-focused arbitration market. These arbitrations may be pure ad hoc arbitrations under the Act or may be administered or take place under a set of specialist rules. These include:

The London Maritime Arbitrators' Association (LMAA)
The IDRC
1 Paternoster lane
London
EC4M 7BQ
Tel: +44 20 7283 7701
info@lmaa.london
www.lmaa.org.uk

Insurance and Reinsurance Arbitration Society (ARIAS (UK))
Tel: +44 7710 799 886
secretary@arias.org.uk
www.arias.org.uk

Grain and Feed Trade Association
9 Lincoln's Inn Fields
London
WC2A 3BP
Tel: +44 20 7814 9666
Fax: +44 20 7814 8383
post@gafta.com
www.gafta.com

Because of the popularity of London as a seat of arbitration, many London-seated arbitrations are conducted under the rules of other leading arbitral institutions, including the International Chamber of Commerce.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

The Arbitration Act 1996 (the Act). specifies that the parties may submit contractual and non-contractual disputes to arbitration. Section 6(1) gives considerable freedom to the parties to determine how their disputes are resolved, subject only to such safeguards as are necessary in the public interest (section 1(b)). However, the Act does not include any express provisions on what disputes are incapable of being referred to arbitration.

Despite this, under common law, there are certain disputes that are considered non-arbitrable. These include:

- disputes under illegal contracts;
- criminal matters;
- certain family matters;
- certain low-value consumer disputes; and
- claims under the Employment Rights Act 1996 (which renders void any agreement that would prevent an employee from having its case heard before an employment tribunal).

Other disputes that provide a statutory remedy from the courts or require the state to intervene to protect or grant a right may be able to be arbitrated, but the arbitral tribunal many not be able to offer the remedy sought (for example, relating to companies or to IP).

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The Act applies (subject to very limited exceptions) to arbitration agreements in writing (section 5). There is an agreement in writing if the agreement:

- is made in writing (whether or not it is signed by the parties);
- is made by exchange of communications in writing; or
- is evidenced in writing.

Section 5 also sets out certain circumstances that will constitute such agreement in writing, including reference to standard terms and conditions.

While oral arbitration agreements fall outside the scope of the Act, they may still be recognised and enforced at common law (section 81(1)(b)).

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

The Act enshrines the principle of separability in section 7. Unless the parties agree otherwise, an arbitration agreement that forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective. The arbitration agreement is, therefore, treated as a distinct agreement, which can have its own separate governing law. In the recent case of *Kabab-Ji Sal (Lebanon) v Kout Food Group* (Kuwait) [2021] UKSC 48, the English Supreme Court clarified the approach under English law to the determination of the law governing the arbitration agreement.

As a result of this doctrine of separability, if the matrix contract in which the arbitration agreement sits is no longer enforceable, the arbitration agreement will remain enforceable unless there are any circumstances that undermine that arbitration agreement itself (under general contractual principles) (*Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20). Section 7 can only be disapplied by express waiver.

An arbitration agreement is not discharged by the death of a party (section 8). An agreement to arbitrate can be waived if a party takes part in court proceedings commenced in breach of that arbitration agreement.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Section 7 of the Act addresses the separability of arbitration agreements from the main agreement.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under English law, a party needs to have agreed to arbitrate for that party to be bound by an arbitration agreement or award.

However, various English common law principles might bind a third party to an arbitration agreement. These include:

- where an agent-principal relationship exists;
- where contractual rights or causes of action are assigned or transferred. If those rights or causes of action were subject to an arbitration agreement, it will bind the third party (*West Tankers Inc v RAS Riunione Adriatica de Sicurta SpA* [2005] EWHC 454 (Comm));
- where a contract is novated, the third party assumes the rights and obligations of one of the original parties to the agreement as if it had been a party from the outset. This will include the arbitration agreement; and
- where rights or claims have been subrogated, subrogated insurers will be bound by the arbitration agreement that applies to the subrogated rights or claims.

Where non-parties to a contract have rights under it pursuant to the Contracts (Rights of Third Parties) Act 1999 and that contract contains an arbitration agreement, the third party may also be able, or be required, to arbitrate to enforce those rights. A third party with a debt claim may have a direct claim against an insurer of the debtor where the debtor is insolvent under the Third Parties (Rights Against Insurers) Act 1930. If the original insurance agreement has an arbitration agreement, it will bind the third party.

The group of companies doctrine does not form part of English law and group parties will not be recognised as parties to an arbitration agreement unless expressly agreed (*Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm)). However, the corporate veil may be pierced to bind a third-party group company to an arbitration agreement where the existence of a separate corporate entity is a façade.

An arbitration award is binding on the parties to the arbitration and on any persons claiming through or under them. Depending on the parties' agreement, the award may also bind other parties, such as guarantors.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

English law requires agreement between the parties to arbitrate. The Act does not permit the tribunal to consolidate proceedings involving third parties or join third parties to the arbitration without the consent of the parties (section 35). Similarly, the tribunal has no power to compel third parties to join an arbitration without their consent. In practice, such consent to joinder or consolidation is addressed either in the drafting of the arbitration clause or through the adoption of institutional rules that provide for joinder or consolidation.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine does not form part of English law and group parties will not be recognised as parties to an arbitration agreement unless expressly agreed (*Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm)). However, the corporate veil may be pierced to bind a third-party group company to an arbitration agreement where the existence of a separate corporate entity is a façade.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Multiparty agreements to arbitrate are commonplace in contracts governed by English law or with an English seat. While the Act does not deal with the issue of multiparty arbitration agreements directly, these are recognised by the English courts, while provisions of the Act expressly identify situations in which there may be more than two parties to an arbitration agreement (sections 16(7) and 18(2)).

In the absence of an express procedure for the appointment of the tribunal in a multiparty agreement in the arbitration agreement or any arbitration rules chosen by the parties, the Act allows for a party to apply to the court to make the appointments or direct the appointment process (section 18(2)).

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Unless the parties agree to confer such power on the tribunal, it has no power to order consolidation of proceedings or concurrent hearings (section 35).

The parties are free to agree the terms on which any consolidation may take place. This agreement may be given expressly through the arbitration agreement itself or by incorporation of a set of arbitral rules that provide for the consolidation of proceedings in certain circumstances.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Arbitration Act 1996 (the Act). expressly requires that an arbitrator be impartial (section 33). By inference from the powers given to the court to remove an arbitrator (section 24), an arbitrator must also possess the qualifications required by the arbitration agreement and be physically and mentally capable of conducting the proceedings. Section 93(2) of the Act states that judges of the Commercial Court of England and Wales can only sit as arbitrators with the approval of the Lord Chief Justice.

In *Jivraj v Hashwani* (2011, UKSC 40) the Supreme Court confirmed that parties need not comply with anti-discrimination provisions contained in labour law when selecting their arbitrators.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

Lawyers and non-lawyers may sit as arbitrators in England and Wales. In practice, the vast majority of arbitrators will come from a legal background. The jurisdiction has a split legal profession, made up of barristers and solicitors. Arbitrators can come from either profession, often chosen from the partners of firms of solicitors or from amongst the QCs and senior juniors of barristers chambers. Retired members of the judiciary (including ex-Court of Appeal and Supreme Court judges) often become arbitrators, joining sets of barristers' chambers. Less common is the appointment of academics or in-house counsel. Where non-lawyers are appointed as arbitrators, the arbitration may have a technical or sector-specific element that requires specific specialist expertise (for example, in commodities arbitration).

The London Court of International Arbitration (LCIA) and Chartered Institute of Arbitrators (CIArb) UK have both signed the Equal Representation in Arbitration pledge to improve gender diversity in institutional appointments. The LCIA has been very proactive in publishing its gender statistics. In 2019, 48 per cent of all arbitrators selected by the LCIA Court were female, up 5 per cent from 2018 and 16 per cent from 2017. In 2020, 45 per cent of all arbitrators selected by the LCIA Court were female, compared to 48 per cent in 2019.

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under section 15(3) of the Act, a dispute will be resolved by a sole arbitrator in the absence of an agreement between the parties as to the number of arbitrators (either expressly in their arbitration agreement or through the adoption institutional rules). If the parties likewise fail to agree on a procedure for appointing the arbitrator or arbitrators (either in their arbitration agreement or through the adoption of institutional rules) the procedure for the appointment of arbitrators in section 16 will apply. Under section 16, if the tribunal is to consist of a sole arbitrator, the parties are given 28 days to agree on a joint appointment. If the tribunal is to consist of three arbitrators, each party has 14 days to appoint their selected arbitrator, with those two so appointed choosing the third arbitrator. There is provision for if a party fails to participate in the process.

Articles 5-8 of the LCIA Rules address the appointment of arbitrators. Under the LCIA Rules the default position is that a sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or

if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three).

If an agreed appointment procedure fails, section 18 of the Act provides a process for the English Court to give directions to establish a tribunal.

Challenge and replacement of arbitrators

20 | On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The appointment of an arbitrator can be challenged. Under section 24 of the Act, a party to the arbitration may apply to the court for the removal of an arbitrator on the following grounds:

- circumstances exist that raise 'justifiable doubts' as to the arbitrator's impartiality;
- the arbitrator does not possess the qualifications required by the arbitration agreement;
- the arbitrator is physically or mentally incapable of conducting the proceedings, or there are justifiable doubts as to his or her capacity to do so; or
- the arbitrator has refused or failed to conduct the proceedings properly or efficiently.

In all these circumstances, the party must also be able to show that there has been or will be substantial injustice caused. The arbitrator has the right to be heard by the court and may continue proceedings while the court hears the application. If the court then decides to exercise its powers of removal, it may make an order determining the fees that the arbitrator should be paid, or require the arbitrator to repay fees or expenses already received. If the parties are arbitrating under institutional rules that provide the institution with the power to remove an arbitrator, the court shall not exercise its power of removal unless it is satisfied that institutional recourses have first been exhausted (section 24(2)).

An arbitrator can be replaced where:

- the parties revoke that arbitrator's authority (section 23);
- the court removes the arbitrator on the basis of specific grounds discussed above (section 24);
- the arbitrator resigns (section 25); or
- the arbitrator dies (section 26).

The parties are free to agree whether and how the vacancy is to be filled, to what extent the previous proceedings should stand and what effect the vacancy has on any appointments made by the arbitrator (section 27). There may be an agreed process in the parties' arbitration agreement or applicable institutional rules. If not, the provisions of section 27 apply to fill the vacancy.

When considering the question of independence and impartiality, the English Courts have sought guidance from the IBA Guidelines on Conflicts of Interest. However, the English Courts have confirmed that they are not bound by the guidelines. In *A v B* [2011] EWHC 2345 (Comm) the court concluded that if the application of the common law test showed there was no apparent or unconscious bias, the IBA Guidelines would not alter that conclusion. In *W Limited v M SDN BHD* [2016] EWHC 422 (Comm), the court identified weaknesses in the guidance, in particular the inability of parties or arbitrators to apply case-specific judgment to a Non-waivable Red List situation. The judgment of the Supreme Court in the case of *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 has confirmed that an arbitrator is under a duty to disclose facts and circumstances that would or might reasonably give rise to an appearance of bias. Compliance with this duty should be assessed with regard to the circumstances at the time the disclosure fell to be made. The Supreme Court confirmed the test for apparent bias under English law and stated that the distinctive features of arbitration must be taken into account when applying that test. The Supreme Court has also confirmed that the duty of impartiality applies in the same way to every member of the tribunal and 'the party-appointed arbitrator in English law is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal'.

Relationship between parties and arbitrators

21 | What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The most commonly held view of the relationship between parties and arbitrators under English law is that there is a contractual relationship between parties and arbitrators. However, this approach is not without nuance. In *Jivraj v Hashwani*, submissions were made on the basis of both a contractual relationship and a quasi-judicial status for the arbitrator, with Sir Nicholas Browne Wilkinson VC stating 'in truth the arbitrator's rights and duties flow from the conjunction of those two elements'. Most therefore consider it to be a special contract in which the arbitrator undertakes quasi-judicial functions in return for remuneration and immunity in his or her role (where acts or omissions are in good faith).

The duties of the arbitrator are addressed in 'Interim measures by the courts'. Under section 28 of the Act, the parties are jointly and severally liable to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances. A party may apply to the court to consider and adjust an arbitrator's remuneration. An arbitrator may also withhold an award for non-payment of his or her fees and expenses by the parties (section 56).

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The tribunal has a general duty to:

- act fairly and impartially between the parties, giving each party a reasonable opportunity to put its case and deal with their opponent's case; and
- adopt suitable procedures for the case to provide a fair means for resolving the matters to be determined, avoiding unnecessary delay or expense (section 33).

The duty of impartiality has been confirmed by the Supreme Court in the case of *Halliburton v Chubb*. This case has also confirmed that an arbitrator is under a duty to disclose facts and circumstances which would or might reasonably give rise to the appearance of bias. The Supreme Court held that compliance with this duty should be assessed with regard to the circumstances at the time the disclosure fell to be made.

Article 14.1 of the LCIA Rules reproduces section 33 of the Act in setting out the tribunal's duties. In addition it specifies at article 14.2 that the arbitral tribunal shall have the widest discretion to discharge these general duties.

Immunity of arbitrators from liability

23 | To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators and their employees and agents are immune for acts and omissions in the discharge or purported discharge of their duties, unless

they have been shown to have acted in bad faith (section 29). However, an arbitrator is generally not immune from any liability incurred where the arbitrator has resigned (subject to any agreement with the parties on the consequences of that resignation, or relief granted by the court from any liability incurred as a result of resignation) (section 25).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The main remedy under the Arbitration Act 1996 (the Act) where English court proceedings are initiated in breach of an existing arbitration agreement is a stay. A stay stops the English court proceedings from continuing and, in effect, requires the parties to commence an arbitration to proceed with their claims. A party to an arbitration agreement against whom legal proceedings are brought in the English court (whether as a claim or counterclaim) in respect of a matter that is covered by an arbitration agreement, may apply to the English court for a stay under section 9 of the Act. In addition to the power under section 9, the English court also has inherent power to stay proceedings under section 49(3) of the Senior Courts Act 1981 in circumstances where the requirements of section 9 are not satisfied, although this will require 'rare and compelling circumstances' (*Reichhold Norwar ASA v Goldman Sachs International* [1999] EWCA Civ 1703).

