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PREFACE

Following the success of the second edition, we are pleased to present the third edition of *Global Legal Insights – International Arbitration.* The book contains 33 country chapters, and is designed to provide general counsel, government agencies and private practice lawyers with a comprehensive insight into the realities of international arbitration by jurisdiction, highlighting market trends and legal developments as well as practical, policy and strategic issues.

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

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Angola

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Introduction

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

Angola has been undertaking, in the past few years, deep legal reforms aiming at modernising its legal system in order to foster investment projects in the country.

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

In line with the economic growth and an increase in the number of international transactions and foreign direct investments involving Angola and/or Angolan parties, there is growing practice of international arbitration in Angola. Nevertheless there are only a small number of domestic arbitration cases. However, due to the reforms of the last few years, there is an increasing tendency to use arbitration for domestic cases with a foreign element (i.e., where a party has foreign shareholders). Furthermore, there are an increasing number of arbitrations relating to Angolan parties where recognition and enforcement in Angola are important issues to consider. Moreover, an increasing number of investment arbitration cases relating to Angola or Angolan parties can be seen.

Arbitration in Angola is currently regulated by Law no. 16/03 of 25 July 2003, entitled the "Voluntary Arbitration Law" (VAL). The VAL was substantially inspired by the Portuguese arbitration law from 1986. Although it cannot be said that this law strictly follows the UNCITRAL Model Law, it includes many solutions that are common to the ones found in that Model Law. In contrast to the Model Law, the VAL contains no provision on definitions, does not provide for rules on interpretation, adopts the disposable rights criterion in regard to arbitrability, does not address the issue of preliminary decisions, does not distinguish between different types of awards, and permits appeal on the merits in domestic arbitrations, unless the parties have agreed otherwise.

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

To date, the Ministry of Justice has authorised the creation of five arbitration centres: Harmonia – Integrated Center for Studies and Conflict Resolution; Arbitral Juris; CAAL –

Angolan Center of Arbitration of Conflicts; Center of Mediation and Arbitration of Angola, CEFA's Arbitration Center; and CREL – Extrajudicial Resolution of Conflicts Center.

Arbitration is also foreseen in other legislation, such as the Private Investment Law (Law no. 14/15, of 11 August 2015), the Mobile Values Law (Law no. 22/15, of 31 August 2015), the Petroleum Activities Law (Law no. 10/04, of 12 November 2004) and the Public Procurement Law (Law no. 20/10, of 7 September 2010).

However, the vast majority of arbitration cases conducted in Angola are *ad hoc*.

The Angolan state and companies in the public sector accept, without any complaints, the resolution of disputes with foreign investors by way of arbitration.

In 2016 another major step was taken in Angola regarding international arbitration, as Angola signed the New York Convention on the Recognition of Foreign Arbitral Awards.

Arbitration agreement

According to article 1 of the VAL, the parties may opt to use arbitration for disputes regarding disposable rights (those which the parties may construct and extinguish by act of will and those which parties can renounce). Only the disputes reserved by law to the State Courts or to some other type of proceedings cannot be submitted to arbitration. So, all commercial disputes are capable of being subject to arbitration.

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

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

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

The VAL does not include specific rules on the issues of modification and revocation of the arbitration agreement. It only addresses the expiry of the arbitration agreement. Thus, the Arbitration Agreement and the Arbitration Clause expire when:

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

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

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

This means that the award of the arbitral tribunal by which it rules on its own jurisdiction,

including any objections with respect to the existence or validity of the arbitration agreement, can only be appreciated by the judicial court after the arbitral tribunal has rendered the award.

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

Arbitration procedure

In line with the Model Law, the parties are free to agree on the procedural rules (directly or by reference to an institution). In the absence of such an agreement, the tribunal will have the power to determine the rules (article 16). The same applies to the place of arbitration (article 17).

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

The notification must contain:

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

Also, if the parties are to nominate the arbitrators, the notifying party must indicate the arbitrator chosen by them, as well as an invitation to the other party to also indicate their arbitrator. If the arbitration procedure is to be commanded by one arbitrator, the notifying party must suggest an arbitrator, and invite the other party to accept that suggestion. If, however, that nomination is to be made by a third party, the notifying party must also notify that third party to appoint and communicate the appointment of the arbitrator to both parties.

According to article 16 of the Law, the parties are free to agree about the rules of the process. However, if those rules aren't defined until the acceptance of the first arbitrator, the arbitrators must define the rules of the arbitration.

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

The arbitration procedure must respect the principle of equal treatment of the parties; in all phases of the procedure the right to response must be granted; and both parties must be heard, orally or by writing, before the rendering of the award. These are the fundamental principles that must be respected in any procedure, breach of which may lead to the setting-aside of the award.

Also, the parties must be represented by a constituted lawyer – meaning one that is allowed to practise in Angola (i.e. an Angolan lawyer).

In national arbitration, according to article 24, the arbitral court must decide in accordance with the national law, unless the parties establish that the conflict is to be resolved by

referring to equity. However, if the parties agree in the decision by the rules of equity, they automatically renounce the ability to appeal the award.

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

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

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

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

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

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

Arbitrators

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

Appointment

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

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

Requirements of the arbitrators

The arbitrators can be singular persons who are in the full enjoyment and exercise of their civil capacity (article 9/3). Arbitrators must be independent and impartial.

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

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

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

Replacement

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

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

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

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

Interim relief

Interim relief may be granted in arbitration, unless otherwise stated by the parties. Any of the parties may require that the court orders interim measures, related to the object of the conflict, namely the provision of guarantees that it considers necessary. The interim relief is stated in article 22 of the Law, which is inspired by article 17 of the UNCITRAL Model Law. However, it does not specify what kind of measures are admitted.

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

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

Arbitration award

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

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

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

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

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

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

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

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

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

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

Challenge of the arbitration award

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

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

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

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

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

The arguments of incompetence of the court and irregularity of the constitution of the

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

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

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

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

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

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

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

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

Enforcement of the arbitration award

National awards

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

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

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

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

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

- unenforceability of the award;
- falseness of the process or transfer or infidelity of the latter, when one or the other influences in terms of the enforcement;
- illegality of the claimant or the defendant;
- undue accumulation of executions or unlawful coalition of claimants;
- fault or nullity of the first summons to the action, when the defendant has not intervened in the proceedings;
- uncertainty, illiquidity or unenforceability of the obligation;

- *res judicata* prior to the sentence that is to be enforced;
- any fact that extinguishes or modifies the obligation, provided that it is after the close of the discussion in the declaration process, and is proved by a document. The prescription of the right or obligation can be proven by any means; or
- any fundament that is sufficient to annul the award.

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

International awards

Angola has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) via resolution no. 38/2016, which was published in the Official Gazette of the State on 12 August 2016. The parliament's resolution, adopted on 16 June, became effective as of 12 August 2016.

Angola made a reservation pursuant to which the Convention will only apply to the recognition and enforcement of awards issued in the territory of another contracting state.

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

Investment arbitration

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

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

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

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

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

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

In these cases, the arbitral tribunal shall consist of three arbitrators, each party being responsible for choosing an arbitrator, the third arbitrator being the arbitrator-president chosen by agreement between the other two. In the absence of an agreement for the choice of the third arbitrator, the latter, under the most diverse investment contracts, shall be appointed by one of the following entities: (i) the General Secretariat of the Paris International Chamber of Commerce (ICC); (ii) designation authority appointed by the Secretary General of the Permanent Court of Arbitration of The Hague, under the UNCITRAL Regulation; and (iii) the President of the Provincial Court of Luanda, at the request of either party.

Angola has the following Bilateral Treaties with other States: the United Kingdom of Great Britain and Northern Ireland (2000); Germany (2003); Namibia (2005); South Africa (2005); Italy (2006); Portugal (2009); Switzerland (2009); and Russia (2009).

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

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

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Australia

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Introduction

Australia has a federal system of government and international arbitration agreements in Australia are governed by the *International Arbitration Act 1974* (Cth) (**the IAA**).

Section 16 of the IAA gives force to the United Nations Commission in International Trade Law (**UNCITRAL**) Model Law on International Commercial Arbitration, (**the Model Law**). UNCITRAL revised some of the provisions to the Model Law in 2006 and the majority of these revisions were given effect in the IAA in 2010. The Model Law 2006 is set out at schedule 2 of the IAA.

Section 21 of the IAA stipulates that the Model Law is to apply to all international arbitrations with their seat in Australia. This prevents parties to an international arbitration opting out of the Model Law, either expressly or impliedly. Pre-2010, parties could have "opted out" of the Model Law in favour of an arbitral law governed by the relevant Australian State or Territory arbitration legislation, which some parties would choose to do, so as to take advantage of the limited right to appeal an arbitration award pursuant to the domestic arbitration acts.

Although Australia has adopted the Model Law, Part III of the IAA contains a number of additional provisions which the parties should consider whether they wish to agree to include or exclude expressly in their arbitration agreement.

The *Civil Law and Justice Omnibus Amendments Act 2015* (Cth) (**the Omnibus Act**), effects a variety of Australian legislation and amends certain sections of the IAA concerning the enforcement of foreign arbitration awards and the confidential nature of arbitrations. The Omnibus Act will be discussed later in this chapter.

Additionally, the *Civil Law and Justice Legislation Amendment Bill 2017* (Cth) (**the CLJ Bill**) received its second reading speech in the Australian Senate on 22 March 2017. The CLJ Bill provides for a number of amendments to the IAA "*to help ensure that Australian arbitral law and practice stay on the global cutting edge, so that Australia continues to gain ground as a competitive, arbitration friendly jurisdiction*". The CLJ Bill does not yet have legislative force and it is not clear if or when it will come into force, but comment as to its potential relevance to some of the matters discussed has therefore been included for completeness.