An application for a stay must be made in the court where the legal proceedings have been commenced and can only be made once you have taken 'the appropriate legal step (if any) to acknowledge the legal proceedings' (section 9(3) of the Act). This will usually mean that the defending party will acknowledge service and indicate that jurisdiction is contested. This acknowledgement of service form is usually required to be submitted within 14 days following service of the claim. Once this has been done, an application notice for the stay, supported by a witness statement, will be issued under Civil Procedure Rule 62.8. Section 9(4) makes the granting of a stay by the English court mandatory unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. However, taking any substantive step in the proceedings brought in breach of the arbitration agreement may waive the right to ask for the stay.

If foreign court proceedings are commenced in breach of an arbitration agreement, the English court may consider issuing an anti-suit injunction restraining the party in breach of the arbitration agreement from commencing or continuing the foreign proceedings. This power arises under section 37 of the Senior Courts Act 1981 (*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35). Following 1 January 2021, the English court may now be able to issue an anti-suit injunction against EU court proceedings. An application for anti-suit relief should be brought promptly. An application under section 37 will be brought using an arbitration claim form under PD62.

Jurisdiction of arbitral tribunal

25 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

An objection to the substantive jurisdiction of a tribunal can be made to the English court at the outset of the arbitration under section 31(1) of the Act. If such an objection is made it should be raised quickly, no later than the time that the party takes the first step in the proceedings to contest the merits of any matter in relation to which it challenges the tribunal's jurisdiction.

It is also possible for a party to raise an objection before the court to the tribunal's jurisdiction during the course of the proceedings under section 31(2). That objection must be made as soon as possible after the matter alleged to be beyond the jurisdiction of the tribunal is raised. The tribunal may allow a later objection if the delay is considered justified.

Under section 32 of the Act, a party may also apply to the English court to determine any question as to the substantive jurisdiction of the tribunal. This application must be made on notice to the other parties and must be made either with the agreement in writing of all the other parties or with the permission of the tribunal. The court must also be satisfied that the determination is likely to produce cost savings, that the application was made without delay and that there was a good reason for the matter to be decided by the court.

Once an award has been issued, a party to the arbitration can challenge that award for lack of jurisdiction under section 67 of the Act. A party's ability to challenge an award on the basis of lack of jurisdiction (section 67) may be lost if that party has not raised a timely jurisdictional objection during the arbitral proceedings themselves (section 73).

The court's role sits alongside that of the arbitral tribunal. Under section 30 of the Act, unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction (the doctrine of competence-competence). While the English courts respect this doctrine and will often defer to the tribunal's own powers to determine jurisdiction, the Supreme Court has emphasised in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 that, notwithstanding the principle of competence-competence, the English court retains the power to examine or re-examine the jurisdiction of the arbitrators.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

The Arbitration Act 1996 (the Act) contains no default position on language or place of arbitration. If the parties have not reached an agreement on these issues, the tribunal has the discretion to decide the language, the seat of the arbitration proceedings and the place where hearings will be held (sections 3 and 34(2)(a) and (b)). If the tribunal is not authorised to do so, it will be for the court to determine the seat.

Under section 46 of the Act, the tribunal shall decide the dispute either:

- in accordance with the law chosen by the parties as applicable to the substance of the dispute; or
- if the parties so agree, in accordance with considerations as agreed by them or determined by the tribunal.

Where the parties have not chosen or agreed an applicable law, the tribunal should apply the law determined by the conflict of laws rules that it considers applicable (section 46(3)).

Commencement of arbitration

27 How are arbitral proceedings initiated?

Parties may often agree to the application of institutional rules to their arbitration, and these will usually address the commencement of an arbitration.

To the extent that the parties have not agreed on a process, section 14 of the Act states as follows:

- where the arbitrator is named or designated by the parties in the arbitration agreement, the proceedings are commenced when one party serves a notice in writing to the other party, requiring them to submit the matter to the person named or designated;
- where the parties are to appoint the arbitrator, arbitration is commenced when one party serves on the other party notice requiring them to appoint an arbitrator or to agree to the appointment of an arbitrator; and
- where the arbitrator or arbitrators are to be appointed by a third party, proceedings are commenced when one party gives notice in writing to that third party requesting it to make the appointment in respect of that matter.

Under section 12, parties are also able to agree on time limits in which claims must be brought by arbitration (in addition to statutory limitation periods).

Under the London Court of International Arbitration (LCIA) Rules the claimant sends copies of a Request for Arbitration simultaneously to the LCIA and the respondent(s) (article 1.1). Article 1.1. sets out various specific requirements about what must be contained within that document and article 4 provides details on how the Request should be submitted. The date on which this is received electronically by the LCIA is the commencement date of the arbitration unless the registration fee has not been received (articles 1.4 and 1.1(vi)). Within 28 days of the commencement date, the respondent must deliver its Response, and has until the delivery of its defence to challenge jurisdiction (articles 2 and 23.3). The LCIA Rules also provide at article 1.2 for a claimant wishing to commence more than one arbitration under the LCIA Rules (whether against one or more respondents or under one or more arbitration agreements) to serve a composite Request in respect of all such arbitrations, provided all the information required in article 1.1 is included for each arbitration. Under article 2.2, a respondent may serve a composite Response where a composite Request has been submitted.

Hearing

28 | Is a hearing required and what rules apply?

There is no requirement under the Act that a hearing be held or that it be held in a particular form. This would fall within the tribunal's general discretion under section 34 in respect of procedural matters. In practice, it is rare that arbitrations are conducted on paper, and most arbitrations have an oral hearing.

The LCIA Rules provide at article 19.1 that any party has the right to a hearing before the tribunal unless they have agreed in writing upon a documents-only arbitration. The LCIA Rules also provided for a hearing to take place in person or by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). This allows for the practice of remote or virtual hearings that have arisen during the covid-19 pandemic.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In the absence of party agreement, the gathering of evidence falls within the tribunal's discretion under sections 34, 43 and 44 of the Act. Documentary evidence is usually obtained through a document production process but may also be provided by parties as annexes to their pleadings, witness statements and expert reports. Witness and expert evidence will usually be provided in the form of a written statement or report, followed by oral examination at a hearing. Subject to the parties' agreement to the contrary, the tribunal may also appoint its own legal or technical expert (section 37).

The tribunal has broad discretion to decide issues of evidence including whether to apply strict rules of evidence (or any other rules) on admissibility, relevance or weight, as well as the time, manner and form in which such material should be exchanged and presented (section 34(2)(f)). Some tribunals will apply or be guided by the International Bar Association's Rules on the Taking of Evidence in International Arbitration. The Prague Rules on the efficient conduct of proceedings in international arbitration launched in late 2018 might also be relevant to the tribunal's approach to evidence in some circumstances.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

The English court will not intervene in proceedings sua sponte. The court can become involved where there is a failure of the appointment process or where there is no agreement as to the appointment process (section 18). In addition, they can intervene in accordance with the powers set out in the Act when approached for assistance or support by a party to an arbitration or by an arbitrator. This may include:

- enforcing a peremptory order of the arbitral tribunal (section 42);
- securing the attendance of a witness (provided they are in the UK and the arbitration is being conducted within England, Wales or Northern Ireland) (section 43);
- obtaining disclosure of documents or other material evidence for an arbitration being conducted within England, Wales or Northern Ireland (section 43);
- unless excluded by the agreement of the parties, the court may also take witness evidence, preserve evidence, make orders relating to property which is the subject of proceedings, order the sale of goods, grant an interim injunction or order the preservation of evidence or assets in the case of urgency (section 44); and
- determining a question of law arising in the course of the arbitration (section 45).

Confidentiality

31 | Is confidentiality ensured?

There is no express provision for confidentiality in the Act. Parties may provide for confidentiality in their arbitration agreements expressly, or may rely on the implied duty of confidentiality under English common law (see *Ali Shipping Corporation v Shipyard Trogir* ([1997] EWCA Civ 3054) and *Emmott v Michael Wilson & Partners Ltd* ([2008] 1 Lloyd's Rep 616 (CA))). The parties to the arbitration and the tribunal are under implied duties to maintain the confidentiality of the hearing, documents generated and disclosed during the arbitral proceedings and the award. The implied duty is subject to certain exceptions. Information produced in or prepared for arbitral proceedings can be disclosed in subsequent proceedings only in certain limited circumstances. These include where:

- consent to disclosure has been given;
- matters in the arbitration are before the court (eg, for preliminary relief, enforcement or challenge);
- disclosure is reasonably necessary to establish or protect a party's legal rights or legitimate interests; or
- disclosure is necessary in the interests of justice.

These exceptions have developed through English common law.

In terms of court proceedings related to arbitration, the Civil Procedure Rules (CPR 62.10) provide that court proceedings relating

to arbitration are usually heard in private except those where there is a point of English law being determined (eg, under section 45 or 69 of the Act).

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The court is able to grant interim measures in support of arbitration (section 44) and has the same power of making orders about the matters listed in section 44 as it has for the purposes of legal proceedings. Those matters include, but are not limited to, the taking of evidence of witnesses, the preservation of evidence and the granting of an interim injunction. Following the case of *A and B v C, D and E* [2020] EWCA Civ 409, the power of the English court under section 44 may also include the power to issue an order compelling a non-party to an arbitration agreement to give evidence in support of arbitration proceedings seated both inside and outside England and Wales.

This is a non-mandatory provision of the Arbitration Act 1996 (the Act) and can be amended by the parties. Certain powers, such as those in relation to the preservation of assets, require either urgency (section 44(3)) or the permission of the tribunal or agreement in writing of the other parties (section 44(4)). In *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch), the English court held that where there is sufficient time for an applicant to obtain relief from an expedited tribunal or emergency arbitrator under the London Court of International Arbitration (LCIA) 2014 Rules, the court has no power to grant urgent relief. In that case, it was held that the court did not have power to grant the freezing injunction requested by the applicant because the applicant's request for an emergency arbitrator had already been considered and dismissed by the LCIA. The LCIA 2020 Rules include some small alterations to the old article 9.12 (now article 9.13) and to article 25.3 to seek to address this case. The result has been to simplify the language of these articles and to confirm the availability of court-ordered interim relief in certain circumstances. It remains to be seen how the English court approaches the interaction between the LCIA 2020 Rules and the Act on this point.

If foreign court proceedings are commenced in breach of an arbitration agreement, the English court may consider issuing an anti-suit injunction restraining the party in breach of the arbitration agreement from commencing or continuing the foreign proceedings. This is covered in 'Sanctioning powers of the arbitral tribunal'.

Interim measures by an emergency arbitrator

33 Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Act does not include any provision for the appointment of an emergency arbitrator.

Interim measures may be available under institutional arbitration rules through the appointment of an emergency arbitrator before the tribunal is constituted. The LCIA Rules include provision for the appointment of an emergency arbitrator (article 9B) and also for the expedited formation of the arbitral tribunal (article 9A). Both articles set out specific requirements that must be fulfilled for the LCIA to permit the application.

See 'Influence of legal traditions on arbitrators' for the relationship between the availability of such procedures under institutional rules and the English court's use of its powers under section 44 of the Act.

Interim measures by the arbitral tribunal

34 What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Unless otherwise agreed by the parties, the tribunal has the power to grant a number of interim measures under sections 38 and 39 of the Act. These include:

- an order for the claimant to provide security for costs of the arbitration;
- measures to inspect or preserve property or evidence; and
- orders on a provisional basis granting relief that they would have the power to grant in a final award.

The parties may have agreed that the tribunal should have different or additional powers to grant interim measures, either in their arbitration agreement or by reference to institutional arbitration rules.

Sanctioning powers of the arbitral tribunal

35 Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Under section 40 of the Act, the parties to an arbitration are subject to a mandatory general duty to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings'. The tribunal is empowered to enforce this general duty under section 41. The parties are free to agree on the powers of the tribunal, otherwise, the tribunal has default powers to dismiss the claim (section 41(3)) in specified circumstances. The tribunal may continue proceedings where one party refuses to participate without sufficient cause and may issue a peremptory order for failure to comply with a tribunal's order without sufficient cause. If the party then fails to comply with a peremptory order of the tribunal, the tribunal, or the other party with the permission of the tribunal, may apply to the court for an order under section 42. The breach of such an order of the court would be treated as contempt, which could result in fines or a term of imprisonment. The tribunal may also sanction a party for its guerrilla tactics in determining its award of costs under section 61 of the Act.

The LCIA Rules are unique among arbitral institutional rules in including an annex entitled General Guidelines for Parties' Legal Representatives, which governs the conduct of party representatives. This annex was introduced in the 2014 LCIA Rules and has been retained in the recent 2020 amendments. Article 18.5 of the Rules provides for sanctions against party representatives for breach of these guidelines. This includes a written reprimand or caution, or 'any other measure necessary' to fulfil the general duties required of the tribunal (article 18.6).

AWARDS

Decisions by the arbitral tribunal

36 Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Under section 20 of the Arbitration Act 1996 (the Act), parties are free to appoint one of the tribunal as chairman and can agree what the functions of the chairman are to be. If there is no such agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators

(including the chair). In the event of a deadlock, the view of the chair shall prevail. Alternatively (albeit unusually), it is possible under section 21 for there to be an 'umpire' who will replace the arbitrators and make decisions if the arbitrators have been unable to agree. Under section 22, where the parties agree that there shall be two or more arbitrators but no chairman or umpire, the parties are free to agree how the tribunal is to make decisions.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Although there is no specific mention that dissenting opinions are permitted, section 20(3) states that awards can be rendered by a majority. Section 53(3) of the Act provides that only those assenting to the award shall sign it. In practice, it is not uncommon for a dissenting arbitrator to issue a dissenting opinion to explain his or her reasons for disagreeing with the majority.