Parties who have selected Australia as the seat of arbitration in their arbitration agreement have a choice of the system of Courts to use in resolving their disputes. Parties may either choose the Federal Court of Australia or State Supreme Courts who have jurisdiction to hear matters arising under the IAA. The Federal Court of Australia, the Supreme Court of Victoria and the New South Wales Supreme Court all have dedicated arbitration lists.

The IAA also implements the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (**the New York Convention**) without reservation, and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, (**ICSID**), both of which are annexed to the IAA at Schedules 1 and 3.

There are several well-regarded arbitration institutions within Australia, which administer international arbitration cases, including the following:

- The Australian Centre for International Commercial Arbitration, (**ACICA**). The ACICA arbitration rules were amended in 2016, (**the ACICA Rules**) and, whilst the ACICA Rules can be applied to both domestic and international arbitrations, they have been designed for international arbitrations only.
- The Resolution Institute (previously known as the Institute of Arbitrators and Mediators). The Resolution Institute arbitration rules were amended in August 2016. The Resolution Institute administers domestic and international arbitrations, (see https://www.resolution.institute/).

Arbitration agreement

Formalities for arbitration agreements

An international arbitration agreement no longer has to be in writing and signed by the parties. It can be concluded in a variety of forms, including orally or by conduct, so long as there is a record that an agreement has been made. There are no further formalities that are required to be met in order for an agreement to constitute a valid arbitration agreement.

However, it is prudent for the parties to ensure that the arbitration agreement clearly stipulates the following matters to avoid future disputes:

- the scope of the disputes that are to be referred to arbitration;
- the governing law of the arbitration agreement, as this determines the validity of the arbitration agreement itself and will also determine questions such as who is a party to the arbitration agreement;
- the seat of the arbitration, as this determines the procedural law that governs the arbitration;
- the arbitration rules, if any, which are to govern the arbitration;
- the number of arbitrators and, where relevant, the qualifications of the arbitrators;
- the venue/place where the arbitration is to be held;
- the language of the arbitration; and
- exclusive jurisdiction to the Australian Courts so as to avoid other Courts intervening in the arbitration.

Arbitration institutions, such as ACICA and the Resolution Institute, provide model arbitration clauses for inclusion in contracts.

Arb-med

There is no statutory support for arb-med under the IAA and it is not widely used in Australia.

Multi-tiered arbitration agreements

Multi-tiered arbitration agreements are common in Australia and the Courts will give effect to such clauses, including clauses requiring negotiation in "good faith" as a pre-condition to arbitration, subject to the requirement that the agreement is sufficiently certain; see for example, *United Group Rail Services Ltd v Rail Corporation of New South Wales* (2009) 74 NSWLR 618 per Allsop P at 641.

Competence-competence and separability

Australia recognises the principles of competence-competence, whereby an arbitral tribunal can rule on its own jurisdiction, as well as the existence or validity of the arbitration agreement itself, as set out under Article 16 of the Model Law. Where the issue of the tribunal's jurisdiction has been decided as a preliminary issue, then, pursuant to Article 16(3) of the Model Law, either party may, within 30 days, request the Courts to determine the issue.

Joinder/consolidation

Section 24 of the IAA allows a party to arbitration to seek the consolidation of two or more arbitrations, on an opt-in basis. There is no possibility for Court-ordered consolidation if the tribunal decides not to consolidate the arbitration proceedings. Rule 14 of the ACICA Rules gives the tribunal the right to consolidate two or more arbitrations where a request is made by one of the parties prior to the appointment of the tribunal.

Under the IAA, there is no compulsory right of joinder. Generally, the arbitral tribunal only has jurisdiction over the parties to the arbitration agreement. Parties who wish to have the option of joining third parties should provide for this expressly in the arbitration agreement. Alternatively, Rule 15 of the ACICA Rules allows the parties to an arbitration, or a third party, to request that an additional party be joined to the arbitration. A tribunal must find that the additional party is joined to the same arbitration agreement as the other parties to the arbitration.

The ACICA Rules on consolidation and joinder do not apply retrospectively and therefore only apply to arbitration agreements which were entered into on or after 1 January 2016 (unless otherwise agreed).

Arbitrability

The IAA does not define the matters which may or may not be referred to arbitration. The Australian Courts recognise that arbitration agreements are to be read and construed as liberally as possible (see *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 per Allsop J at 87).

Certain disputes are not arbitrable as a matter of Australian law, for example where specifically prohibited by statute:

- Section 11 of the *Carriage of Goods by Sea Act 1991* (Cth) declares an arbitration agreement in a 'sea carriage document' (such as a bill of lading), relating to the international carriage of goods from or to Australia, to be void unless it provides that the seat of the arbitration is in Australia. A voyage charterparties which provides for arbitration outside of Australia is not a 'sea carriage document' and therefore is valid and capable of being enforced (see *Dampskibsselskabet Norden A/s v Gladstone Civil Pty Ltd* (2013) 216 FCR 469 per Rares J at 488 – 489).
- Similarly, there is legislation which voids arbitration agreements in insurance contracts, although parties are free to agree to arbitrate after a dispute arises.
- Statutory claims under the *Trade Practices Act 1974* (Cth) (**the TPA**) and the *Australian Consumer Law 2010* (Cth) (**the ACL**) are likely to be arbitrable (see *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) NSWLR 160).

Section 7(2)(b) of the IAA provides that the Courts must stay the Court proceedings if there is a valid arbitration agreement and the dispute which has been referred to the Courts is capable of settlement by arbitration. Section 7(5) of the IAA provides that the Courts

shall not stay its proceedings if the arbitration agreement is "null and void, inoperative or incapable of being performed".

Australian Courts have demonstrated a good track record of enforcing arbitration agreements. However, there have been circumstances where the Courts have refused to stay Court proceedings in favour of arbitration. Such circumstances generally relate to competition, bankruptcy and insolvency matters and the reason for not staying the proceedings was because the arbitration agreements did not extend to cover the dispute that had been referred to the Courts as opposed to the Courts ruling that the subject of the matter was not arbitrable.

It is unclear whether the operation of the TPA and ACL would be excluded by choosing a foreign governing law (see *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175). Much is likely to depend on the facts in any given case. It is possible that the Courts would not stay proceedings where the ACL or TPA has been expressly excluded.

Arbitration procedure

Commencing arbitration proceedings

The procedure for commencing arbitration proceedings in Australia will depend on the actual procedure agreed to by the parties in the arbitration agreement or, in absence of an agreed procedure, the arbitration rules adopted by the parties. If there is no agreement between the parties and there are no arbitration rules applicable to the arbitration, then Article 11 of the Model Law provides that either the Courts or ACICA, being the authority prescribed under the IAA, (see clause 4.1(2) below), shall make the appointment.

Conduct of proceedings

Parties are free to choose the procedural rules which apply to the arbitration. Pursuant to Article 18 of the Model Law, arbitration proceedings in Australia must be conducted such that the parties are treated equally and given a full opportunity of presenting their case. This requirement of natural justice is also set out in the ACICA Rules.

The choice of seat as Australia does not mean that the venue for the arbitration must be conducted in Australia. Parties are free to agree on the venue in which the arbitral hearings are to be held.

In accordance with the Model Law, the arbitral tribunal must schedule a hearing at the request of either party or, failing such a request, the tribunal can decide for itself whether to hold hearings or conduct the arbitration proceedings on the "papers".

There are no specific requirements or restrictions as to the persons who may represent a party in Australian arbitration proceedings. Foreign lawyers may appear in arbitrations seated in Australia.

Western Australia recently demonstrated its commitment to arbitration as the Supreme Court (Arbitration) Rules 2016 (WA) came into operation on 3 January 2017. These rules outline the procedures that apply to both domestic and international arbitration when applying to the Supreme Court for matters such as stays, referring proceedings to arbitration, setting aside and enforcing arbitration awards, subpoenaing witnesses or evidence, disclosure of confidential information, enforcement of procedural orders and interim measures.

Confidentiality

Prior to the Omnibus Act, parties to an international arbitration were required to specifically "opt-in" to the IAA's confidentiality provisions. Through the enactment of the Omnibus

Act, the default position for Australian international arbitrations is that they are confidential, unless the parties expressly opt out.

The CLJ Bill proposes a new subsection 22(3) in the IAA to provide that the opt-out confidentiality provisions in sections 22C to 22G of the IAA do not apply where the parties to an arbitration seated in Australia have agreed to apply the Transparency Rules, whether those Rules apply because of the United Nations Convention of Transparency in Treaty-based Investor-State Arbitration (2014) (Convention on Transparency) or otherwise. Amended subsection 3(1) of the IAA will define the Convention on Transparency and the Transparency Rules.

Australia is not presently a party to the Convention on Transparency. However, according to the Explanatory Memorandum to the CLJ Bill, the proposed amendments will prevent any conflict between the IAA and the Transparency Convention, broadening the scope of arbitration work in Australia under the IAA.

Where the ACICA Rules are adopted, Article 22 of those Rules provides that parties and the arbitral tribunal are required to treat all matters relating to the arbitration (including its existence), the award, materials created for the purposes of the arbitration and documents produced by the other party as confidential, subject to certain exceptions, such as when making an application to enforce an arbitration award.

Evidence

International arbitrations seated in Australia are not bound by local rules of evidence. The parties to the arbitration are free to agree the rules of evidence to be applied to the arbitration (Article 19(1) of the Model Law).

Where agreement cannot be reached, the tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence (Article 19(2) of the Model Law). Arbitrators may have regard to the IBA Rules, which provide guidelines to the arbitrator on these issues.