Form and content requirements

38 | What form and content requirements exist for an award?

Section 52(1) of the Act specifies that the parties are free to agree on the form of the award. If no agreement has been reached the award must:

- be in writing;
- be signed by all arbitrators (or those assenting to the award);
- contain the reasons for it (unless it is an agreed award or the parties have agreed to dispense with reasons);
- state the seat of the arbitration; and
- state the date on which it is made (sections 52(3) to (5)).

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

There are no time limits contained in the Act regarding the delivery of the award. However, the parties may agree to a time limit in their arbitration agreement. On the application of the tribunal or by any party to the proceedings (having exhausted all available arbitral processes for obtaining an extension), the court may extend the time limit if it considers that a substantial injustice would otherwise result (section 50(3)).

Under article 15.10 of the London Court of International Arbitration (LCIA) Rules, the tribunal should seek to make the award as soon as reasonably possible and shall endeavour to do so not later than three months following the last submission from the parties, in accordance with a timetable notified to the parties and the Registrar as soon as practicable.

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Time limits under the Act all rely on the date of the award rather than its date of delivery (as set out in the Act and confirmed in *S v A and B* [2016] EWHC 846 (Comm)). This includes:

- correction of the award or an additional award: to be applied for within 28 days of the date of the award or such longer period as the parties may agree (section 57(4)); and
- challenge to the award under sections 67-69: to be brought within 28 days of the date of the award (or if there has been any arbitral process of appeal or review, of the date when the applicant was notified of the result of that process) (section 70(3)).

The court may extend these time limits under section 79, but will only do so where any available recourse has first been exhausted and the court is satisfied that a substantial injustice would otherwise have been done. In practice, this is very rare.

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

In addition to a final award, the Act recognises that a tribunal may issue: partial final awards: under section 47 of the Act, unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matter (partial awards). This could be an award relating to:

- an issue affecting the whole claim; or
- a part only of the claims or cross-claims submitted to it;
- provisional awards: section 39(1) of the Act recognises that a tribunal may grant provisional relief in a final award if the parties confer such power by agreement;
- agreed awards: section 51(2) provides that, if claims are settled during arbitral proceedings, if so requested by the parties, the tribunal 'shall record the settlement in the form of an agreed award'. This is also known as a consent award; and
- additional awards or corrections to awards: section 57 allows a tribunal to correct an award for a clerical mistake or error or to make an additional award in respect of a claim that was not dealt with in its earlier award.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

If a party fails to comply with its duty under section 40 of the Act, the tribunal may make an award under section 41 dismissing the claim. In the event of a settlement before an award is granted, they may request that the tribunal terminate the proceedings and record the settlement as an agreed or consent award under section 51.

In addition, it may be open for a claimant to withdraw their claim and seek to terminate the arbitration, subject to any counterclaim or the allocation of costs incurred.

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

In the absence of agreement between the parties, the tribunal can determine which costs of the arbitration are recoverable (section 63(1)) and make an award allocating those costs (section 63). In advance of the parties incurring costs, the tribunal may also direct that recoverable costs be limited (section 65).

The costs of the arbitration include:

- the fees and expenses of the arbitrator or arbitrators (provided that they are reasonable or appropriate in the circumstances (section 64(1));
- the fees and expenses of any arbitration institution concerned; and
- the legal and other costs of the parties (section 59).

The general principle under English law is that costs should follow the event (ie, the successful party will be awarded its costs), unless this is not considered appropriate in the circumstances (section 61(2)).

If the tribunal does not determine what costs (if any) are recoverable, any party to the arbitration may apply to the court for a costs determination (section 63(4)).

Interest

44 May interest be awarded for principal claims and for costs, and at what rate?

Subject to an agreement between the parties, the tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers to meet the justice of the case (section 49) both up to the date of the award and from the date of the award to the date of payment. The rate and period of any interest is therefore largely at the tribunal's discretion.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Subject to any agreement of the parties to the contrary, if there are mistakes in an award, the tribunal may, on its own initiative or on the application of a party, correct the award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity (section 57(3)(a)). The tribunal is also able to make an additional award in relation to any claim presented to it that was not dealt with in the original award. All the parties must be given a reasonable opportunity to make representations to the tribunal (section 57(3)(b)).

There are a number of specific time limits (subject to the parties agreeing a longer period):

- any application for a correction must be made within 28 days of the date of an award or such longer period as the parties may agree (section 57(4)) and any correction of an award must then be made within 28 days of the date on which the tribunal receives the application;
- where the correction is made by the tribunal on its own initiative, the correction must be made within 28 days of the date of the award;
- any additional award must be made within 56 days of the date of the original award (section 57(6)); and
- any correction of an award shall form part of the award (section 57(7)).

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

A party must first exhaust all available options to correct or review the award within the arbitral process itself (sections 57 and 70(2) of Arbitration Act 1996 (the Act)). This will include any provisions in any applicable arbitration rules.

A party may then apply to the court to challenge an award on the grounds that the tribunal lacked substantive jurisdiction (section 67) or there was a serious irregularity affecting the tribunal, the proceedings or the award (section 68). Section 68 provides an exhaustive list of irregularities and in each case the court must be satisfied that the irregularity has caused or will cause substantial injustice to the applicant. A party may also seek to appeal an award on the grounds that the tribunal made an error on a point of English law (section 69).

Both sections 67 and 68 are mandatory (they cannot be excluded by party agreement), but section 69 is non-mandatory. Many institutional arbitration rules (including the London Court of International Arbitration (LCIA) Rules) expressly exclude all non-mandatory rights of appeal.

A party can lose the right to object if it takes part, or continues to take part, in the proceedings, unless that party can show that at the time it took part, or continued to take part, in the proceedings, it did not know and could not with reasonable diligence have discovered the grounds for the objection (section 73).

A section 67 or 68 challenge or an appeal under section 69 must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process (section 70(3)). Part 62 of the Civil Procedure Rules will apply.

Levels of appeal

47 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

An application to challenge an arbitral award will be made to the Commercial Court (a part of the High Court). The application must be made within the time limit set out by the Act and will also need to comply with the requirements of the Civil Procedure Rules Part 62, PD 62 and the Admiralty and Commercial Court Guide. The Court will usually determine applications for permission to appeal under section 69 of the Act without an oral hearing, but may direct otherwise (Admiralty and Commercial Court Guide O8.1(l)). A challenge for serious irregularity under section 68 can also be dealt with without a hearing. If an applicant requires a hearing despite the court and respondent agreeing it should be dealt with on paper, the court may award costs on an indemnity basis if the challenge is then dismissed. Where a hearing is to take place, it will usually be heard within six to nine months of the date of the application.

The Commercial Court may grant permission to appeal to the next level, the Court of Appeal. The Court of Appeal does not have the power to grant permission if the Commercial Court refuses, subject to the extremely limited residual jurisdiction of the Court of Appeal to set aside a High Court Judge's refusal of permission if the decision can be considered to be so unfair or improper that it cannot be considered a decision at all. Further appeal is possible to the Supreme Court with the permission of the Court of Appeal. This is incredibly rare in the context of arbitration claims. Each level of appeal would take 12 to 18 months to result in a judgment. Costs will usually follow the event.

Recognition and enforcement

48 What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The English courts have a pro-enforcement stance and both domestic and foreign arbitral awards can be enforced in the English courts. English courts will refuse to enforce arbitral awards only rarely. As a signatory to the New York Convention, the courts recognise foreign arbitration awards made in the territory of a state that is a party to the New York Convention in accordance with section 101 of the Act, but awards made in the territory of non-signatory states may also be enforced.

The party seeking to enforce the award will apply to the court to enter a judgment or order of the court on the same terms as the award (under sections 66 or 101 of the Act). A party may also be able to enforce an arbitral award at common law.

A party seeking to enforce an arbitral award under the New York Convention will need to comply with the formal requirements set out in it, together with any additional local procedural requirements.

Certain grounds may be raised in opposition to an application for recognition and enforcement of an award:

- a non-New York Convention award will not be enforced under section 66 of the Act where the tribunal lacked the substantive jurisdiction to make the award. The English court may also refuse

enforcement under section 66 on grounds similar to those which may be relied upon in defence of an application for recognition and enforcement of a New York Convention award (found in section 103 of the Act);

- section 103 contains an exhaustive list of the grounds for refusing recognition or enforcement of a New York Convention award, replicating the language of the New York Convention. The English Supreme Court recently refused to recognise a foreign-seated arbitration award under section 103(2)(b) of the Act on the basis that the award was made against a non-party (*Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48). In doing so, the Supreme Court confirmed the availability of a summary procedure under this provision where appropriate. The Commercial Court has also held that it does not have the jurisdiction to allow a defendant to a New York Convention enforcement application to issue a CPR Part 20 counterclaim (*Selevision Saudi Co v Bein Media Group LLC* [2021] EWHC 2802 (Comm));
- section 37 of the Arbitration Act 1950 sets out the grounds on which recognition and enforcement of a Geneva Convention award can be refused; and
- an award being enforced at common law may not be enforced where the validity of the award is in doubt.

Enforcement of the award can then take place using all means available to a court under English law, such as enforcement against goods or assets or third-party debt orders.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Claims to enforce a domestic award are subject to the same limitation rules as would apply to an action on the award. The limitation period for an action on the award is six years from the date on which the cause of action accrued (see section 7, Limitation Act 1980). Where the award specifies a date for compliance, the action will accrue from that date. Where no date is specified the cause of action is likely to accrue from when a reasonable time to pay the award has elapsed.

While the New York Convention does not set out grounds to reject enforcement of foreign awards on the basis of limitation, these same rules will apply to foreign awards being enforced within the jurisdiction.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The English courts have a pro-enforcement stance and will refuse to enforce arbitral awards only rarely. As a signatory to the New York Convention, the courts recognise foreign arbitration awards made in the territory of a state that is a party to the New York Convention in accordance with section 101 of the Act, but awards made in the territory of non-signatory states may also be enforced.

In terms of foreign awards set aside by the courts at the place of arbitration, section 103(2)(f) of the Act does specify that enforcement of an award can be refused where 'the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made'.

The English court will usually stay enforcement proceedings where an application is ongoing in the court of the seat to set aside the award (eg, *Stati v Republic of Kazakhstan* [2015] EWHC 2542 (Comm)). However, it will not do so where the court of the seat is applying its own domestic laws and the risk of contradictory judgments is inevitable (*Kabab-Ji Sal (Lebanon) v Kout Food Group* (Kuwait) [2021] UKSC 48). In that case, the Supreme Court refused recognition of an arbitral award that had been upheld at the seat by the Paris Court of Appeal (although, as of November 2021, the appeal to the Paris Supreme Court is still pending).

Where a decision to set aside the award has been rendered, the court will consider whether the decision is entitled to recognition and should not then have discretion to enforce the award (eg, *Malicorp Ltd v Government of the Arab Republic of Egypt and others* [2015] EWHC 361 (Comm)). However, the English court is not bound to recognise a decision of the seat that sets aside an award if the decision is contrary to natural justice and domestic concepts of public policy (*Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm)).

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

To date, the authors are unaware of any enforcement of an order from an emergency arbitrator within the jurisdiction.

There is no reference to emergency arbitrators within the Act because the Act predates the introduction of such processes. Whether or not the decision of an emergency arbitrator could be enforced by the English courts would depend on the nature of the decision. While an award is not defined in the Act, an award will be finally determinative of the issues in dispute (*Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd (The Smaro)* [1999] 1 Lloyd's Rep 225). In deciding whether a decision is an award or a procedural ruling on the merits, an English court will ask itself how the decision would have been understood by the parties, what issues the tribunal was asked to determine, whether the tribunal was asked by the parties to produce an award and what language was used in that decision (*Michael Wilson v John Forster Emmott* [2008] EWHC 2684 (Comm)). Whether or not an emergency arbitrator's decision will be enforceable as an award will be a question of its content rather than whether it is named an order or award.

Under article 9.9 of the LCIA Rules, emergency arbitrator decisions shall 'take effect as an award under article 26.8' and shall be 'final and binding on the parties'. It is unclear what impact these provisions would have on the court's analysis.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

Enforcement of both domestic and foreign awards must take place under the procedure set out in CPR 62.18. The application will be made to the court, accompanied by the arbitration agreement, award, witness statement, a draft order and the application fee, together with the fee for filing an arbitration claim form.

The main additional costs of enforcement will be legal fees, particularly if enforcement is contested by the other side (although these may be recoverable if enforcement is then permitted). There will be costs in serving the defendant party with the enforcement application. Once enforcement is permitted, there will then be resulting costs in enforcing against the defendant's assets.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Most arbitration practitioners in the jurisdiction have an international approach to arbitration. However, there are some aspects of the English

or common law legal tradition that may continue to affect some practitioners' attitudes. These include:

- a tendency to order document production of some variety, whether limited or otherwise;
- the assumption that witnesses should be cross-examined on their evidence and that common law cross-examination practice should be adopted;
- the assumption that rules of privilege will apply in all jurisdictions, including the concept of without prejudice communications; and
- a predisposition towards the 'costs follow the event' approach to the allocation of costs in arbitration.

Professional or ethical rules

54 Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules that apply solely to counsel and arbitrators in international arbitration in the jurisdiction. Rather, practitioners are bound by the general regulatory regime. This includes:

- the Solicitors' Regulation Authority's Principles and Code of Conduct, which binds solicitors in England and Wales, registered foreign lawyers and registered European lawyers; and
- barristers of England and Wales are subject to the Bar Standards Board.

The interaction between different regulatory regimes for foreign practitioners who are temporarily in the jurisdiction for an arbitration hearing will depend on the domestic rules of those foreign practitioners and whether any agreement exists between the UK and that country (for example, under European legislation).

However, certain prohibitions on fee arrangements may apply to foreign lawyers working on English-seated arbitrations.

The IBA Guidelines on Party Representation in International Arbitration do, in the main, represent best practice in the jurisdiction, although care should be taken in the preparation of witnesses for cross-examination.

Third-party funding

55 Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

English law, in line with other common law systems, has historically refused to allow for disputes to be funded by third parties. The principle of champerty and maintenance was based on a public policy concern that the funding party might seek to increase the size of the claim, exert influence over the party it is funding or seek to profit disproportionately from the dispute.

This restriction has, for the most part, now been lifted. Under English law third-party funding is permitted provided there is no impropriety in the arrangement. This could occur where the arrangement appears to inflate the damages claimed or where the funder takes control of the litigation or arbitration (see the cases of *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 and *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] EWCA Civ 1144 for guidance on how active a role funders may have in English litigation and arbitration). If a funding arrangement falls foul of the guidance it may be unenforceable by the funder.

Other than the common law guidance, there is no specific regulation of third-party funders in the jurisdiction. However, most third-party funders adhere to the Code of Conduct for Litigation Funders issued by the Association of Litigation Funders (last updated in January 2018), which sets out standards of best practices and behaviour.

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Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

London is one of the most commonly used seats of arbitration. English law remains a hugely popular choice for international contracts and a choice of London seat is often seen as going hand in hand with that choice. The Arbitration Act 1996 (the Act) is also a well-regarded piece of arbitration legislation, supported by a highly sophisticated legal system with a supportive (but not interventionist) judiciary.

There are no restrictions on foreign practitioners acting as advocates in London-seated arbitral proceedings. In terms of access to the jurisdiction for a hearing, anyone seeking entry to the UK should seek their own advice on the visa requirements. Non-visa nationals are not required to apply for a visa or a Permitted Paid Engagement visa unless they are planning to stay over a particular period of time. Visa nationals must obtain a visa before they enter the UK (either a standard visitor visa or a Permitted Paid Engagement visa, depending on their activities).

Anyone involved in an arbitration in the jurisdiction should similarly seek advice on the implications for VAT, depending on whether the parties are commercial customers and whether they, or the arbitrators, are UK nationals. These factors are likely to impact on whether and how the parties or arbitrators charge or account for VAT.

Any foreign practitioner considering offering a success- or damages-based fee arrangement to their client for an arbitration seated in the jurisdiction should also be aware of the regulation of such arrangements in the UK and consider whether they are required to comply with that regulatory regime by virtue of the seat of arbitration.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Arbitration is well established in the UK, as is the courts' pro-arbitration stance.

Some have questioned the longer term impact of Brexit on London as a seat of arbitration, although the framework of arbitration in England and Wales and the enforceability of London-seated arbitral awards under the New York Convention is unaffected by European legislation. The London Court of Arbitration reported its highest ever caseload for 2020. Its long-term growth also shows a doubling of arbitrations over the past 10 years.

In late November 2021, the Law Commission of England announced that it will conduct a review of the English Arbitration Act 1996 as part of its 14th Programme of Law Reform. The overarching aim will be to "maintain the attractiveness of England and Wales a '*destination' for dispute resolution and the pre-eminence of English law as a choice of law*". Although the scope of the review is yet to be determined, the Law Commission has stated that possible areas that will be included are:

- the power to summarily dismiss unmeritorious claims or defences in arbitration proceedings;
- the courts' powers exercisable in support of arbitration proceedings
- the procedure for challenging a jurisdiction award;
- the availability of appeals on points of law;
- the law concerning confidentiality and privacy in arbitration proceedings; and
- electronic service of documents, electronic arbitration awards, and virtual hearings.

The Law Commission will launch the review during the first quarter of 2022 and aims to publish a consultation paper in 2022.

United States

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The United States has been a party to the New York Convention since 29 December 1970. The United States took both the reciprocity and commercial reservations under article I of the Convention, meaning that the Convention applies to arbitral awards that:

- are made in the territory of another contracting state; and
- pertain to disputes considered to be commercial under US law.

The United States is also a party to:

- the Inter-American Convention on International Commercial Arbitration (the Panama Convention), effective since 27 October 1990. The text of the Panama Convention is similar to that of the New York Convention, and courts generally implement the two conventions in a manner designed to achieve consistent outcomes; and
- the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), effective since 14 October 1966.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

The United States is a party to bilateral investment treaties with 45 other countries, and to a number of bilateral and multilateral free trade agreements (FTAs) containing investor–state dispute settlement (ISDS) mechanisms. On 1 July 2020, the US-Mexico-Canada Agreement (USMCA) came into force among the United States, Mexico and Canada. The USMCA replaced NAFTA, significantly altering NAFTA's ISDS mechanism. The countries have largely abandoned the ISDS mechanism between US and Canada and Canada and Mexico. However, The USMCA ISDS mechanism will not be fully effective immediately. NAFTA has a sunset clause, permitting investors from all three countries to have access to investor–state arbitration for the next three years, provided they made their investments while NAFTA still was in effect.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Federal Arbitration Act (FAA), a federal statute, regulates both domestic and international arbitration in the United States. Chapter 1 of the FAA, 9 United States Code (USC) sections 1–16, governs domestic arbitrations between US citizens.

The New York and Panama Conventions (codified as Chapters 2 and 3 of the FAA, respectively) apply to 'foreign' or 'international' arbitrations - that is, where the arbitration is not wholly between citizens of the United States or has some other 'reasonable relation' to another New York- or Panama Convention contracting state.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The FAA predates the UNCITRAL Model Law and is not based on it. Nonetheless, it similarly supports the principles of party autonomy, the enforcement of arbitration agreements in accordance with their terms and limited judicial review of arbitral awards.

There are a few noteworthy differences between the FAA and the UNCITRAL Model Law. In general, the FAA is much less detailed than the UNCITRAL Model Law, leaving various matters of procedure and process to be determined by the parties, the arbitrators or the applicable institutional rules. The two regimes also provide somewhat different grounds for setting aside (or vacating) an arbitration award. As another example, whereas the UNCITRAL Model Law does not grant national courts the power to modify or correct arbitral awards, the FAA does grant US courts the ability to do so in certain cases.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Courts consider arbitration to be contractual in nature, and thus do not apply mandatory rules to the conduct of arbitration proceedings.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

US-seated tribunals will generally honour the parties' choice of law applicable to the merits of a dispute. The FAA does not provide tribunals with any guidance as to which substantive law should apply to the merits

of a dispute absent express agreement by the parties, and tribunals may exercise their discretion in this regard.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

Major US-based arbitral institutions include:

The American Arbitration Association (AAA)
120 Broadway, 21st Floor
New York, NY 10271
United States
www.adr.org

The International Centre for Dispute Resolution (ICDR)
(the international branch of the AAA)
120 Broadway, 21st Floor
New York, NY 10271
United States
www.icdr.org

The International Institute for Conflict Prevention
and Resolution (CPR)
30 East 33rd Street, 6th Floor
New York, NY 10016
United States
www.cpradr.org

Judicial Arbitration and Mediation Services (JAMS)
620 8th Avenue, 34th Floor
New York, NY 10022
United States
www.jamsadr.com

The ICDR is a prominent US-based organisation for international disputes. It respects the choice of the parties with respect to the place of arbitration, the selection of arbitrators and the language or applicable law of the arbitration (as do all of the US arbitration institutions). The ICDR calculates fees based on time spent by the arbitrators.

JAMS and the CPR have international rules that likewise respect party choice in these respects.

The International Chamber of Commerce (ICC) has an office in New York from which it administers its North American arbitrations. In 2020, the Singapore International Arbitration Centre (SIAC) opened an office in New York for the administration of cases. Although the ICC and SIAC are used frequently by US parties for international arbitration disputes, a discussion of their rules is not included in this chapter.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

There are very few restrictions on the types of disputes that can be arbitrated under federal law. Certain intrastate family, consumer and municipal matters may be considered non-arbitrable under state law.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

The FAA and the New York Convention require arbitration agreements to be made in writing. However, courts interpret this requirement in a commercially practical manner and, in appropriate cases, have enforced arbitration agreements where, for example, the final contract was unsigned or where the agreement to arbitrate was entered into via email or in certain other circumstances.

Generally, US law permits non-signatories to be bound to an arbitration agreement through application of traditional principles of state law such as assumption, corporate veil piercing, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel. This year, the US Supreme Court clarified that in arbitrations governed by the New York Convention, a non-signatory to the arbitration agreement can be compelled to arbitrate based on the doctrine of equitable estoppel (see *GE Energy Power Conversion Fr. SAS, Corp. v Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (1 June 2020)).

An agreement to arbitrate may be set out in a document other than the contract in dispute, such as where that document is incorporated by reference into the main agreement. Parties may also agree to arbitrate after a dispute has arisen.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

FAA section 2 permits challenges to arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract', such as mistake, lack of capacity, fraudulent inducement, incapacity, rescission and termination of the arbitration agreement. Nonetheless, US policy strongly favours the enforcement of arbitration agreements, and these challenges will be scrutinised closely.

Courts respect the principle of separability, which requires that the arbitration agreement be treated as a distinct agreement that is not rendered invalid, non-existent or ineffective simply because the contract itself may be treated as such.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The Federal Arbitration Act does not expressly provide for the separability of arbitration agreements from the main agreement. However, the US Supreme Court recognised this doctrine in Prima Paint, providing that 'an arbitration clause in the contract is "separable" from the rest of the contract, and that allegations that go to the validity of the contract in general, as opposed to the arbitration clause in particular, are to be decided by the arbitrator, not the court' (*Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395, 409 (1967)).

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

Generally, third parties or non-signatories are neither bound by an arbitration agreement nor can they compel a signatory to arbitrate. There are, however, exceptions to this rule. Third parties and non-signatories can be bound to arbitrate a dispute based on common law contract and agency principles, such as incorporation by reference, assumption, agency, veil-piercing or alter ego, estoppel, succession in interest or assumption by conduct. The law governing the contract (or putative contract) is potentially relevant in such cases, as is the law of the place of incorporation and the law of the arbitral seat.

Third parties – participation

13 Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Many institutional rules provide mechanisms for joinder or consolidation of arbitration proceedings; US courts have generally respected these mechanisms.

Class arbitration may also be permitted, but only where the parties have expressly manifested their consent to such a procedure. Silence or ambiguity in the arbitration agreement is not a sufficient basis to permit class arbitration (see *Stolt-Nielsen v Animalfeeds Int'l Corp*, 559 US 662 (2010) and *Lamps Plus, Inc v Varela*, 139 S Ct 1407 (2019)). Waiver of class arbitration is also permitted. Consumer contracts that require arbitration but prohibit class arbitration are valid even when the cost of pursuing such claims on an individual basis would be prohibitively expensive, or seem to conflict with US labour protections (*Epic Systems v Lewis*, 138 S Ct 1612 (2018)); and even when an online user agreement notifies consumers of it simply through a hyperlink (*Meyer v Uber Tech Inc*, 868 F 3d 66 (Second Circuit, 17 August 2017)).

Groups of companies

14 Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Although state and federal law do not recognise the group of companies doctrine, a non-signatory parent, subsidiary or affiliate of a signatory company may be bound to an arbitration agreement pursuant to the applicable law's principles of agency, contract, estoppel or veil-piercing (*Arthur Andersen LLP v Carlisle*, 556 US 624 (2009)). Specific terms of the arbitration clause can be important in determining such matters.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

A multiparty arbitration agreement must meet the same validity requirements as any arbitration agreement - it must be in writing and manifest the parties' intent to be bound. Courts will generally enforce valid multiparty arbitration agreements.

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The FAA is silent on the consolidation of separate arbitral proceedings, as are the AAA Commercial Arbitration Rules and the JAMS Comprehensive Arbitration Rules and Procedures. However, the ICDR International Arbitration Rules provide for an appointment of a consolidation arbitrator under article 8, who may consolidate separate arbitral proceedings in the circumstances listed below. Rule 3.13 of the CPR Administered Arbitration Rules 2019 also provides for consolidation in certain circumstances. Further, certain state arbitration statutes, such as the California Arbitration Act (section 1281.3) (Cal Code Civ P paragraphs 1280-1294.4) also provide for consolidation.

Relevant considerations for consolidation are:

- the parties' express agreement to consolidation;
- the appointment of one or more arbitrators in one or more of the arbitrations;
- the existence of common issues of law or fact creating the possibility of conflicting decisions;
- claims and counterclaims in the arbitrations arising out of the same arbitration agreement;
- undue delay and prejudice from failing to consolidate outweighs the prejudice caused to parties opposing it; and
- interests of justice and efficiency.

The US courts have provided arbitral tribunals with a substantial amount of discretion with respect to consolidation and have placed emphasis on the language of the arbitration agreement. A federal court in Ohio recently distinguished a bilateral arbitration from a class arbitration where the consent of every party is required for consolidation and held that courts do not require every party's consent for consolidation (*Parker v Dimension Serv Corp*, 2018-Ohio-5248).

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The FAA is silent on arbitrator eligibility. However, state and federal judicial ethics rules and codes of conduct generally prevent sitting judges from serving as arbitrators.

State and federal law generally recognise the autonomy of the parties to require that the arbitrators have certain characteristics, and contractually stipulated requirements for arbitrators based on nationality or religion are regularly enforced.

Parties to an arbitration agreement are free to choose any number of arbitrators to decide their disputes. While, in theory, parties could agree that those on one side of a dispute would select more arbitrators than the other, this is rarely the case in practice. Recently, however, the Fifth Circuit court of appeals upheld the decision of a nine-arbitrator tribunal where one side selected more arbitrators than the other. See *Soaring Wind Energy, LLC v Catic USA Inc*, 946 F3d 742 (5th Cir 2020).

Background of arbitrators

18 Who regularly sit as arbitrators in your jurisdiction?

It is common for practising US attorneys, retired judges, non-lawyer industry experts and foreign lawyers to serve as arbitrators in US-seated proceedings. There are increasing efforts to improve gender and other types of diversity among arbitrators. The AAA, for example, aims to provide parties with arbitrator lists that are at least one-third diverse.