Arbitrators only have the authority to order the parties to an arbitration to produce documents. However, pursuant to section 23 of the IAA, the Courts have been given the power to issue subpoenas for document production or for a person to attend an examination before the tribunal. However, the party seeking the subpoena can only make the application to the Court with the permission of the tribunal.

Article 27 of the Model Law gives power to the Courts to assist in taking evidence in the arbitration where either the tribunal or a party, with the approval of the tribunal, makes such a request. When executing the request, the Courts may do so according to their rules on taking evidence.

Arbitrators

Appointing an arbitrator

The parties are free to choose their own arbitrator(s) and the number of arbitrators suitable for their dispute. Often, parties expressly specify the number of arbitrators, the qualifications of the arbitrators (if any particular qualifications are required), and the process by which the arbitrators are to be selected in the arbitration agreement. If there is no express agreement, the arbitration rules, if chosen by the parties, provide a backup procedure to the arbitral institution to nominate the arbitrators and the number of arbitrators. Where institutional rules do not apply to the arbitration agreement, Articles 10 and 11 of the Model Law set out the default procedure.

Regulation 4 of the *International Arbitration Regulations 2011* (Cth) provides that where the parties fail to appoint an arbitrator, ACICA is the prescribed appointing authority pursuant to Article 18(1) and 18(2) of the IAA. This essentially means that where there is an international arbitration with its seat in Australia and the parties have failed to agree on the appointment of an arbitrator, then ACICA has the authority to appoint an arbitrator.

Challenging an arbitrator

Pursuant to Articles 12 and 13 of the Model Law, the appointment of an arbitrator can be challenged if there are 'justifiable doubts" as to the arbitrator's impartiality, independence or if he/she is not in possession of the qualifications agreed by the parties. Such a challenge is to be decided by the arbitral tribunal and, if the challenging party is unsuccessful, it may request the Court to rule on the challenge. The decision of the Court is final with no right of appeal and whilst the Court is considering its decision, the arbitral tribunal, including the challenged arbitrator, may continue with the arbitration, including making an award.

The parties may agree the process by which the arbitrator(s) is to be challenged. Alternatively, Article 13 of the Model Law provides the procedure by which a challenge is to be brought. The tribunal has the power to decide the challenge but if the challenge is not successful, then the challenging party may, within 30 days of being notified that the challenge was unsuccessful, request the Courts to decide the challenge. There is no right of appeal from the Court's decision.

Section 18A of the IAA expands on the justifiable doubt test under Articles 12(1) and 12(2) of the Model Law by stating that such a doubt only exists if there *"is a real danger of bias on the part of that person in conducting the arbitration"*.

The real danger test follows the common law test applied in *R v Gough* [1993] AC 646 (UK House of Laws) which is to be applied across all cases where there may be apparent bias. This test was defined as follows:

> *"...the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party the issue under consideration by him."*

Terminating an arbitrator's mandate

Article 14 of the Model Law provides that where an arbitrator becomes unable to perform his/her functions or fails to act without undue delay, his/her mandate terminates if he/she withdraws from his/her office or if the parties agree on the termination.

If the mandate is not terminated by agreement, then any party may request the Courts to decide on the termination. There is no right of appeal from the Court's decision.

Immunity of arbitrators

Section 28 of the IAA provides that an arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator.

Emergency arbitrator

Schedule 1 of the ACICA Rules provides for the appointment of an emergency arbitrator where an arbitration has been commenced pursuant to the ACICA Rules but where the tribunal has not yet been appointed. The purpose of the emergency arbitrator is to allow a party to make an urgent interim application. The party, in making its application, is required to set out the relief sought, the reasons why this relief is urgent and why the party is entitled

to such relief. On receipt of the application, ACICA endeavours to appoint an arbitrator within one business day of receipt of the application (so long as the emergency arbitrator fee and the application fee have been received by ACICA). The emergency arbitrator is to make a decision in respect of the application within five business days from receiving the application.

Interim relief

Interim relief

Subject to the parties agreeing differently, an arbitral tribunal has the express authority to grant any interim measure of protection (except *ex parte* interim orders), it deems necessary in respect of the dispute, including measures which:

- 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;
- preserve evidence that may be relevant and material to the resolution of the dispute; and
- award security for costs.

Interim awards are enforceable in the same manner as final awards.

Article 9 of the Model Law provides that, where it is not incompatible with the arbitration agreement, a party can request the Courts to determine an interim measure, without waiving any rights under the arbitration agreement.

Article 17G of the Model Law provides that a tribunal may award costs and damages caused by an interim measure to any party if, at a later stage, the tribunal determines that the measure should not have been granted. Such a costs award can be made at any point during the arbitration.

The Courts' powers

The Courts' powers to intervene in an international arbitration are restricted under the Model Law. Generally, the Courts have preserved and respected the exclusive jurisdiction of the arbitral tribunal.

The Courts have the power to act as follows:

- appoint arbitrators where the parties, or the two appointed arbitrators, fail to appoint an arbitrator (Articles 11(3) and 11(4) of the Model Law);
- grant preliminary or interim relief in proceedings subject to arbitration (Articles 9 and 17J of the Model Law);
- issue subpoenas (Section 23 of the IAA);
- assist in taking evidence (Article 27 of the Model Law);
- prohibit a party to arbitral proceedings from disclosing confidential information in relation to the arbitration (Section 23F of the IAA);
- allow a party to arbitral proceedings to disclose confidential information in relation to the arbitration (Section 23E of the IAA);
- decide on a challenge of an arbitrator (Article 13(3) of the Model Law);
- decide upon the termination of an arbitrator's mandate (Article 14 of the Model Law);
- decide on the jurisdiction of the tribunal (Article 16(3) of the Model Law);

- set aside an arbitral award, (Article 34(2) of the Model Law);
- refuse recognition or enforcement of an arbitral award (Article 36(1) of the Model Law); or
- tax the costs of an arbitration (other than the fees or expenses of an arbitrator) that are directed to be paid by an award (Section 27(3) of the IAA).

Arbitration award

The award

Article 29 of the Model Law stipulates that, where there is more than one arbitrator, the arbitration decision is to be made by the majority of the arbitrators, unless the parties agree otherwise. However, procedural issues may be decided by the chairperson, so long as the parties or all the members of the tribunal agree.

The IAA has adopted the requirements in Article 31 of the Model Law as to the form and contents of an award. An arbitration award must be written and must be signed by the arbitrator(s) and dated. It must also state the place of the arbitration, and the arbitration will be deemed to have been made at that place.

Unless the parties have agreed otherwise, the award must give reasons as to how the award has been reached, and each party is to receive a copy of the signed and dated award. Under Australian law, the required standard of the statement of reasons is not clear.

There are no timeframe requirements in which the arbitration award is to be made. The effect of a timeframe clause inserted into the arbitration agreement is unclear but if the award is not delivered in this timeframe, the arbitration would not be terminated (Article 32 of the Model Law). A possible recourse for the parties would be to make an application to the Courts that the arbitrator is unable to perform his functions pursuant to Article 14 of the Model Law.

There are no limits to the remedies that an arbitrator can award.

Costs and interest

Costs

Section 27 of the IAA gives the tribunal the authority, at its discretion, to make an award for costs as it sees fit. In making such an award, the tribunal can:

- direct which parties are to pay the costs and in what amounts;
- tax or settle the amount of costs to be so paid or any part of those costs;
- award costs to be taxed or settled as between party/party or as between solicitor and client; and
- limit the amount of costs that a party is to pay to a specified amount.

On its face, a discretion exists even where the parties have agreed in the arbitration agreement to share the costs of the tribunal equally and to bear their own legal costs.

If the award makes no provision for costs, a party to the arbitration agreement may, within 14 days after receiving the award, apply to the arbitral tribunal for directions as to the payment of those costs. The tribunal shall, after hearing any party who wishes to be heard, amend the award by adding to it such directions as the tribunal thinks proper with respect to the payment of the costs of the arbitration.

Whilst an award for costs is discretionary, the trend in Australian international arbitrations seems to be that costs follow the event.

The CLJ Bill proposes an amendment to section 27 (for the avoidance of any doubt, it seems) to provide that the tribunal is not obliged to follow the scales and practices adopted by the Court on taxation when assessing the amount of costs. It is intended that the proposed amendment will apply to any arbitral proceedings commenced after the amendment comes into force.

Interest

Pre-award interest: Where the tribunal determines to make an award for the payment of money, the tribunal may include an amount for interest in the award (section 25 of the IAA).

Post-award interest: Where the tribunal has made an award for money to be paid by a due date, then the tribunal can award that interest (set at a reasonable rate), including compound interest, payable if the amount is not paid on or before the due date.

Challenge of the arbitration award

Under Australian law, there are limited grounds to set aside an award pursuant to Article 34(2) of the Model Law, which replicates the grounds for refusal to recognise and enforce an award pursuant to the New York Convention. Where the seat of arbitration is in Australia, express exclusion of error of law to appeal an award is not required.

To have an arbitral award (or interim measure) set aside, the party making the application must show that there has either been a violation of due process or a breach of public policy. Without limitation, section 19 of the IAA provides that an arbitral award is in breach of Australian public policy if there is evidence of fraud, corruption or a breach of natural justice.

A party seeking to set aside the award must make its application within three months from the date it received the award.

Enforcement of the arbitration award

Prior to the Omnibus Act, the position in Australia was that an arbitral award made in a country that was not a signatory to the New York Convention was not enforceable in Australia. However, through the implementation of the Omnibus Act, this position has changed so that any arbitral award is enforceable in Australia irrespective of where the award was made, subject to the usual grounds for challenge. An Australian Court will recognise foreign arbitral awards made in any country and will enforce that award as if it was a judgment of the Australian Court according to local rules of procedure.

There are 157 signatories to the New York Convention but a number of Asia Pacific countries in which Australian businesses operate are not, including Papua New Guinea and East Timor. Awards made in these countries will now be enforceable in Australia.