Default appointment of arbitrators

19 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Courts will defer to the applicable institutional rules regarding the appointment of arbitrators. Assuming no such rules apply (or other special circumstances prevent an appointment under such rules), FAA section 5 provides a mechanism by which the parties may request a court appointment of the arbitral tribunal. In such cases, courts are directed to appoint a sole arbitrator absent a contrary agreement by the parties.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Courts will defer to the mechanisms provided in the parties' agreement or applicable institutional rules for challenge or replacement of an arbitrator. Absent such mechanisms, courts disagree as to the proper approach when an arbitrator dies or resigns; although some courts in the Second Circuit have required the arbitration to commence anew, other circuit courts of appeal have permitted either party to request appointment of a replacement arbitrator under FAA section 5, (eg, *WellPoint, Inc v John Hancock Life Ins Co*, 576 F 3d 643 (Seventh Circuit 2009)).

Courts have found the IBA Guidelines on Conflicts of Interest in International Arbitration to be a persuasive, but not binding, authority (eg, *Republic of Argentina v AWG Group*, 211 F. Supp. 3d 335, 355 (DDC 2016)).

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The FAA contains no particular requirements and defers to institutional rules and party agreement regarding the relationship between parties and arbitrators, neutrality of arbitrators and their compensation. Although arbitrators are generally required to be neutral and not engage in ex parte communications about the merits of the case, 'parties can agree to have partisan arbitrators' (eg, *Gambino v Alfonso*, 566 Fed Appx 9 (First Circuit, 2014)). Some institutional rules applying solely to domestic arbitrations, such as the JAMS Comprehensive Arbitration Rules and Procedures (the JAMS Rules), and the AAA Commercial Arbitration Rules (the AAA Rules), expressly permit agreements that party-appointed arbitrators may be non-neutral. However, absent such an agreement, the default under the rules is that party-appointed arbitrators must be neutral.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The Federal Arbitration Act is silent on the arbitrators' duties of disclosure regarding impartiality and independence; however, it recognises an 'evident partiality or corruption in the arbitrators' as a ground for vacating an arbitral award (section 10 (a)(4)). US courts have found a failure to disclose relationships with parties or counsel is relevant to determinations of evident partiality (eg, *Scandinavian Reinsurance Co v Saint Paul Fire & Marine Ins Co*, 668 F 3d 60 (Second Circuit 2012).

The American Bar Association, in conjunction with the AAA, promulgated a Code of Ethics for Arbitrators in Commercial Disputes (revised in 2004) (the Code). JAMS has also issued the Arbitrators Ethics Guidelines by JAMS. These guidelines, though not legally enforceable, impose a continuing duty of disclosure on the arbitrators regarding their impartiality and independence throughout the arbitral proceedings, requiring them to make a reasonable effort to inform themselves of any knowledge or interest in the dispute. Canon II of the Code states: 'An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias'.

Likewise, US courts will apply and enforce the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration when found to have been applicable to the arbitration. See, for example, *Pao Tatneft v Ukraine*, Civil Action No. 17-582, (DDC 2020).

Arbitral institution rules on duties of disclosure are formulated on these lines. The AAA Commercial Arbitration Rules (Rule 17), CPR Administered Arbitration Rules (Rule 7) and the JAMS Arbitration Rules (Rule 15) require the arbitrators to disclose in writing any circumstance that might give rise to a justifiable doubt on their independence and impartiality. The duty to disclose commences before appointment and continues throughout the arbitration proceedings.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are immune from civil liability for acts undertaken within the scope of their authority pursuant to the common law doctrine of arbitral immunity (eg, *Sacks v Dietrich*, 663 F 3d 1065 (Ninth Circuit, 2011)).

Additionally, a recent federal district court decision (*Wartsila N Am, Inc v Int'l Ctr for Dispute Resolution*, 2018 US Dist LEXIS 137836 (2018)) created arbitral immunity by applying a judicial immunity standard to the administrative stages prior to the appointment of an arbitration tribunal. According to the court, immunity applies unless the resolution of the arbitrability issue is 'facially obvious' and there is a 'clear absence' of jurisdiction that is so obvious that it could be resolved before the arbitrators are even empanelled.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Courts may review the jurisdiction of the arbitral tribunal after the proceedings have commenced, unless there is clear and unmistakable evidence that the parties agreed to submit questions of arbitrability to the arbitrators (*First Options of Chicago, Inc v Kaplan*). If the parties have delegated the issue to the arbitrator, the court will refuse to decide arbitrability even if there is a 'wholly groundless argument' on arbitrability and will let the arbitrators decide it (*Henry Schein, Inc v Archer & White Sales, Inc*, 139 S. Ct. 524 (2019).

An agreement to abide by institutional rules granting arbitrators authority to rule on their own jurisdiction, such as the AAA Rules, the ICDR Arbitration Rules (the ICDR Rules) and the CPR Rules for Administered Arbitration of International Disputes (the CPR Rules), has generally been considered sufficient evidence of consent to 'arbitrate arbitrability' by a majority of courts. However, the Restatement of the Law of International Commercial Arbitration by the American Law Institute (2019) considers that such rules are not sufficient in certain circumstances. The Supreme Court will decide during its current term whether arbitration clauses that incorporate such institutional rules and at the same time carve out certain disputes from the scope of arbitration, leave the gatekeeping function to the courts, as a lower court recently decided (see *Archer & White Sales, Inc v Henry Schein, Inc,* 935 F.3d 274 (Fifth Circuit 2019), or to arbitrators.

Courts may preclude parties from raising jurisdictional objections if their conduct in the arbitration indicates a waiver of their right to challenge the arbitrators' jurisdiction, such as if a party failed to maintain its jurisdictional objection consistently throughout the arbitration proceedings.

In the case of a claim for fraud in the execution of the contract containing a provision delegating gateway issues to the arbitrator, under section 4 of the FAA the courts nevertheless retain the power to decide such questions. The Third Circuit Court of Appeals held in a recent decision, for example, that 'unless the parties clearly and unmistakably agreed to arbitrate questions of contract formation in a contract whose formation is not in issue, those gateway questions are for the courts to decide'. *MZM Construction Co v New Jersey Building Laborers Statewide Benefit Funds* 974 F.3d 386 (Third Circuit 2020).

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

Courts may review the jurisdiction of the arbitral tribunal after the proceedings have commenced, unless there is clear and unmistakable evidence that the parties agreed to submit questions of arbitrability to the arbitrators (*First Options of Chicago, Inc v Kaplan*). If the parties have delegated the issue to the arbitrator, the court will refuse to decide arbitrability even if there is a 'wholly groundless argument' on arbitrability and will let the arbitrators decide it (*Henry Schein, Inc v Archer & White Sales, Inc*, 139 S. Ct. 524 (2019)). An agreement to abide by institutional rules granting arbitrators authority to rule on their own jurisdiction, such as the AAA Rules, the ICDR Arbitration Rules (the ICDR Rules) and the CPR Rules for Administered Arbitration of International Disputes (the CPR Rules), has generally been considered sufficient evidence of consent to arbitrate arbitrability by a majority of courts. However, the Restatement of the Law of International Commercial Arbitration by the American Law Institute (2019) considers that such rules are not sufficient in certain circumstances.

Courts may preclude parties from raising jurisdictional objections if their conduct in the ongoing arbitration indicates a waiver of their right to challenge the arbitrators' jurisdiction, such as if a party failed to maintain its jurisdictional objection consistently throughout the arbitration proceedings.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

The FAA does not provide a default mechanism for the determination of the seat or language of the arbitration. Absent agreement by the parties, the language of the proceedings will generally be the same as the language of the contract containing the parties' arbitration agreement (subject to the tribunal's overriding discretion) (ICDR Rules, article 18; and CPR Rules, Rule 9.5).

Many US-based institutions grant the arbitral institution authority to determine the place of arbitration at the outset, which may later be overridden by the tribunal (AAA Rules, rule 11; ICDR Rules, article 17; and CPR Rules, Rule 9.5).

US-seated tribunals generally must honour the parties' choice of law applicable to the merits of a dispute. A party may avoid enforcement of an arbitral-forum clause on the grounds of impracticability if conditions in the selected jurisdiction render arbitration impracticable, and the party could not force those conditions when it entered into the contract (*Northrop Grumman Ship Sys v Ministry of Def of the Republic of Venez*, 850 F. App'x 218, 227 (5th Cir. 2021)).

The FAA does not provide tribunals with any guidance as to which substantive law should apply to the merits of a dispute absent express agreement by the parties, and tribunals may exercise their discretion in this regard.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

The FAA is silent regarding the initiation of arbitration proceedings. Institutional rules contain specific provisions for initiating arbitration; for example, article 2 of the ICDR Rules requires the claimant to serve a copy of the notice of arbitration upon the counterparty (in addition to the ICDR administrator), and provides that the notice of arbitration shall contain a copy of the applicable arbitration clause, a description of the claim and the facts supporting it, and the relief or remedy sought, among other things. The JAMS Rules (article 2), the AAA Rules (Rule 4) and the CPR Rules (article 3) provide similar procedures.

Hearing

28 | Is a hearing required and what rules apply?

The FAA contains no specific requirements for hearings, other than requiring tribunals to 'provide . . . adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator' (*Gold Reserve Inc v Venezuela*, 146 F Supp 3d 112 (DDC 2015)). Tribunals may forego in-person hearings where the 'choice to render a decision based solely on documentary evidence is reasonable, and does not render the proceeding "fundamentally unfair"' (see *In re Arbitration between Griffin Indus and Petrojam*, 58 F Supp 2d 212 (SDNY 1999)). Most institutional rules grant wide leeway with respect to the timing and conduct of oral hearings (AAA Rules, Rules 24–25; ICDR Rules, article 25; CPR Rules, Rule 12). In general, tribunals must give the parties reasonable notice prior to hearings, and parties and their counsel have the right to attend them.

Courts have generally found that conducting hearings by videoconference satisfies a parties' right to be heard. See *Eaton Partners, LLC v Azimuth Capital Mgmt. IV, Ltd.*, 18 Civ. 11112 (ER), 8 (SDNY 18 Oct 2019); *Legaspy v Financial Industry Regulatory Authority*, No. 1:2020 Civ. 04700 (ND Ill 12 Aug 2020); *Research & Dev. Ctr. 'Teploenergetika,' LLC v EP Intl., LLC*, 182 F Supp 3d 556 (ED Va 2016]). But the parties' arbitration agreement and the applicable arbitration rules could dictate a different outcome.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Tribunals seated in the United States are not bound by the rules of evidence that apply in US litigation (such as the Federal Rules of Evidence), and are free to make procedural decisions to admit and consider the oral or written testimony of fact and expert witnesses, as well as documentary evidence (eg, *Kolel Beth Yechiel Mechil of Tartikov, Inc v YLL Irrevocable Tr*, 729 F 3d 99 (Second Circuit, 2013)).

Generally, the tribunal and the parties have autonomy to structure the taking of evidence as appropriate for the matter, as guided by the applicable institutional rules. For example, articles 20(6) and 22 of the ICDR Rules provide that '[t]he tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence' while 'tak[ing] into account applicable principles of privilege' such as the attorney–client privilege under US law. The International Bar Association's Rules on the Taking of Evidence in International Arbitration are utilised by many US-seated tribunals as guidance.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Section 7 of the FAA permits arbitrators to issue subpoenas for witness testimony at the hearing, including by third parties, and to compel the witness to bring documents to the hearing. Upon request, the district court at the seat of the arbitration may compel compliance with arbitral subpoenas, or hold the recalcitrant party in contempt of court. The court, however, must have personal jurisdiction under the law of the state in which the district court is located, and the subpoena must comport with due process under the US Constitution (see *Licci v Lebanese Canadian Bank*, 673 F 3d 50, 60–61 (Second Circuit, 2012)).

As to the territorial scope and timing of section 7 subpoenas, courts have held that section 7 does not allow for subpoenas to testify prior to a hearing (or at deposition). Courts have also expressed doubts as to whether section 7 allows subpoenas significantly beyond the location of the arbitration; the scope and reach of such subpoenas must therefore be carefully considered in every case.

28 USC section 1782 permits district courts to order persons within their territory to provide written or oral testimony, or to produce documents 'for use in a proceeding in a foreign or international tribunal'. Section 1782 has even been used to reach documents outside the United States. (*In re del Valle Ruiz*, 939 F3d 520 [2d Cir 2019]).

Courts routinely grant section 1782 requests in aid of proceedings in foreign courts, as well tribunals in investor-state arbitrations (*NBC v Bear Stearns & Co,* 165 F3d 184 [2d Cir 1999]). Courts are split, however, as to whether this provision allows a party to seek discovery in aid of international commercial arbitration, and careful attention must be paid to the specific court precedents in the applicable jurisdiction. The Second Circuit recently held that section 1782 is not available in aid of private international commercial arbitration. (See *In Re Application of Hanwei Guo* Second Circuit Case No. 19-781, 8 July 2020)). The Fourth and Sixth circuits have found the opposite (see *Abdul Latif Jameel Transp. Co v FedEx Corp* (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F3d 710 (6th Cir 2019)); *Servotronics, Inc v Boeing Co*, 954 F.3d 209, 210 (Fourth Circuit 2020)). The Supreme Court has so far not resolved this split, but observers expect that it will likely do so soon.

Confidentiality

31 | Is confidentiality ensured?

The FAA is silent with respect to confidentiality, and courts do not impose an automatic duty of confidentiality in arbitration. They will, however, endeavour to uphold any specific agreement by the parties (or in the arbitral rules) to keep their arbitration confidential. Leading arbitral rules vary in the level of confidentiality they require. Parties to a confidential arbitration who seek enforcement of an arbitral award in US courts should be aware of the risk that their arbitration award will become public unless they obtain a specific 'sealing order' from the court prior to filing.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Several cases have held that the FAA permits courts to grant interim relief pending arbitration and in aid of an ongoing arbitration (eg, *Braintree Laboratories v Citigroup Global Markets*, 622 F 3d 36 (First Circuit, 2010)). In limited circumstances, courts may also issue anti-suit injunctions prohibiting parties from pursuing foreign lawsuits in breach of an arbitration agreement and may impose monetary sanctions if violated (eg, *Jolen, Inc v Kundan Rice Mills, Ltd,* No. 19-cv-1296 (PKC) (SDNY July 9, 2019). These orders are often provisional, and only apply until a fully constituted tribunal has the chance to revisit the request for interim relief.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The AAA was the first institution to include the modern-day version of the 'emergency arbitrator' in its institutional rules (Rule 38), and this approach has been followed by the ICDR, the CPR and JAMS (ICDR Rules, article 6; CPR Rules, Rule 14; and JAMS Rules, article 3), though the speed of each institution's process varies. In July 2020, CPR introduced a new set of Fast Track Rules that parties may adopt to shorten the length of proceedings.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under the rules of US-based institutions, tribunals exercise broad discretion in ordering interim measures deemed to be necessary, such as preliminary injunctions and measures to protect or conserve property (AAA Rules, Rule 37; ICDR Rules, article 24; CPR Rules, Rule 13; and JAMS Rules, article 32). The law recognises the right of arbitrators to issue partial or interim awards prior to the final award. Courts consider such awards to be final and enforceable as long as they 'finally and definitely dispose' of at least one claim in the arbitration (even if other claims remain to be heard) (*Ecopetrol v Offshore Exploration and Production*, 46 F Supp 3d 327 (SDNY 2014)). Courts will generally respect an arbitral tribunal's interim awards, including for security for costs.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Tribunals have 'inherent authority to police the arbitration process and fashion appropriate remedies to effectuate this authority' (eg, *Hamstein Cumberland Music Group v Estate of Williams*, 2014 WL 3227536 (Fifth Circuit, 2013)). Some US institutions grant arbitrators express authority to impose sanctions for party misconduct, which may include fines, adverse inferences, withdrawing or revising a prior award, and awards of costs and attorney's fees (AAA Rules, Rule 58; ICDR Rules, article 20(7); and JAMS Rules, article 33). Other institutional rules are silent on sanctions, but allow arbitrators to award costs and fees to compensate a party for misconduct in the arbitration proceedings (CPR Rules, Rule 19.2).

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Although the FAA is silent regarding whether a majority or unanimous vote is required when the tribunal consists of more than one arbitrator,

US-based institutions provide that awards or other decisions by the tribunal shall be made by a majority of the arbitrators (AAA Rules, Rule 46; ICDR Rules, article 29; CPR Rules, Rule 15; and JAMS Rules, article 34.2)).

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are not legally binding and do not impact the award's enforceability (eg, *Associated Transp. Line, LLC v Slebent Shipping Co*, 2004 U.S. Dist. LEXIS 18735 (SDNY 16 Sep. 2004)).

Form and content requirements

38 | What form and content requirements exist for an award?

The FAA does not expressly prescribe any formal requirements for awards. Unlike many national arbitration statutes, the FAA does not require reasoned awards explaining the basis for the tribunal's decision, and courts will uphold and enforce unreasoned awards so long as the parties' agreement or applicable institutional rules do not require a reasoned award (eg, *D H Blair & Co v Gottdiener*, 462 F 3d 843, 847 (Second Circuit, 2006)). Many institutional rules do require reasoned awards absent contrary agreement by the parties (ICDR Rules, article 30(1); CPR Rules, Rule 15.2; and JAMS Rules, article 35.2). Rule 46 of the AAA Rules, however, disposes of any reasoned award requirement unless requested by the parties in writing prior to the formation of the tribunal, or if the arbitrator determines that one is appropriate.

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The FAA does not impose any time limits for the tribunal to render an award. The AAA and ICDR Rules require the tribunal to issue its final award within 30 and 60 days of the date of the closing of the hearing, respectively (AAA Rules, Rule 45; and ICDR Rules, article 30(1)).

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The limitations period for parties to confirm foreign awards falling under the New York or Panama Conventions is three years, and for parties to confirm domestic awards is one year (see FAA sections 9, 207 and 302). The limitations period for confirming an award, whether foreign or domestic, begins running on the date that the award is made (the date of the award itself).

FAA section 12 requires that petitions to vacate, modify or correct an award be filed within three months after the award is filed or delivered. This three-month time limit has been applied to the vacatur of international awards seated in the United States.

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

The tribunal enjoys broad discretion to issue interim or partial relief.

If the parties reach a settlement during the pendency of the arbitration proceedings, institutional rules permit the arbitration to terminate with the issuance of a final and binding consent award. Such consent awards are often recognised and enforced by US courts.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

If a party fails to appear in the arbitration, most institutional rules, such as article 26 of the ICDR Rules, permit the tribunal to issue an award, but only after hearing evidence from the party seeking relief and providing the defaulting party with notice and an opportunity to participate. Article 32(3) of the ICDR Rules further allows the tribunal to terminate the proceedings if their continuation 'becomes unnecessary or impossible'.

In some circumstances, proceedings may be terminated or suspended if the parties default on payment of arbitrator fees or costs. When this happens, courts have occasionally permitted the defaulting party that was 'unable to pay for [its] share of arbitration' to pursue its claims in litigation; this accommodation is not afforded, however, where a party has 'refuse[d] to arbitrate by choosing not to pay for arbitration' despite having the resources to do so (*Tillman v Tillman*, 825 F 3d 1069 (Ninth Circuit, 2016)).

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Absent express agreement by the parties, arbitrators have broad discretion with respect to the allocation of costs and fees, including administrative costs and attorneys' fees (AAA Rules, Rule 47(c); ICDR Rules, article 34; CPR Rules, Rule 19; and JAMS Rules, article 37.4). Awards of costs and fees constitute part of the award and are enforceable in US courts. Generally, contractual agreements for any 'fee-shifting' (including agreements that the prevailing party may recover its attorneys' fees and costs) will be respected.

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

Institutional rules permit arbitrators to award pre- or post-award interest at a rate they deem appropriate (AAA Rules, Rule 47(d)(i); ICDR Rules, article 31(4); CPR Rules, Rule 10.6; and JAMS Rules, article 35.7). US courts will generally confirm and enforce such awards.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Most institutional rules grant tribunals a limited amount of time to correct or interpret minor clerical, typographical or computational errors (ICDR Rules, article 33; CPR Rules, Rule 15.6; and JAMS Rules, article 38.1). The ICDR and CPR Rules further grant arbitrators a short period in which to make an additional award on claims presented in the arbitration but not disposed of in the initial award.

FAA section 11 vests district courts with the power to modify or correct the award where it contained a material miscalculation or mistake, where it ruled upon a matter outside of the tribunal's jurisdiction or where it 'is imperfect in matter of form not affecting the merits of the controversy'. Nonetheless, courts may refuse to do so on the basis that the arbitrators already considered, and declined, such a request (eg, *Daebo Int'l Shipping Co v Americas Bulk Transport (BVI) Ltd*, 2013 WL 2149591 (SDNY 2013)).

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

FAA section 10 sets forth the standard and procedure for setting aside arbitral awards made in the United States. A majority of US circuit courts have held that the section 10 standards for vacatur also apply to international or foreign awards seated in the United States (see, eg, *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us, Inc*, 126 F.3d 15, 23 (Second Circuit 1997); *Ario v Underwriting Members at Lloyds*, 618 F.3d 277, 292 (Third Circuit 2010); *Gulf Petro Trading Co Inc v Nigerian National Petroleum Corp*, 512 F.3d 742 (Fifth Circuit 2008)); and *Jacada (Europe), Ltd v Int'l Mktg Strategies*, 401 F.3d 701, 709 (Sixth Circuit 2005). But see, *Inversiones y Procesadora Tropical INPROTSA, SA v Del Monte Int'l GmbH*, 921 F.3d 1291 (11th Circuit 2019), holding that FAA grounds for vacatur are inapplicable to an international arbitration award governed by the New York Convention.

Under section 10, awards may be vacated where:

- the award was procured by corruption, fraud or undue means;
- there was evident partiality of the arbitrators;
- 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 misbehaviour by which the rights of any party have been prejudiced; or
- the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Some courts have interpreted the arbitrators' 'excess of powers' to permit vacatur on the basis that the tribunal acted in 'manifest disregard of the law' (eg, *Warfield v ICON Advisors, Inc*, 2020 US Dist. LEXIS 105321 (WDNC June 16, 2020, No. 3:20CV195-GCM)). But these decisions are outliers. The Fifth, Eighth and Eleventh circuits have rejected the manifest disregard doctrine. In circuits where the doctrine has not been expressly rejected, it has been considerably limited, and it is rare for awards to be vacated on this basis (see, eg, *Daesang Corporation v NutraSweet Company*, 85 NYS 3d 6 (2018) (reversing the trial court's vacatur of a foreign arbitral award on the grounds of manifest disregard of the law)). The Federal Court of Appeals for the Second Circuit recently explained that 'awards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent'. *Seneca Nation of Indians v New York*, 988 F.3d 618, 626 (2d Cir. 2021).

The issue of what constitutes a reasoned award is not litigated frequently in US courts but was examined by the Second Circuit in *Smarter Tools v Chongqing Senci Import & Export Trade Inc*, 2019 US Dist LEXIS 50633 (SDNY Mar. 26, 2019, No. 18-cv-2714 (AJN)), where the Court concluded that the parties agreed that any award be reasoned, and that an award that contained no rationale for rejecting plaintiff's claims did not meet the standard for a reasoned award.

Finally, it is worth noting that courts may impose sanctions for challenges to arbitral awards that lack any real legal basis. *Inversiones y Procesadora Tropical INPROTSA, SA v Del Monte Int'l GmbH*, 921 F.3d 1291 (11th Circuit 2019).

Levels of appeal

47 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Normally, arbitral awards themselves are not subject to appeal on the merits by courts or arbitral institutions. Nevertheless, parties to AAA, CPR, or JAMS arbitrations may opt in to those institutions' appeal procedures.

However, court orders with respect to confirmation, vacatur or recognition and enforcement of awards are subject to the normal appeal procedures of US litigation. Parties wishing to challenge a final federal district court order can appeal to the federal circuit court of appeals in which the district court sits. In general, the circuit courts of appeals have the final word on the matters before them; in rare cases, the Supreme Court may grant a request to review a circuit court decision.

Recognition and enforcement

48 What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Courts generally uphold arbitration awards in line with the United States' strong public policy in favour of arbitration. Awards made by US-seated tribunals may be recognised and enforced (ie, confirmed) by any court agreed upon by the parties or, in the absence of such agreement, by a court sitting in the district in which the arbitration agreement was made, provided no ground for vacatur or modification exists under sections 10 or 11 of the FAA.

For foreign-seated arbitrations, the FAA incorporates the grounds for denial of recognition and enforcement of awards set forth in the New York and Panama Conventions (FAA sections 207 and 301). In limited circumstances, the United States may also permit denial of recognition or enforcement of a foreign award on the basis of certain procedural defences, such as the court's lack of personal jurisdiction over the award debtor, or the doctrine of forum non conveniens.

Time limits for enforcement of arbitral awards

49 Is there a limitation period for the enforcement of arbitral awards?

A petition to confirm a domestic arbitral award 'may' be filed within one year from the date of the award (9 USC section 9). Whether this limitation is mandatory depends on the court in which it is brought (see *FIA Card Servs, NA v Gachiengu*, 571 F Supp 2d 799, 803-804 (SD Tex 2008)). For foreign awards, a petition to confirm must be filed within three years (9 USC sections 207 and 302). The FAA provides a three-month limit for motions to vacate, modify or correct an award (9 USC section 12).

Enforcement of foreign awards

50 What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Citing concerns for international comity, US courts usually do not enforce foreign awards set aside by the courts at the place of arbitration (eg, *Getma Int'l v Republic of Guinea*, 862 F 3d 45 (DCC 2017); and *Thai-Lao Lignite (Thailand) Co v Gov't of Lao People's Democratic Republic*, 864 F 3d 172 (Second Circuit, 2017)).

However, several courts have held that they may enforce an award despite vacatur by the courts of the seat in 'extraordinary circumstances'. For instance, one recent decision upheld the enforcement of an award that had been vacated by Mexican courts on the basis of newly enacted legislation that applied retroactively, stating that to hold otherwise would be 'repugnant to fundamental notions of what is decent and just in this country' (*Commisa v Pemex*, 832 F 3d 92 (Second Circuit, 2016)). Similarly, in a recent decision, the Second Circuit found that a court can enforce an award set aside at the seat if the judgment setting aside the award is contrary to US public policy 'because it offends notions of justice from the point of view of the United States.' *Esso Exploration & Prod Nig v*

Nigerian Natl Petroleum Corp, 397 F Supp 3d 323 (SDNY 2019)]; see also *Compañía De Inversiones v Grupo Cementos de Chihuahua*, S.A.B. de C.V., Civil Action No. 1:15-cv-02120-JLK (D. Colo. Apr. 30, 2021). The Second Circuit, articulated four factors relevant for exercising discretion under article V(1)(e):

> *(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectation; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.*

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The enforceability of awards issued by emergency arbitrators is somewhat uncertain. Although courts have enforced emergency awards on a number of occasions, some courts have refused to enforce them on the basis that they are not final and therefore not reviewable under the FAA (compare *Yahoo! Inc v Microsoft Corp*, 983 F Supp 2d 310, 319 (SDNY 2013) (enforcing an emergency award) with *Chinmax Medical Sys, Inc v Alere San Diego, Inc*, 2011 WL 2135350 (SD Cal 2011) (refusing to enforce an emergency award)).

Cost of enforcement

52 | What costs are incurred in enforcing awards?

In general, each party bears its own costs and fees in connection with post-award litigation pursuant to the 'American Rule'. US court fees are quite minimal; the bulk of a party's costs for enforcement will be attorneys' fees, which will generally be borne by the enforcing party absent agreement to the contrary. However, the position may be different if the parties contractually agree to fee shifting in post-award proceedings, or if a party opposes confirmation or enforcement on a ground deemed to be frivolous (in which case fees may be awarded as a sanction).