Any award made in Australia can be enforced in any country that is a party to the New York Convention.

The process for recognition and enforcement of an award is straightforward and there are limited grounds on which the Courts may refuse to enforce an award. The Courts cannot refuse enforcement of an award simply on grounds of error of fact or law. However, through the enactment of the Omnibus Act, the previous position where a party could not resist enforcement of an award due to the incapacity of another party to the arbitration agreement has been changed. The IAA has been amended so that a party will be able to resist enforcement of an award where any party to the arbitration agreement lacked contractual capacity at the time the arbitration agreement was made.

Australia has a pro-enforcement bias in accordance with the New York Convention and the IAA. Australia's public policy is to enforce arbitral awards wherever possible, in order to: (1) uphold contractual arrangements entered into in the course of international trade; (2) support certainty and finality in international dispute resolution; and (3) meet other objects specified in s 2D of the IAA: *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 416 at 436. The extent to which Courts must give weight to and respect the decisions reached by the Court at the seat of arbitration is not settled.

In *Gujarat NRE Coke Limited v Coeclerici Asia* (Pte) Ltd (2013) 304 ALR 468, the Full Federal Court refused an appeal by the award debtor who had failed to resist enforcement of the award at first instance. The Court held that it would be inappropriate for an enforcement Court applying the New York Convention to reach a different conclusion from the Court at the seat of arbitration. At first instance, the Federal Court refused to allow the award debtor to resist enforcement on similar grounds to those relied upon in the application to set aside the award.

A related question which has not yet arisen in Australia is the approach of the Courts towards the recognition and enforcement of arbitral awards set aside in the seat of arbitration. In such a case, whether the Australian Courts will defer to the decision of the Courts at the seat of arbitration and refuse enforcement is not clear. To date, the Courts have not indicated that they would be prepared to do so should exceptional circumstances arise, unlike the approach taken by other jurisdictions such as the United States, France and the Netherlands.

If an award is made against a party not named in the arbitration agreement, the onus of proof for the enforcement of an award under Australian law is perhaps unclear (see *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9; *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161). The CLJ Bill proposes an amendment to the IAA to make the foreign award binding between the "parties to the award" (rather than binding between the "parties to the arbitration agreement in pursuance of which it was made"). The proposed amendment will remove the opportunity for the award debtor to add an additional procedural step in an enforcement application (i.e. the award creditor proving that the award does bind the award debtor), improving the efficiency of recognition and enforcement proceedings. It is intended that these proposed amendments will apply to any arbitral proceedings, whether commenced before or after the amendments come into effect.

Investment arbitration

Australia has entered into 21 Bilateral Investment Treaties (**BITs**) in the form of Investment Protection and Promotion Agreements, including with China, Peru, India, Chile and Indonesia. Australia has nine free trade agreements (**FTAs**) currently in force with New Zealand, Singapore, Thailand, United States, Chile, New Zealand and the Association of South East Asian Nations (ASEAN), Japan, Malaysia and Korea. Australia has also recently concluded a FTA with its key trading partner, China and there are another eight FTAs under negotiation, including with India and Indonesia.

A majority of the BITs and FTAs in force typically include investor-state dispute settlement (**ISDS**) provisions, typically providing investors with access to investor-state arbitration (**ISA**) where there has been an alleged non-compliance with provisions of a BIT or FTA.

Not all investment treaties that Australia has entered into allow for ICSID arbitration. ICSID arbitration is available and can be used where the host State and the State of the

investor are both members of the Convention. For example, the Hong Kong-Australia BIT provides for UNCITRAL Arbitration.

Australia's current government policy is to consider ISDS provisions in FTAs on a case-by-case basis, reversing the previous Gillard government's policy of rejecting ISDS in trade agreements.

However, Australian companies remain reluctant to utilise ISDS as a mechanism of resolving disputes with host States. Since 2010, companies incorporated in Australia have used ISDS in proceedings against other host States to protect their interests in three disputes: against India, Pakistan and Indonesia.

Given the reciprocal nature of investment treaties, foreign investors with investments in Australia also benefit from ISDS provisions in the event that their investments are subject to adverse interference by the Australian Government. To date, Australia has had just one ISDS case registered against it by Philip Morris Asia Ltd (**Philip Morris**), a company incorporated in Hong Kong, under the Australia-Hong Kong BIT. Philip Morris brought a claim against the Australian government alleging Australia's *Tobacco Plain Packaging Act 2011* (Cth) breached the terms of its BIT with Hong Kong. In December 2015, a tribunal at the Permanent Court of Arbitration dismissed Philip Morris' claim on the grounds that it did not have the jurisdiction to hear the case.

To be given effect in Australia, awards under ISDS procedures require legislative support. Section 33 of the IAA provides that an award is binding on a party to the investment dispute to which the award relates. Section 35 of the IAA provides an award to be enforcement by the Australian Supreme and Federal Courts, with leave of the Courts, as though the award were a judgment or order.

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Austria

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Introduction

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

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

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

The Vienna International Arbitral Center (**VIAC**), which is attached to the Austrian Federal Economic Chamber, was established in 1975 and has since maintained its position as one of the leading arbitration institutions in Europe. As of today, more than 1,300 arbitral proceedings have been administered under its rules. VIAC's recent statistical reports show that disputes in the finance, general trade, machinery and construction and engineering sectors account for the largest share of its caseload. VIAC has been cautious to preserve its traditions while also keeping pace with recent trends in international arbitration. In 2013, it amended its arbitration rules by introducing, among others, new provisions on multi-party arbitration, expedited proceedings and advance on costs in order to meet the demands of the international arbitration community. Apart from VIAC, ICC Austria contributes to promoting arbitration in Austria by, *inter alia*, organising seminars, nominating arbitrators and advising on arbitration and mediation clauses.

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

Arbitration agreement

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

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

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

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

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

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

Special form requirements apply to arbitration agreements between entrepreneurs and consumers and to certain employment matters. Such agreements with consumers are only valid if concluded after the specific dispute has arisen. In addition, both the consumer and the employee have to receive written legal advice on the differences between arbitration and court proceedings. Furthermore, the arbitration agreement must be contained in a separate document signed by the consumer or employee and such a document must only comprise agreements relating to the arbitral proceedings. Importantly, if the arbitration agreement

provides for a seat of arbitration that is different from the consumer's or employee's domicile, residence or place of work at the time the contract was concluded or at the time of commencement of the arbitral proceedings, such an agreement is only binding if it is invoked by the consumer or employee. These special requirements, however, do not apply to members of the boards of stock corporations and managing directors of limited liability companies.

Unlike the UNCITRAL Model Law, the ACCP expressly governs objective arbitrability in its Section 582 and provides that all pecuniary disputes may be the subject of an arbitration agreement. Such disputes include among others corporate disputes, disputes over anti-trust claims and competition law claims that are generally arbitrable. Non-pecuniary claims are arbitrable if the law allows the parties to conclude a settlement on the subject matter. Claims involving family law, as well as all claims arising out of contracts that are even only partially subject to the Landlord and Tenant Act or the Limited Profit Housing Act, are expressly excluded and may not be validly referred to arbitration.

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

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

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

Arbitration procedure

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

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

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

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

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

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

Arbitrators

Parties are in principle free to appoint whichever arbitrators they choose, and are not restricted to necessarily selecting lawyers. Whilst there are no statutory requirements regarding the

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

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

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

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

Interim relief

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

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

However, since arbitral tribunals have no coercive powers, once granted but not complied

with, interim measures may only be enforced by the competent district courts. Thus, even though arbitral tribunals have the authority to grant interim or protective measures of types which are unknown under Austrian law, at the enforcement stage state courts may have to adapt the interim relief granted to enforcement measures known under Austrian law which closest reflect the measures ordered by the tribunal.

Arbitration award

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

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

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

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

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

Challenge of the arbitration award

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

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

- grounds concerning the right to be heard;

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

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

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

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

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

Enforcement of the arbitration award

Austria is a party to the New York Convention and originally made a reciprocity reservation which it subsequently withdrew. Besides the New York Convention and the European Convention, Austria has concluded bilateral treaties in particular with Belgium, British Columbia, Croatia, Germany, Kosovo, Liechtenstein, Macedonia, Montenegro, the Russian Federation, Slovenia, Switzerland and Serbia governing the recognition and enforcement of arbitral awards.

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

The party seeking a declaration and an authorisation for enforcement must provide the court with the arbitral award and – if so requested by the competent court – the arbitration agreement

and certified translations thereof. The court that grants the enforcement authorisation will not review any legal matters relating to the arbitration proceedings, but will only examine certain form requirements with the exception that the grounds for setting aside an award due to the lack of objective arbitrability and the violation of Austrian substantive public policy have to be examined *ex officio* and might ultimately lead to the denial of enforcement.

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

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

Investment arbitration

Austria is a party to more than 60 bilateral investment treaties (**BITs**): 2015 saw the first and, to date, only investment treaty claim brought against the Republic of Austria. In this case, the majority shareholder of an Austrian bank seeks redress for damages allegedly caused through state court proceedings and investigations involving the bank and some of its executives. The proceedings are still pending before ICSID.

Austrian companies, on the other hand, have made more frequent use of the country's BITs. In total, 16 investor-state arbitrations have been initiated by Austrian investors, six of which are still pending. Notably, the energy sector accounts for more than a third of these claims. Eleven of the Austrian BITs are intra-EU BITs, i.e. investment agreements with other Member States of the European Union. The status of these BITs is subject to considerable debate: The European Commission has, on multiple occasions, expressed its view that such treaties are in conflict with the EU single market, as they afford special protection to citizens of the respective BIT signatories, excluding investors from all other EU Member States. On this basis, the Commission has initiated infringement proceedings against five Member States, including Austria, over the termination of their respective intra-EU BITs. These proceedings remain pending.