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

The scope of mandatory disclosure or discovery is an important difference between judicial and arbitral proceedings in the United States. In US litigation, the Federal Rules of Civil Procedure and corresponding state practice rules allow parties to obtain wide-ranging discovery of documents or information that may be relevant to any claim or defence in the litigation. Disclosure in international arbitration is generally much less burdensome than discovery in US litigation, and it is relatively unusual for an international tribunal to permit multiple depositions or the type of broad-ranging document discovery contemplated by the Federal Rules.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Attorneys practising in the United States, including in international arbitrations, are bound by the rules of professional conduct of the state bars to which they are admitted. American Bar Association Model Rule 5.5, which has been implemented in many US jurisdictions (including New York), permits lawyers admitted in one US state to represent clients in arbitration proceedings seated in another US state; however, it is silent on the ability of lawyers admitted abroad to represent clients in US-seated arbitrations.

The conduct of arbitrators in international arbitration is regulated by ethics guidelines promulgated by the various arbitral institutions, such as the Code of Ethics for Arbitrators in Commercial Disputes (revised in 2004) recommended and approved by the AAA and ABA and the Arbitrators Ethics Guidelines by JAMS. These guidelines do not have the force of law.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitrations has become increasingly common in the United States, including in arbitration. Laws governing third-party funding, if any, generally exist on the state level. Parties exploring third-party funding options should be attuned, therefore, to relevant state laws, such as laws directly regulating funders, the common law doctrines of maintenance, champerty, barratry and attorney ethics rules.

Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign parties, non-US counsel or arbitrators involved in an international arbitration seated in the United States should consult with local counsel well in advance of the arbitration to ensure compliance with federal visa requirements.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Potential legal reform

In 2021, the Forced Arbitration Injustice Repeal Act (FAIR Act, HR 1423) was introduced into the House of Representatives and the Senate. The Act was passed by the House in 2020 but did not come up for a vote in the Senate. The Act, if it became law, would prohibit arbitration agreements covering civil rights disputes, consumer claims, employment disputes and certain types of antitrust disputes, and it would also prohibit any type of class, joint or collective action waiver in arbitration or litigation. The FAIR Act reflects a growing concern in the United States with mandatory arbitration agreements between parties with unequal bargaining power, especially between individuals and companies. Some observers expect the Act will come up for votes in the current Congress. It appears unlikely the Senate would pass the Act, but if it did President Biden has said he would sign it into law.

Rule revisions

On 31 March 2021, the AAA/ICDR issued amended ICDR International Dispute Resolution Procedures, which include the ICDR's International Arbitration Rules. Among the changes, the new Rules:

- encourage the early disposition of issues;
- presumptively incorporate mediation;
- expressly provide for the use of virtual hearings;
- raise the ceiling amount for expedited procedures;
- expand the scope for consolidation and joinder; and
- provide for greater transparency.

ICSID is currently considering revising its arbitration rules. It received public comment on proposed rule revisions over the past five years. In November 2021, the Secretariat issued an updated proposal for amendment of the ICSID Rules, along with a final working paper. The proposed amendments address disclosure of third-party funding and security for costs, and offer new provisions for expanded transparency and expedited proceedings. ICSID has proposed to close the consultation phase and proceed to a vote on the amended rules in early 2022.

Recent international investment arbitrations to which the United States was a party

In March 2021, the United States was named a respondent in an investment treaty arbitration for the first time in five years. See *Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC v United States of America* (ICSID Case No. ARB/21/11). The most recent investment treaty arbitration in which the United States was a respondent state was *TransCanada v USA*, filed in 2016 under the NAFTA. This case was settled. The most recent case in which the United States was a respondent state and there was a decision was *Apotex III v USA*, which was filed in 2012 under NAFTA and was decided in favour of the state in 2014.

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Zambia has been a contracting party to the New York Convention on the Recognition and Enforcement of foreign Arbitration Awards since 14 March 2002. Zambia made no declarations or notification under articles I, X and XI of the Conventions. The United Nations Commission on International Trade Law (UNCITRAL) Model Law, was domesticated by the enactment of the Arbitration Act No. 19 of 2000 (the Arbitration Act). In addition, Zambia is a party to the Convention on the Settlement of Disputes between States and Nationals of Other States (1965) (the ICSID Convention), which was domesticated by the Investment Disputes Convention Act, Chapter 42, volume 4 of the Laws of Zambia.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

No.	Title of bilateral investment treaty	Date of Signature	Date of entry into force
1.	United Arab Emirates–Zambia	7 February 2020	Not in force
2.	Turkey–Zambia BIT	28 July 2018	6 May 2020
3.	Morocco–Zambia	20 February 2017	Not in force
4.	Mauritius–Zambia	14 July 2015	6 May 2016
5.	United Kingdom–Zambia	27 November 2009	Not in force
6.	Finland–Zambia	7 September 2005	Not in Force
7.	Italy–Zambia	30 April 2003	2 December 2014
8.	Netherlands–Zambia	30 April 2003	1 March 2014
9.	France–Zambia	14 August 2002	3 March 2014
10.	Belgium Luxembourg Economic Union(BLEU)–Zambia	28 May 2001	Not in force
11.	Ghana–Zambia	18 May 2001	Not in force
12.	Egypt–Zambia	28 April 2000	Not in force
13.	China–Zambia	21 June 1996	Not in force
14.	Cuba–Zambia	22 January 200	Not in force
15.	Switzerland–Zambia	3 August 1994	7 March 1995
16.	Germany–Zambia	10 December 1966	25 August 1972

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary source of law is the Arbitration Act No. 19 of 2000 (the Act). The Act governs both domestic and foreign arbitration proceedings. According to section 8 of the Act, the UNCITRAL Model law, New York Convention, ICSID Convention, Zambia's Arbitration Rules and the Arbitration (Code of Conduct and Standards) Regulations are also applicable. The Act also governs the enforcement of domestic and foreign awards. An arbitration proceeding is considered to be foreign if it falls under article 1(3) of the UNCITRAL Model Law.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Zambia's domestic legislation on arbitration is based on the UNCITRAL Model Law, with a few modifications with regard to the default of a claimant, the setting aside of awards and the refusal of the recognition of awards. In particular, sections 2, 3, 7,10 and 12 are the major modifications.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

There are no mandatory provisions on procedure and the parties are at liberty to agree on the conduct of their arbitral proceedings. There is party autonomy.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The substantive law applicable to an arbitral proceeding is determined by the parties in accordance with their choice of law, and in default of such agreement article 28(2) of the UNCITRAL Model law provides that where the parties fail to designate the substantive law applicable to the dispute the arbitral tribunal shall apply the law determined by the conflict of laws rules it considers applicable, the terms of the contract and the usage of trade practices applicable to the transaction.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitral institution is the Chartered institute of Arbitrators, 1st Floor, Suite F22, 23 and 24, Kambendekela House, Dedan Kimathi Road, P.O. Box 51489, Lusaka.

The Chartered Institute of Arbitrators' Zambian Branch is the only recognised arbitral institution. The CIArb Zambia Branch is currently the leading arbitral institute in Zambia. The CIArb has a full-time secretariat and a permanent office, which is located in Lusaka, Zambia. The institution is governed by the Arbitration Act No. 19 of 2000, and therefore uses the same rules. The institution is called upon to select arbitrators when the need arises. This, though not mandatory, is done using a list of reputable arbitrators. The fees payable are determined based on the complexity of the subject and time spent on the matter, having due regard to the incidental factors. Ultimately, the tribunal fixes its fees taking into account the institutes' recommended schedule of fees.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

Section 6 of the Arbitration Act No. 19 of 2000 provides that parties are at liberty to subject any dispute to arbitration. However, the following are the exceptions to the rule:

- agreements that are contrary to public policy;
- a dispute that, in terms of any law, may not be determined by arbitration;
- criminal matters except insofar as permitted by written law or leave of court is granted;
- matrimonial causes;
- matters incidental to matrimonial causes, save for when the court grants leave that said matter can be determined by arbitration;
- matters concerning paternity, maternity or parentage; and
- matters affecting the interest of a minor or individual under a legal incapacity, unless the minor or individual is represented by a competent person.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Section 2 of the Arbitration Act No. 19 of 2000 defines an arbitration agreement as an agreement, whether in writing or not, by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not. Therefore, not all agreements should be in writing, provided there is evidence of a contractual relationship that submits to arbitration when a dispute arises. It further states that, where an arbitral agreement is in writing, it must be contained in a document signed by all the parties. There is further recognition of agreements contained in exchange of letters or other means of communication that provide evidence of the agreement. In circumstances where an objection can be raised and it has not its assumed the right is waived. An arbitration agreement can also be contained in a contract as part of its terms and conditions provided the contract is in writing and the clause is part of the contract.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

Arbitration agreements are generally a separate agreement embedded in any contract and as such survive the termination, death or insolvency of a party. Arbitration agreements will only not be enforceable if they violate the fundamentals of contract formation.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

Yes, the doctrine of separability is recognised in Zambia as per article 16 of the UNCITRAL Model Law, which has been domesticated.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

According to the Superior Court decisions of *Odys Oil Company Limited v The Attorney General and Others* (2012) ZR 164 Volume 1 and *Vedanta Resources Holdings Limited v ZCCM Investment Holdings Plc & Konkola Copper Mines Plc* (Appeal No. 181/2019), a non-party to an arbitration agreement cannot be bound by the terms and outcomes of an arbitration agreement. In this regard, there are no circumstances under which an arbitration agreement can be operative against a third party.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Court of Appeal in the case of *Beza Consulting Inc Limited v Bari Zambia Limited & Another* (Appeal No. 171/2019), guided on the status of a third party to arbitral proceedings, is that third parties cannot be joined to arbitral proceedings but if they wish to be heard on an incidental matter the third party must do so by way of a court action.

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

While the Arbitration Act is silent with regard to the extension of arbitration agreements to non-signatory parent or subsidiary companies, the Zambian arbitral tribunals are more likely to follow the English position in this regard.

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Sections 2 and 9 of the Arbitration Act No. 19 of 2000 provides that there can be multiple parties to an arbitration agreement. Parties are generally free to agree on an appointment procedure with regard to arbitrators. Where a party fails to jointly appoint an arbitrator, the other party is at liberty to request the arbitration institute to appoint an arbitrator on the party's behalf. This is provided for in section 12(3) of the Arbitration Act No. 19 of 2000.

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The Arbitration Act No. 19 of 2000 does not provide specifically for consolidation of arbitral proceedings. However, this is possible by agreement of the parties.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are no restrictions on who may act as an arbitrator and the parties are free to choose any qualified person in a relevant field (any person, judges, active or retired inclusive). This is as per section 12 of the Arbitration Act and Article 11 of the UNCITRAL Model law. The parties are free to agree contractually on the procedure and qualification the arbitrators should possess but they cannot exclude an arbitrator on the basis of nationality, colour, race or creed.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

The bulk of the arbitrators are practising lawyers and judges of the Superior Courts (most of the judges are retired but still active in arbitration matters).

Default appointment of arbitrators

19 | Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In default of agreement of the parties on the procedure of appointment, the practice is that, in an arbitration with a sole arbitrator, if the parties fail to appoint an arbitrator, the arbitration institute appoints an arbitrator. In the case of three arbitrators, each party may appoint an arbitrator and the two appointed arbitrators may appoint a third arbitrator. If a party fails to appoint an arbitrator within 30 days of the request to do so or if the two selected arbitrators fail to appoint a third arbitrator, the other party may request an arbitration institute to appoint an arbitrator on behalf of the failing party. This is as per section 12(3) of the Arbitration Act.

In terms of section 12(4) of the Arbitration Act and article 11(4) and (5) as read with Rule 10 of the Arbitration (Court Proceedings) Rules, the court will only intervene in an event that a party fails to appoint an arbitrator or the two arbitrators fail to appoint a third arbitrator or if the third party, including an arbitration institute, fails to perform their functions. Only then can any party request the court to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment. A decision of the High Court appointing an arbitrator is not subject to appeal.

Challenge and replacement of arbitrators

20 | On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The parties are free to agree on a procedure for challenging an arbitrator. In default of an agreement on the procedure, a party may challenge an arbitrator by written statement within 15 days of the constitution of the arbitral tribunal or the occurrence of the event resulting in the challenge. Unless that challenge is agreed with by the other party, the challenge will be determined by the arbitral tribunal. If for any reason the challenge is unsuccessful under the agreed procedure or by the tribunal, an aggrieved party is at liberty to apply to court for determination of the challenge. This must be done 30 days after receipt of notice of the decision or failure by the tribunal or other agreed procedure. This is in accordance with article 13 of the UNCITRAL Model Law.

An arbitrator can be challenged on impartiality or independence, or lack of the requisite qualifications agreed on by the parties.

Relationship between parties and arbitrators

21 | What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The relationship between the parties and arbitrators is contractual in nature. The parties of the arbitration agreement and the tribunal agree on the terms and conditions on which their relationship is to be based, which provide for the independence, impartiality and qualifications of the arbitrator. The contract will also stipulate the remuneration of the arbitrators and how said remuneration is to be paid by the parties. Expenses are detailed and the payment structure stated as well.

Duties of arbitrators

22 | What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The arbitrators have a duty to give full disclosure of any circumstance that may affect impartiality or independence or that may reasonably raise doubts as to the arbitral proceedings. The Arbitration (Code of Conduct Standards) Regulations contained in Statutory Instrument No. 12 of 2007 provides for duties of an arbitrator to be impartial, fair and to disclose any interest or relationship that might affect the arbitrator's impartiality as well as any conflicts of interest. The case of *Tiger Limited v Engen Petroleum Zambia Limited* (Appeal No. 63 of 2013) also highlights duty of an arbitrator to avoid any perception of bias.