In parallel, the European Court of Justice has been requested to issue a preliminary ruling on the compatibility of intra-EU BITs and EU law. Hopefully, this preliminary ruling will provide the necessary guidance on the future of intra-EU BITs and their relation to EU law.

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

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Azerbaijan

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Introduction

The act which primarily governs international arbitration in the Republic of Azerbaijan is the Law of the Republic of Azerbaijan on International Commercial Arbitration, dated 18 November 1999 ("Law on Arbitration"). The Law on Arbitration is completely based on the UNCITRAL Model Law on International Commercial Arbitration 1985 ("Model Law"). Republic of Azerbaijan has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards with no reservation ("New York Convention"). Republic of Azerbaijan has also signed and ratified the European Convention on International Commercial Arbitration, 1961 (with no reservation). The Civil Procedure Code of the Republic of Azerbaijan dated 1 September 2000 ("CPC") also regulates matters related to the recognition and enforcement of foreign arbitral awards in the Republic of Azerbaijan and replicates provisions of the New York Convention in this respect.

Azerbaijan International Commercial Arbitration Court ("AICAC"), established on 11 November 2003, is the only arbitration institution functioning in the Republic of Azerbaijan. As in accordance with AICAC's Charter, AICAC is an independent and permanently functioning arbitral institution. No public information is available with respect to the cases considered by AICAC. No special national courts exist in the court system in the Republic of Azerbaijan which are specifically responsible for international arbitration.

Arbitration agreement

As per Art. 7.2 of the Law on Arbitration, the arbitration agreement shall be in writing. An agreement shall be considered to be concluded in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which the counter-party has not opposed.

An arbitration agreement may be concluded either by means of inclusion of an arbitration clause into the contract or as a separate agreement (Art. 7.1, Law on Arbitration). A reference, in a contract, to an arbitration clause shall be deemed an arbitration agreement, provided that the agreement is concluded in writing and such reference makes that clause a part of the agreement (Art. 7.2, Law on Arbitration). No other specific prerequisites exist for the arbitration agreement to be considered as valid. However, when drafting an arbitration clause, the following matters shall be taken into account: the court before which an action is brought in a matter in respect of which the parties have made an agreement shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. (Art. 8.1, Law on Arbitration.) Therefore, as a rule, in case of the existence of an arbitration clause

in the contract (or separate arbitration agreement), the court in the Republic of Azerbaijan shall refer the parties to arbitration, unless it finds that the respective arbitration clause (or arbitration agreement) is null and void, inoperable or incapable of being performed.

The Law on Arbitration incorporates the principle of *kompetenz-kompetenz,* i.e. the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of an arbitration clause (Art. 16.1, Law on Arbitration).

The principle of separability is also recognised by the Law on Arbitration. An arbitration clause forming part of the contract shall be treated independently from other terms of the contract. A decision by the arbitral tribunal regarding invalidity of the arbitration clause shall not entail the invalidity of the arbitration clause (Art. 16.1, Law on Arbitration).

The legislation of the Republic of Azerbaijan does not specifically regulate matters related to joinder/consolidation of third parties. Article 42 of the AICAC's Charter states that third parties may be involved in the proceedings only with the consent of the parties to the dispute. In addition to the consent provided by the parties to the dispute, third parties should also provide their consent. Consent shall be provided in writing.

Arbitration procedure

The arbitral proceedings concerning a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent, unless otherwise has been agreed by the parties (Art. 21, Law on Arbitration). The parties can agree on the procedure to be followed by the arbitral tribunal (Art. 19, Law on Arbitration). If no agreement exists between the parties, the arbitral tribunal may, subject to the provisions of Law on Arbitration, conduct the arbitration in such manner as it considers appropriate (Art. 19.2, Law on Arbitration). The arbitral tribunal is vested with the power to determine the admissibility, relevance, materiality and weight of any evidence (Art. 19.2, Law on Arbitration).

The claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought within the time agreed by the parties or determined by the arbitral tribunal (Art. 23.1, Law on Arbitration). The respondent, in its own turn, shall state its defence in respect of the matters raised by the claimant, unless the parties have agreed otherwise as to the necessary prerequisites of such statements (Art. 23.1, Law on Arbitration). Moreover, the parties are free to submit together with their statements all documents which they consider relevant, or may provide reference to the documents or evince others to be submitted later (Art. 23.1, Law on Arbitration). The above-mentioned statements, documents or other information provided to the arbitral tribunal by the party shall be communicated to the other party accordingly. The same rule also applies to the expert report or evidentiary document on which the arbitral tribunal may rely during its decision-making process (Art. 24.3, Law on Arbitration).

Both a party (with approval of the arbitral tribunal) and the arbitral tribunal may request from a Supreme Court of the Republic of Azerbaijan ("Supreme Court") support in taking evidence (Art. 27, Law on Arbitration).

Confidentiality matters are not specifically regulated by the Law on Arbitration. However, the parties are free to agree on the procedure to be followed by an arbitral tribunal in conducting the proceedings (Art. 19.1, Law on Arbitration), and consequently can agree for the proceedings to be confidential. IBA rules on the taking of evidence in international arbitration are not taken into account in the Republic of Azerbaijan. However, the parties are free to agree on the applicability of respective rules to their arbitral proceedings.

No specific guidelines exist with respect to taking into account LCIA and IBA guidelines. However, the parties are free to stipulate these matters in the arbitration agreement.

Arbitrators

As a rule, the parties are free to determine the number of arbitrators (Art. 10.1, Law on Arbitration). A person shall not be precluded by reason of his nationality from acting as an arbitrator, unless it has been agreed otherwise by the parties (Art. 11.1, Law on Arbitration).

The parties can determine the procedure of arbitrators' appointment (Art. 11, Law on Arbitration).

If parties fail to agree on the procedure, the following rules will be applicable, as per the Law on Arbitration (Art. 11.2, Law on Arbitration):

(a) In case of arbitration with the participation of three arbitrators, one arbitrator is appointed by each party; afterwards, two arbitrators shall appoint the third arbitrator. In case a party fails to appoint the arbitrator within 30 (thirty) days of receipt of the respective request from the other party, or if the two arbitrators cannot agree on the third arbitrator within 30 (thirty) days of their appointment, such an appointment shall be made, upon request of a party, by the Supreme Court.

(b) In case of arbitration with the participation of a sole arbitrator, if the parties fail to agree on the arbitrator, such appointment shall be made, upon request of a party, by the Supreme Court.

In case, under the agreed appointment procedure, i) any party fails to act as per such procedure, ii) either party or two arbitrators fail to reach an agreement as per such procedure, or iii) a third party, including an institution, does not perform any function required to be performed from a third party under such procedure, and another appointment procedure is not stipulated by the arbitration agreement, any party may request the Supreme Court to take the necessary action (Art. 11.4, Law on Arbitration).

Mandate of the arbitrator (Art. 14.1, Law on Arbitration) is terminated in case an arbitrator cannot perform his/her functions, or for any other reason fails to act for a long period of time, or if s/he withdraws from his office, or in case the parties agree on termination. In case of controversy due to any of the above-mentioned grounds, any party may request the Supreme Court to decide on the termination of the arbitrator's mandate. Such a decision shall not be subject to appeal (Art. 14.1, Law on Arbitration).

The Law on Arbitration also prescribes the arbitrators' challenge procedure. Parties can agree on the respective procedure (Art. 13.1, Law on Arbitration). In case such an agreement does not exist, a party who intends to challenge an arbitrator shall, within 15 days of becoming aware of the arbitral tribunal's composition or after becoming aware of any circumstances referred to in Art. 12.2 (if circumstances exist that give rise to justifiable doubts as to the impartiality or independence of the arbitrator, or if s/he does not have qualifications agreed by the parties), submit a written statement of the reasons for the challenge to the arbitral tribunal. The respective arbitral tribunal shall decide on the challenge, unless the challenged arbitrator withdraws from his office or another party agrees to the challenge (Art. 13.2, Law on Arbitration).

The Law on Arbitration does not have any specific provision with respect to use of secretaries. However, the Regulation of AICAC (Arts. 9, 11, 14, 16, 18-20, 24, 26, 29, 36, 47, 52) stipulates the matters related to the mandate and responsibilities of secretaries

and the Secretariat in general. There is no public information with respect to actual use of secretaries in the arbitral proceedings.

The IBA Guidelines on conflict of interest are not adopted in the legislation of the Republic of Azerbaijan. However, parties are free to agree on the use of IBA Guidelines during their arbitral proceedings. Matters related to arbitrators' immunity are not specifically regulated by the Law on Arbitration.

Interim relief

As per Art. 27 of the Law on Arbitration, with the approval of the arbitral tribunal a party may request the assistance of the Supreme Court in taking evidence. The Supreme Court may execute this request within its competence and in accordance with the rules on taking evidence. The Law on Arbitration (Art. 9) provides for the possibility of a party to request, before or during arbitral review, an interim measure of protection from the Supreme Court and for a court to grant such measure. In practice, the Supreme Court considers requests for interim relief only if arbitral proceedings have already commenced.

Arbitration award

According to the Law on Arbitration, an arbitral award must be in writing and signed by an arbitrator (if the dispute has been heard by a sole arbitrator) or by a majority of arbitrators. If signed by a majority of arbitrators, not all the reasons for the absence of other arbitrators' signatures need be stated in the award.

The Law on Arbitration does not regulate fee structures. Regulation of AICAC, however, provides for the fees. Amounts of fees under the Regulation depend on the amount of the dispute, i.e. if the amount of dispute is up to US$ 20,000, then the arbitration fee is US$ 1,000, and if above US$ 10,000,001, then the fee will be equal to US$ 32,200 plus 0.05% of the dispute amount.