In the case of *Mpulungu Harbour Management Ltd v Attorney General Mpulungu Harbour Corporation Ltd* 2010/HPC/ARB/0589, the court, in addressing the duty of disclosure of arbitrators, held that the burden of disclosure rests on the arbitrators and the duty is a continuing one that does not cease until the arbitration is concluded.

Immunity of arbitrators from liability

23 | To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The liability of arbitrators is dealt with in the Arbitration Act No. 19 of 2000. Section 28 of the Arbitration Act provides that arbitrators are

immune from any liability that arises by virtue of them faithfully and diligently executing their duties as arbitrators.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 | What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

An application must be made before the court requesting that the matter before it be the subject of arbitration as there is an arbitral clause in a contract or agreement between the parties. The court will stay proceedings before it and refer the matter to arbitration unless it is of the view that the arbitration agreement is null and void. There is no time limit, as the application can be made at any time, but a delay in making such objection as to jurisdiction will attract costs. This is in accordance with section 10 of the Arbitration Act.

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

An arbitral tribunal can rule on its own jurisdiction. A party must raise an objection to jurisdiction no later than the submission of the statement of defence. Where an arbitral tribunal rules that it has the required jurisdiction and a party is of a divergent view, the said party is at liberty to apply to court for a further determination within 30 days of receipt of the arbitral tribunals ruling. A party is generally precluded from raising objections out of time but in limited circumstances the arbitral tribunal may admit a late application.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

In default of the party's agreement, articles 19 and 20 of the Model Law apply. That is, that the arbitral tribunal, promptly after its appointment, will determine the place and language of the arbitral proceeding.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Arbitration is commenced by way of a simple notice to arbitrate, or any other manner as may be agreed by the parties that briefly outlines the issues in dispute. The request is then signed by the party commencing the proceedings and served on the respondent. There are no time bars under the laws with regard to commencement of arbitral proceedings.

Hearing

28 | Is a hearing required and what rules apply?

Generally, parties have a physical hearing of the arbitral proceedings. However, parties may elect to dispense with the full hearing of the matter and simply rely on the documents submitted to the tribunal and direct that an award be rendered based on said submitted documents. This is pursuant to article 24 of the UNCITRAL Model Law.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Under article 19 of the UNCITRAL Model law, the parties are free to decide on the procedure for receiving evidence. In default of agreement, the tribunal will determine the manner in which evidence is given during the arbitral process and may further add the form in which evidence is received. The tribunal can request documentary evidence or exhibits or other evidence for the proper determination of the case where is sees fit. Further, the UNCITRAL Model law does not proscribe the calling of expert witnesses: this may be done at the instance of the tribunal or the parties. Where an expert witness is called at the instance of the tribunal, the parties are given an opportunity to call an expert witness if required. Anyone can be a witness; parties or party officers to the proceeding may be called upon to testify if need be. Article 27 of the Model law provides that court assistance maybe sought in obtaining evidence. No application is required to be made to the IBA on the taking of evidence in international arbitration.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Where the parties agree that the arbitral tribunal has the power to order any interim and other measures. The arbitral tribunal can:

- make an order it considers necessary to compel the attendance of a witness;
- order the examination of a witness under oath;
- order discovery of documents;
- request for evidence outside the jurisdiction;
- detain, preserve or inspect any property or thing that is at issue in the arbitral proceedings (however, in default of such agreement or if necessitated, the tribunal may seek court intervention);
- authorise any necessary sample or experiment to be carried out which is necessary for the purpose of obtaining full information; and
- request from the court executory assistance in the exercise of any of the aforementioned powers.

The tribunal or a party to the arbitral proceedings may ask the court to assist or intervene in the above regard. This is pursuant to section 14 of the Arbitration Act No. 19 of 2000. Therefore, the courts do not play a role in the obtaining of evidence unless a party or tribunal requests the court's assistance in obtaining evidence. This is pursuant to Rule 37 of the Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 2001 as well as article 27 of the Model Law.

Confidentiality

31 | Is confidentiality ensured?

Section 27 of the Arbitration Act No. 19 of 2000 provides that, unless the parties agree otherwise, information relating to the arbitration proceedings shall not be published, disclosed or communicated to a non-party to the proceedings. Similarly, Rules 25 and 26 of the Arbitration (Court Proceedings) Rules 2001 also provides that arbitral proceedings shall be treated with utmost confidentiality and that all documents with the court relating to the proceedings are to be kept confidential. Further, Rule 28 of the Arbitration (Court Proceedings) Rules 2001, states that all proceedings are to be held in camera.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Section 11 of the Arbitration Act No. 19 of 2000 provides that the following are the interim measures that are available before or during arbitration proceedings:

- an order for the preservation, interim custody, sale or inspection of any goods that are the subject matter of the dispute;
- an order securing the amount in dispute or the costs and expenses of the arbitral proceedings;
- an interim injunction or other interim orders; and
- any order to ensure that an award that may be made in the arbitral proceedings is not rendered ineffectual.

Section 11 of the Act is clear on the powers of the courts to grant interim measures of protection to any party, before or during arbitral proceedings.

Section 14 of the Act outlines the interim measures the arbitral tribunal may order. Therefore, certain interim orders are a preserve of the court only.

Interim measures by an emergency arbitrator

33 Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

As there are no emergency arbitrators in Zambia, there is no law in this regard.

Interim measures by the arbitral tribunal

34 What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Section 14 of the Arbitration Act No. 19 of 2000 provides that the arbitral tribunal may make interim orders that it deems necessary. The arbitral tribunal can grant injunctions or other interim orders. The arbitral tribunal has the power to make orders regarding deposits of the fees, costs and expenses of the arbitration. The tribunal may also at the request of a party make such interim measure of protection as the arbitral tribunal may consider necessary in respect of a subject matter of the dispute and may require any party to provide appropriate security. If parties agree, no court assistance is required, though it is available at a party's application.

An arbitral tribunal would make an order for security for costs if one or more parties belong to a foreign jurisdiction or where one or more parties to the arbitration request for said security.

Sanctioning powers of the arbitral tribunal

35 Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

While there is no particular arbitral legislation that allows for sanctions against a party or its counsel, the arbitral tribunal is at liberty to report counsel to the Law Association of Zambia's Disciplinary Committee, which would then be able to sanction counsel accordingly. Further, nothing prevents any party to the proceedings from proceeding with alternative legal recourse in the courts of law.

AWARDS

Decisions by the arbitral tribunal

36 Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Section 16 of the Arbitration Act stipulates that, in default of agreement, an arbitral award may be made by a signature of the majority provided that the reason for any omitted signature is stated. This position is further confirmed in article 29 of the UNCITRAL Model law, which states that a decision by an arbitral panel will be by majority in absence of a contrary agreement by the parties.

Dissenting opinions

37 How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions make up a part of the award but in no way affect the enforceability or validity of the award.

Form and content requirements

38 What form and content requirements exist for an award?

Section 16 of the Arbitration Act No. 19 of 2000 requires that an award should be made in writing and shall be signed by all the arbitrators. Where for some reason one signature is omitted, the reasons for that omission must be stated.

The award shall state the reasons upon which it is based, unless the parties agree that no reasons should be given.

The award should further state its date and place of arbitration. The award will be deemed to have been made at that location. The award must be delivered to all the parties of the arbitral proceedings.

Time limit for award

39 Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

There is no time limit within which the arbitral tribunal must render an award. However, section 17(3) of the Arbitration (Code and Conduct) regulations provides that a timeline of events should be set and followed by the arbitrator.

Date of award

40 For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the award is pivotal for purposes of interpretation and correction, as well as setting aside should it be necessitated.

Types of awards

41 What types of awards are possible and what types of relief may the arbitral tribunal grant?

The Arbitral tribunal may make a final award pursuant to section 16(1) of the Arbitration Act No. 19 of 2000. The arbitral tribunal may also make

interim, interlocutory or partial award pursuant to section 16(7) of the Arbitration Act No. 19 of 2000.

The arbitral tribunal can further make an award on agreed terms in accordance with article 30 of the UNCITRAL Model law.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

Article 32 of the UNCITRAL Model law provides that arbitral proceedings may, other than by an award, be terminated when:

- the claimant withdraws his or her claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his or her part in obtaining a final settlement of the dispute;
- the parties agree on the termination of the proceedings; and
- the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The parties ordinarily agree on the cost of the arbitral proceedings and payment thereof. In default of such agreement, section 16(5) of the Arbitration Act provides that the costs and expense of an arbitration including the legal and other expenses of the parties, the fees and expenses of the arbitration shall be fixed and allocated by the arbitral tribunal in its award. Where the award does not specify otherwise each party shall bear its own legal and other expenses and share equally the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

Section 16(6) of the Arbitration Act No. 19 of 2000 provides that unless otherwise agreed upon by the parties an arbitral tribunal can award interest on the whole or any part of the sum; simple or compound interest in accordance with the law applicable in Zambia to judgment debts, this being the judgment act that provides that such rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment or award in this case.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal has, by virtue of article 33 of the Model law, power to correct or interpret an award. This can be done either at the request of a party to the arbitral proceeding or at the instance of the arbitral tribunal. In default of agreement, the request for interpretation or correction is made by notice with 30 days of receipt of the award. The request of the party may either be to:

- correct in the award any errors in computation, clerical or typographical errors or any other errors of similar nature; or
- request for an interpretation of a specific award or point or part of the award.

Under article 33(4) of the UNCITRAL Model Law, the arbitral tribunal has power to extend the time within which it can make a correction or interpretation where necessary.

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

The Arbitration (Court Proceedings) Rules Statutory Instrument No. 75 of 2001 under Rule 23 provides for setting aside an award by a court. The application to set aside must be made by way of originating summons to the High Court, supported by an affidavit stating the facts relied upon in support of the application, exhibiting the original award, stating the date of receipt of the award by the party, arbitration agreement and other evidence with respect to the matters referred to.

Section 17(2) and article 34 of the UNCITRAL Model Law provide that an arbitral award may be set aside by the court only if the party making the application furnishes proof that:

1. *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;*
2. *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;*
3. *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 decisions on matters not submitted to arbitration may be set aside;*
4. *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*
5. *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.*

Section 17(2)(b) of the Arbitration Act provides that the court will set aside an award on the following grounds:

1. *the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia; or*
2. *the award is in conflict with public policy; or*
3. *the making of the award was induced or effected by fraud, corruption or misrepresentation.*

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There are two levels of appeal. A dissatisfied party with regard to setting aside an award can appeal against the decision of a High Court judge to the Court of Appeal. If the party is not satisfied, it can make a further appeal to the Supreme Court of Zambia as a last recourse and final level of appeal. However, appeal to the Supreme Court is not automatic, as

leave has to be sought and the party seeking the appeal must demonstrate that the appeal brings forth issues or questions that are not settled at law. The appeal must bring in novel issues or changes with regard to the law.

The appeal at each stage would generally take six to 12 months. This is dependent on whether any interlocutory applications have been made.

Legal costs are incurred at each level of the appeal by both parties. These costs generally follow the event, in that the successful party is entitled to costs spent. There are exceptional circumstances where each party bears its own costs.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An arbitral award will be recognised in Zambia irrespective of the country in which it was granted and will further be enforceable upon application in writing to the High Court of Zambia. The application for registration and enforcement is made by a summons accompanied by an affidavit exhibiting the authenticated original award, the authenticated arbitral agreement (if the award is foreign), and that the award is valid and binding. Security for costs of the application and or any proceedings that may follow may be requested. Further, the applicant will be required to file a notice of registration. This is as per Part 7 of the Arbitration (Court Proceedings) Rules No. 75 of 2001.

A court may refuse recognition or enforcement of an award on the following grounds:

- at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
- a party to the arbitration agreement was under some incapacity; or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

if the court finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia;
- the recognition or enforcement of the award would be contrary to public policy; or
- the making of the award was induced or effected by fraud, corruption or misrepresentation.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

There is no time limit for the enforcement of an arbitral award.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

An award that has been set aside by courts at the place of arbitration cannot be registered in Zambia as it is a requirement of registration that the arbitral award should not only be binding on the parties but also valid at the place of origin. This is in accordance with section 16 of the Arbitration (Court Proceedings) Rule Statutory Instrument No. 75 of 2001.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

As there is no emergency arbitrator in Zambia, there is no law in this regard.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

In the case of foreign or international awards, there is first a cost of registration of the award and making an application to the court for the execution of the award. An award is generally executed like any court judgment and the costs so incurred are similar. This includes the legal fees related to the execution and registration of the award.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

In default of agreement of the parties, the arbitral tribunal will set the system of receipt of evidence.

Parties have been known to follow a process of inspection and discovery of documents as per English law. Documents that are not objected to during inspection are then tendered into. Further, it is common that parties opt to have witness statements as opposed to an oral examination of a witness. Further, party officers are not precluded from being witnesses of a party.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no rules that speak specifically to international arbitration. However, with regard to professional or ethical rules, arbitrators are governed by the Arbitration (Code of Conduct and Standards) Regulation 2007 and counsel is governed by the Legal Practitioners Act and its attendant rules. Best practice in Zambia reflects the IBA guidelines.

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Contingency fees are prohibited by the Legal Practitioner Act, this is as per the court judgment in the case of *Savenda Management Ltd v Stanbic Bank Zambia* (Appeal No. 002/2015). However, there are no particular regulations with regard to arbitral claims.

Regulation of activities

56 | What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no visa requirements. However, work permits are required. As a foreign attorney, one is unable to practise in Zambia unless he or she takes the bar exam. Taxes are payable in the form of reverse VAT unless there is an agent in Zambia that pays VAT on their behalf. The ethical standards are akin to the English courts.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

There are currently no significant legal reforms relating to arbitration in Zambia. There are no anticipated changes to the rules on domestic arbitration. There are no changes with regard to BITs. Zambia has no intention of terminating any of the BITs it is a party to. It is worth considering as a topic of study the reasons for Zambia's failure to put into force some of the BITs it has entered into and the international perception and effect thereof.

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