The Law on Arbitration does not regulate the way costs and expenses should be borne. However, in accordance with the AICAC Regulation on costs, if there is no agreement between the parties, the unsuccessful party will be required to pay the arbitration fees (*Art. 6.1, AICAC Regulation on costs*).

Challenge of the arbitration award

Arbitration law does not provide for rights of appeal. Arbitral awards may not be appealed in the local courts of Azerbaijan. An award can be set aside by the Supreme Court, however. This is the only recourse against an arbitral award. According to Art. 34 of the Law on Arbitration, this is possible if the applicant proves 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 choice of law, under Azerbaijan law).
- The applicant was not given proper notice about the appointment of an arbitrator or the arbitral proceedings, or was otherwise unable to present his case.
- The award deals with a dispute not contemplated by or not falling within the terms of the arbitration, or contains decisions on matters beyond the scope of the arbitration (provided that, if decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award relating to decisions not submitted to arbitration can be set aside).

- The composition of the arbitral tribunal or the arbitral procedure did not accord with the parties' agreement, unless the agreement was in conflict with a provision of the Arbitration Law from which the parties cannot derogate (or, failing such agreement, was not in accordance with the Arbitration Law).

An award can also be set aside if the court finds that:

- the dispute is not subject to settlement by arbitration under Azerbaijani law; or
- the award violates the Constitution of Azerbaijan.

Enforcement of the arbitration award

Republic of Azerbaijan has signed and ratified the New York Convention. Therefore, the provisions of the New York Convention with respect to enforcement of foreign arbitral awards are incorporated into the legislation of the Republic of Azerbaijan. As a rule, the arbitral award shall be recognised as binding and shall be enforced accordingly (Art. 35, Law on Arbitration). The Supreme Court is the body responsible for review of petitions in respect of enforcement and recognition of arbitral awards. The party seeking enforcement shall supply the duly authenticated original award or a duly certified copy accordingly, as well as the arbitration original of the arbitration agreement or its certified copy. If the arbitration agreement is not made in the Azerbaijani language, a duly certified translation of the arbitration agreement shall be supplied (Art. 35.2, Law on Arbitration).

Enforcement of a foreign arbitral award may be refused by the Supreme Court based on the below grounds (Art. 476 of CPC):

(a) if the party against whom the award has been made presents to the court evidence that:
   i) one of the parties to the arbitration agreement did not have a capacity to this or other extent, or that the arbitration agreement was invalid in accordance with the legislation to which the parties made such agreement subject or, in the absence of reference to such legislation, with the legislation of the State where the award was rendered; or
   ii) the party against whom the award was made was not duly notified about the appointment of the arbitrator or the arbitration process, or that such party was not able to present his case; or
   iii) the award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
   iv) the composition of the arbitration tribunal or the arbitration procedures were not in compliance with the arbitration agreement signed between the parties or, where the parties have not concluded any such agreement, with the Law of the State where the arbitration was held; or
   v) the decision is not final for the parties or has been cancelled or suspended by the court in accordance with the legislation of the State where such decision was adopted; or
(b) if the court determines:

i) that the object of the dispute may not be the subject of an arbitration process according to the legislation of the Republic of Azerbaijan; or

ii) if the recognition or enforcement of the arbitral award contradicts the main principles of the legislation and sovereignty of the Republic of Azerbaijan.

It should be also noted that the following matters relate to exclusive jurisdiction of the courts of Republic of Azerbaijan (Art. 444 of CPC):

- court proceedings related to property rights, rent or mortgage where the case is related to real estate and is located in Republic of Azerbaijan;
- cases related to legal status of entities: dissolution or de-registration of legal entities if such legal entities have a legal address in Republic of Azerbaijan;
- cases relating to claims in respect of recognition of validity of patents, marks or other rights where registration or application for registration of these rights has been carried out in the Republic of Azerbaijan;
- if the decision on mandatory enforcement measures, taken in the course of court proceedings, has been implemented in the Republic of Azerbaijan; or
- cases related to claims against cargo shippers, deriving from contracts on transportation services.

As a matter of practice, arbitral awards are enforced in the Republic of Azerbaijan, if the above-mentioned preconditions are met.

Investment arbitration

Republic of Azerbaijan has concluded the following bilateral investment treaties:[1]

Country	Date (Signed)	Status (Ratified)
Albania	09/02/2012	22/05/2012
Austria	04/07/2000	28/05/2001
Belarus	03/06/2010	30/09/2012
Bulgaria	07/10/2004	01/03/2005
BLEU (Belgium-Luxembourg Economic Union)	18/05/2004	27/05/2009
China	08/03/1994	01/04/1995
Croatia	02/10/2007	30/05/2008
Czech Republic	17/05/2011	09/02/2012
Egypt	24/10/2002	13/05/2003
Estonia	07/04/2010	08/06/2010
Finland	26/02/2003	10/12/2004
France	01/09/1998	24/08/2000
Georgia	08/03/1996	10/07/1996
Germany	22/12/1995	29/07/1998
Greece	21/06/2004	03/09/2006
Hungary	18/05/2007	26/02/2008
Islamic Republic of Iran	28/10/1996	20/06/2002
Israel	20/02/2007	16/01/2009
Italy	25/09/1997	04/02/2000

Country	Date (Signed)	Status (Ratified)
Jordan	05/05/2008	25/12/2008
Kazakhstan	16/09/1996	30/04/1998
Korea	23/04/2007	25/01/2008
Kyrgyzstan	28/08/1997	28/08/1997
Latvia	03/10/2005	10/05/2006
Lebanon	11/02/1998	04/12/1998
Lithuania	08/06/2006	01/07/2007
Macedonia	19/04/2013	21/06/2013
Moldova	27/11/1997	28/01/1999
Montenegro	16/09/2011	02/11/2012
Norway	25/09/1996	n/a
Pakistan	09/10/1995	12/03/2006
Poland	26/08/1997	10/02/1999
Qatar	28/08/2007	19/10/2007
Romania	29/10/2002	29/01/2004
Russian Federation	29/09/2014	16/11/2015
San Marino	25/09/2015	18/12/2015
Saudi Arabia	09/03/2005	10/05/2005
Serbia	08/06/2011	14/12/2011
Switzerland	23/02/2006	25/06/2007
Syrian Arab Republic	08/07/2009	04/01/2010
Tajikistan	17/03/2007	26/02/2008
Turkey	25/10/2011	02/05/2013
Ukraine	21/03/1997	09/12/1997
United Arab Emirates	01/11/2006	24/08/2007
United Kingdom	04/01/1996	11/12/1996
United States of America	01/08/1997	02/08/2001
Uzbekistan	27/05/1996	02/11/1996

The Republic of Azerbaijan has also signed and ratified the Agreement on protection and promotion of investment with the OPEC Fund for International Development[2] (dated 19 November 2002).

The Republic of Azerbaijan has signed and ratified with no reservation the following multilateral conventions:

- Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force on 14 October 1965); and
- Energy Charter Treaty.

Only three cases have been raised against Republic of Azerbaijan before the International Centre for Settlement of Investment Disputes ("ICSID"):

- *AZPETROL INTERNATIONAL HOLDINGS B.V. AZPETROL GROUP B.V. AZPETROL OIL SERVICES GROUP B.V. v. Republic of Azerbaijan* (hereinafter, "Azpetrol case");

- *Barmek Holding A.S. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/16 (hereinafter "Barmek case"); and
- *Fondel Metal Participations B.V. v. Republic of Azerbaijan*, ICSID Case No. ARB/07/1 (hereinafter "Fondel case").

In the *Azpetrol* case, the Respondent lodged a preliminary objection in which it contested the jurisdiction of the Tribunal.[3] The parties notified the Tribunal that they had reached "an in-principle settlement of the case". However, the Claimants subsequently denied that a binding agreement to settle the case was concluded. In this respect the Respondent disagreed and applied for an order dismissing the proceedings by reason of binding settlement.[4] The Tribunal concluded that the parties concluded a binding settlement agreement in the form of an exchange of emails. Accordingly, the Tribunal held that it had no jurisdiction to hear the claim under the Energy Charter Treaty and the Convention on Settlement of Investment Disputes between States and National of other States ("ICSID Convention").[5]

In the *Barmek* case, the award was not published. However, as per available information, the Tribunal rendered an award, embodying the parties' settlement as per ICSID Arbitration Rules 43(2).[6]

In the *Fondel* case, the details of the award were not made public. However, as per available information, the Respondent filed a request for the discontinuance of the proceedings pursuant to ICSID Arbitration Rule 43(1). The Claimant has informed the Tribunal that it does not object to the Respondent's request for the discontinuance of the proceedings. As a result, the Tribunal issued a procedural order for discontinuance of the proceedings, pursuant to ICSID Arbitration Rule 43(1).[7]

Since no award was issued by ICSID with respect to compensation to investors, there is no track record *per se* with respect to enforcement of such awards in Republic of Azerbaijan.

* * *

Endnotes

1. http://investmentpolicyhub.unctad.org/IIA/CountryBits/13 (last visited 12 April 2017).
2. Republic of Azerbaijan ratified the Agreement on 9 December 2003.
3. Para. 1 of the Award. available at http://www.italaw.com/sites/default/files/case-documents/ita0059.pdf (last visited 12 April 2017).
4. *Ibid*.
5. *Ibid*. para. 2.
6. https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/06/16 (last visited 12 April 2017).
7. https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/1 (last visited 12 April 2017).

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Belgium

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Introduction

Belgium, a small country at the crossroads of international commerce, has always been dependent on international trade. An important part of the Belgian economy is in the hands of foreign corporations. In addition, the presence in Brussels of the headquarters of the European Union, NATO and many other institutions, has helped transform the country into an international, multilingual and multi-cultural hub for business and the service industry.

One of the consequences of this is that Belgium has always been amongst the first jurisdictions to adopt treaties, laws and regulations favouring international business.

It has long been allowed in Belgium to settle most international and national business disputes through arbitration, and Belgian courts show little reluctance to enforce arbitration agreements and arbitral awards.

Arbitration is the predominant alternative mode for settling disputes in M&A transactions, industrial joint ventures and international construction agreements. It is also often chosen in international commercial disputes. By contrast, agreements between two Belgian entities to be performed in Belgium most often remain subject to State courts' adjudication.

Under the impetus of the main Belgian arbitration centre CEPANI, a new generation of multilingual, sophisticated practitioners have successfully lobbied the government to modernise the law and are actively promoting Belgium as a hub for arbitration.

In 2013, Part VI of the Belgian Code of Civil Procedure was entirely replaced in order to bring the rules in line with recent changes in international practice and the UNCITRAL model, and to encourage and facilitate arbitration under Belgian law. Since then, other measures and laws have been adopted, with the objective of increasing the attractiveness of Brussels as a place for arbitration[1].

Part VI of the Code of Civil Procedure and relevant conventions

Part VI of the Code of Civil Procedure governs both national and international arbitration. It is applicable whenever the seat of the arbitration is located in Belgium[2]. The Parties may, however, choose to apply it even though the seat of the arbitration is not located in Belgium[3]. In any event, Art. 1676.8 provides that a certain number of provisions of the Code are applicable irrespective of both the seat of arbitration and the will of the parties. This is notably the case with the provisions on the recognition and enforcement of foreign arbitral awards.

Part VI of the Code of Civil Procedure was modified by the Belgian Arbitration Act of 24 June 2013[4]. The reform carried out by this 2013 Act made some significant changes to Belgian law on arbitration and was designed to closely reflect the rules of the 1985 UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006

('UNCITRAL Model Law'). However, it should be noted that Part VI of the Code of Civil Procedure applies to several areas of law whereas the UNICITRAL Model Law was drafted to apply only to commercial disputes.

The 2013 Act modernised the arbitration rules and made them more flexible so as to render the proceedings more efficient. Court control has also been limited for the same purpose. In addition, competence to deal with most disputes regarding arbitration has been conferred to only six courts of first instance, so as to foster specialisation[5].

The new rules apply to arbitral proceedings that were started after 1 September 2013.

Part VI of the Code of Civil Procedure is divided into nine chapters:

- General provisions (Art. 1676-1680).
- Arbitration agreement (Art. 1681-1683).
- Composition of the arbitral tribunal (Art. 1684-1689).
- Jurisdiction of the arbitral tribunal (Art. 1690-1698).
- Conduct of the arbitration (Art. 1699-1709).
- Arbitral award and closing of the proceedings (Art. 1710-1715).
- Challenge of the arbitration award (Art. 1716-1718).
- Recognition and enforcement of arbitral awards (Art. 1719-1721).
- Time limitations (Art. 1722).

On 22 December 2016, the Parliament adopted the fourth potpourri bill (the '2016 Act'), containing provisions on various aspects of the justice system[6]. This law, which gives further form to the implementation of Minister Koen Geens' Justice Plan and aims, in particular, to make minor corrections and simplifications to the 2013 Act, entered into force (for the most part) on 9 January 2017.

Beyond its national legislation, Belgium has adhered to various international conventions on the recognition and enforcement of foreign arbitral awards:

- the Geneva Convention of 26 September 1927 on the Execution of Foreign Awards;
- the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. However, Belgium has declared that it would apply the Convention subject to reciprocity. Ratification of the New York Convention was not restricted to commercial matters; and
- the European Convention of 21 April 1961 on International Commercial Arbitration and Appendices[7].

Belgium has also ratified bilateral conventions concerning the recognition and enforcement of arbitral awards with France, the Netherlands, Germany, Switzerland and Austria.

When those conventions are applicable, the rules contained therein are applied instead of those provided by the Code of Civil Procedure.

Arbitration institutions – international institutions and *ad hoc* arbitration

While most arbitration proceedings in Belgium are institutional, there is still a fair amount of *ad hoc* arbitration (mainly, but not exclusively in small disputes).

The ICC Rules are probably the rules that are most often adopted in large international disputes involving a Belgian Party. There are occasional instances of arbitrations being held in Belgium under the auspices of the LCIA, the Netherlands Arbitration Institute or other foreign organisations.

The main Belgian arbitration institution is the Belgian Centre for Arbitration and Mediation (**CEPANI**)[8]. CEPANI was founded in 1969, under the auspices of the Belgian National Committee of the International Chamber of Commerce (**ICC**) and the Federation of Belgian Enterprises (**VBO/FEB**). Today, it is the leading arbitration institution in Belgium, although there are also a handful of sectorial or regional arbitration centres. *Ad hoc* arbitration still occurs regularly.

CEPANI arbitrations are governed by the **CEPANI Arbitration Rules**, which are inspired by the ICC Rules and refer to some extent to Part VI of the Code of Civil Procedure[9].

Arbitration agreement

Art. 1681 of the Code of Civil Procedure defines an arbitration agreement as *'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*'. This definition is lifted verbatim from Art. 7 of the UNCITRAL Model Law.

Arbitrability

In accordance with Art. 1676.1 of the Code of Civil Procedure, an arbitration agreement is only enforceable in relation to a dispute that is arbitrable. Parliament has made it clear that it expects the courts to construe this requirement in favour of arbitration[10].

Pursuant to Art. 1676.4 of the Code of Civil Procedure, this general rule of arbitrability applies without prejudice to the exceptions provided by specific laws.

In certain areas, Belgian law provides that a dispute can only be arbitrated if the arbitration agreement was entered into after the dispute has arisen, or provided that the arbitrators have the obligation to apply Belgian law. One such restriction is to be found in the law governing the termination of distributorship agreements. Art. 1676.4 also provides that an arbitration agreement entered into prior to any dispute falling under the jurisdiction of labour courts will be null and void.

In addition, pursuant to Art. 1676.3 of the Code of Civil Procedure, public authorities may only enter into an arbitration agreement when the aim of that agreement is to resolve disputes either arising from a contract or concerning certain subject matters provided by law or by royal decree. In the latter event, the law or royal decree is to state the conditions (if any) under which an arbitration agreement may be entered into. An example of such a law or royal decree is Art. 14 of the Act of 21 March 1991 on the reform of certain State enterprises[11]. This article provides that an autonomous State enterprise may conclude an arbitration agreement after a dispute has arisen.

Joinder of third parties and consolidation of proceedings

Art. 1709 of the Code of Civil Procedure provides that any third party showing an interest may file a request before the arbitral tribunal to join the proceedings. Such a request must be made in writing and forwarded by the tribunal to the parties. A party to the proceedings may also call upon a third party to join the proceedings. However, the admissibility of any joinder is subject to both the unanimous consent of the arbitral tribunal and the existence of an arbitration agreement between the third party and the parties involved in the arbitration.

Part VI of the Code of Civil Procedure does not provide for any rules regarding the consolidation of proceedings. Unless the parties have agreed otherwise, the arbitral tribunal thus does not have the power to consolidate proceedings without the parties' consent[12]. Of course, this is without prejudice to the provisions on consolidation that can

be found in the rules of most arbitration organisations. In this regard, Art. 13.1 of the CEPANI Arbitration Rules provides for a consolidation mechanism.

Competence-Competence

In accordance with the 'competence-competence' principle, Art. 1690 of the Code of Civil Procedure provides that an arbitral tribunal has jurisdiction to rule on a party's challenge to the tribunal's own jurisdiction. A claim that the tribunal does not have jurisdiction must be raised by a party no later than the communication of its first written submission.

When a case that allegedly falls under an arbitration agreement is brought before State courts, the courts may not raise an objection based on the arbitration agreement *ex officio*[13]. They must decline jurisdiction only if it is disputed by a party on the grounds of the arbitration agreement before any other defence, *i.e.* in that party's first written submission. If no party disputes the State court's jurisdiction before any other defence, the parties are considered to have agreed to it.

Severability

In accordance with Art. 1690.1 of the Code of Civil Procedure, an arbitral clause contained in a contract is considered to be an agreement distinct from the other clauses of the contract. The arbitration clause can thus be considered valid when the rest of the contract in which it is contained is declared null and void.

Arbitration procedure

The Code of Civil Procedure sets out the procedural rules to be applied in arbitration proceedings. However, those rules only apply if the parties have not agreed otherwise[14], with the exception of the provisions on the impartiality and independence of arbitrators and on the adversarial nature of the procedure, which are mandatory[15].

Commencing an arbitration

Pursuant to Art. 1702 of the Code of Civil Procedure, the arbitral procedure starts on the date on which the request for arbitration is communicated in accordance with Art. 1678.1. From that moment, the limitation period is interrupted.

Seat of arbitration

Art. 1701.1 of the Code of Civil Procedure provides that absent an agreement between the parties, the arbitral tribunal may determine the place of arbitration. In doing so, the tribunal must take into account the factual circumstances of the case, such as the parties' preferences. If the arbitral tribunal does not determine the seat of arbitration, this place is located where the award is rendered.

Unless otherwise agreed by the parties, the location of the seat of arbitration does not prevent the arbitral tribunal from holding hearings and meetings in other places[16]. For instance, witnesses can be heard at their place of business. When the place of hearing or meeting differs from the place of arbitration, this place must be mentioned in the minutes, the award or the order[17].

The place of arbitration is of great importance as it determines the law applicable to arbitration proceedings (see below).

Applicable law

Pursuant to Art. 1710.1 of the Code of Civil Procedure, the arbitral tribunal shall decide on the dispute based on the law chosen by the parties as the law applicable to the merits of the case. The parties may also allow the arbitral tribunal to decide on the case *ex aequo et bono*

or as *amiable compositeur*[18]. In any event, the arbitral tribunal shall decide in accordance with the terms of the contract in cases of contractual disputes. The tribunal must also take into account the usages of trade when the parties are involved in a commercial dispute[19].

As for the law applicable to the procedure, Part VI of the Belgian Code of Civil Procedure is applicable to arbitration proceedings when the seat of arbitration is located in Belgium. The Parties may, however, choose to apply it even though the seat of the arbitration is not located in Belgium[20]. However, some provisions of Part VI of the Code are applicable irrespective of both the seat of arbitration and the will of the parties[21]. This is notably the case of the provisions on the recognition and enforcement of awards.

Rules on evidence

As in the UNCITRAL Model Law, Art. 1700.3 of the Code of Civil Procedure provides that absent an agreement between the parties, the arbitral tribunal determines at its own discretion the rules of evidence it will apply. In that regard, the International Bar Association (**IBA**) Rules of Evidence and other similar rules have become the standard practice in Belgium. However, while exercising its discretionary power, the arbitral tribunal is bound by the principle provided at Art. 1699 that the parties must have equal opportunity to present their case.

Privilege

A party may refuse to produce a piece of evidence for the reason that it contains confidential information if such reason appears legitimate pursuant to Art. 882 of the Code of Civil Procedure. Obviously, privileged lawyer-to-client or lawyer-to-lawyer communication must not be disclosed.

Disclosure

There is no pre-trial discovery procedure in Belgium, whether before State courts or before arbitral tribunals. Belgium is a civil-law country, where the procedure is adversarial and the legal culture is not favourable to US or English-style discovery proceedings.

Before the civil courts, Art. 877 of the Code of Civil Procedure allows a party to ask the court to order the disclosure of one or several documents, provided these documents are clearly identified, their existence is proven and these documents are relevant and appear *prima facie* useful for proving a fact that is decisive to the dispute.

In arbitration, Art. 1700.4 of the Code of Civil Procedure allows the arbitral tribunal to compel a party to disclose a piece of evidence, but does not refer to the standards and requirements of Art. 877 of the Code of Judicial Procedure. The arbitrators thus appear to have broader discretion than the courts to order the disclosure of documents[22]. The IBA Rules would generally serve as the guideline under which the arbitrators will order a party to disclose one or several documents.

With regard to the language of documentary evidence, the arbitral tribunal enjoys broad discretion in allowing the submission of documents in foreign languages and in ordering their translation, unless the parties have agreed otherwise or due process requires a translation[23]. Indeed, the flexibility of arbitration (as opposed to litigation before the State courts) on language issues is one of the factors that contribute to the success of arbitration.

Witness deposition

While they very seldom take place before the civil courts, witness depositions are becoming the norm in arbitration. The international model based on affidavits, direct examination, and cross-examination, has become standard practice, with each party bringing its witnesses to the hearing or summoning the other party to bring designated witnesses.

However, the arbitral tribunal cannot coerce a person to appear as a witness[24]. If a witness refuses to appear before the arbitrators, Art. 1708 of the Code of Civil Procedure provides that a party can request the presiding chair of the court of first instance (in fast-track proceedings) to order all necessary measures for the taking of evidence[25]. For instance, the presiding chair of the court of first instance may order a witness to appear before the arbitral tribunal, subject to a non-compliance penalty and damages[26].

Expert evidence

In the Belgian legal tradition, the parties seldom bring their experts to the proceedings. They may do so, but the courts and also the arbitrators will be less inclined to listen to a party-expert than to a neutral, court-appointed expert.

Art. 1707.1 of the Code of Civil Procedure provides that the tribunal arbitral may appoint one or more experts to report on specific issues. As under the former arbitration regime, an expert may only be appointed to report on questions of fact and not on legal questions submitted to the arbitral tribunal[27].

The tribunal may appoint an expert either *proprio motu* or at a party's request[28]. However, the parties may exclude the tribunal's authority to appoint an expert either in the arbitration agreement or during the arbitration proceedings[29]. Pursuant to Art. 1707.3 of the Code of Civil Procedure, the parties themselves may also jointly appoint technical experts.

At the request of a party or when the tribunal deems it necessary, the expert shall participate in a hearing where the tribunal and the parties may interrogate them[30].

The arbitral tribunal is not bound by the expert's findings. Those findings only amount to an advisory opinion[31]. Nonetheless, in practice, tribunals often do rely on the expert evidence.

Confidentiality

Although the Code of Civil Procedure does not expressly so provide, arbitral proceedings in Belgium are considered to be entirely confidential. Art. 25 of the CEPANI Arbitration Rules provides that the proceedings are confidential, unless otherwise agreed by the parties or unless there is a legal requirement of publicity. In practice, where no arbitral institution rules provide for the confidentiality of the arbitration, a clause is often inserted to that effect in the terms of reference[32].

Moreover, it is generally considered that arbitrators under Belgian law are bound by an obligation of professional secrecy with respect to the facts of which they have become aware as a result of their role as an arbitrator, an obligation that is not limited in time. However, in the current context of the intensifying fight against tax fraud and money-laundering, there is a prevalent tendency to consider that arbitrators have a duty to disclose criminal offences of which they have become aware during the course of proceedings.

Arbitrators

Appointments in general

Pursuant to Art. 1684 of the Code of Civil Procedure, as long as the arbitral tribunal is composed of an odd number of arbitrators, the parties may agree on the number of arbitrators and may choose to appoint a sole arbitrator. Absent any agreement of the parties, an arbitral tribunal is composed of three arbitrators.

Procedure

As provided by Art. 1685.2 of the Code of Civil Procedure, the parties may agree on

a procedure for the setting-up of the arbitral tribunal as long as they fulfil the general requirements of independence and impartiality of the arbitrator(s).

Absent such an agreement between the parties, in the case of an arbitral tribunal composed of three arbitrators, the procedure is as follows. The claimant must notify the respondent of their intention to start an arbitration, appoint the arbitrator of their choice and invite the respondent to appoint their arbitrator. If the respondent fails to appoint an arbitrator within one month of the notification sent by the claimant, the latter may request the presiding chair of the court of first instance to appoint the respondent's arbitrator. Both party-appointed arbitrators must then appoint the presiding chair of the arbitral tribunal. If they fail to do so within one month of the appointment of the second party-appointed arbitrator, the presiding chair of the court of first instance may be requested to make the appointment[33].

When the arbitral tribunal is to be composed of a sole arbitrator or of more than three arbitrators, if the parties cannot agree on the choice of the arbitrator or on the composition of the arbitral tribunal, the presiding chair of the court of first instance may be requested to make the necessary appointments[34].

Challenging an arbitrator

Arbitrators may be removed on the following grounds: if they lack the legal capacity to act as an arbitrator; if they do not meet the requirements set in the arbitration agreement; or if justifiable doubts exist as to their impartiality or independence[35]. However, a party cannot challenge the appointment of an arbitrator after he/she has been appointed, on grounds of which that party was aware at the time of the appointment[36].

The parties may agree on a procedure for removing arbitrators[37]. Absent such an agreement, the party wishing to challenge the appointment of an arbitrator must first notify its objections to all of the arbitrators and to the other party. The arbitrator facing such challenge then has 10 days to withdraw. If he/she does not withdraw, a motion for their dismissal can be filed before the presiding chair of the court of first instance, whose decision is not subject to any recourse[38].

The parties may also agree to terminate the mandate of an arbitrator when that arbitrator cannot or does not fulfil his/her mission within a reasonable time[39]. Absent such an agreement, a party may seize the presiding chair of the court of first instance, whose decision is not subject to any recourse[40].

Impartiality of arbitrators

A general requirement of independence and impartiality of the arbitrators appears from several provisions of Part VI of the Code of Civil Procedure. In addition, a person who is approached in order to be appointed as an arbitrator must declare any circumstance that could raise justifiable doubts as to his/her impartiality or independence. The occurrence of any such circumstance during the proceedings must also be communicated to the parties[41].

Immunity of arbitrators

The concept of 'immunity' of an arbitrator does not exist as such under Belgian law. An arbitrator may be sued based on the rules of contractual and extra-contractual liability under Belgian law. However, an arbitrator cannot be held liable for having erred in law.

Secretaries to the arbitral tribunal

There are no rules under Belgian law governing the position of secretaries to the arbitral tribunal. In practice, many arbitrators use one of their assistants as informal secretary, with the parties' consent.

Interim relief

The provisions of the Code of Civil Procedure concerning interim and conservatory measures provide for parallel jurisdiction of both State courts and arbitral tribunals, although the parties may agree otherwise[42].

Articles 1691 to 1697 deal with the power of arbitral tribunals to grant interim and conservatory measures. Those articles are based on Art. 17 of the UNICITRAL Model Law, but depart from it to a certain extent. For instance, under Belgian law the arbitral tribunal is not allowed to order *ex parte* interim measures[43]. However, the 2013 Belgian Act grants more power to the arbitral tribunal than the UNICITRAL Model Law does, as it does not restrict the arbitral tribunal's discretion to grant interim measures whereas the Model Law provides a list of conditions that must be met in order to grant such measures (see below).

Powers to grant interim relief

Pursuant to Art. 1691.1 of the Code of Civil Procedure, an arbitral tribunal may order any interim or conservatory measure that it deems appropriate. The arbitral tribunal has full discretion to decide which measures are necessary and when. The arbitral tribunal may also amend, suspend or terminate an interim or conservatory measure, not only when the tribunal itself has granted such a measure but also when that measure results from a State court decision[44].

In addition, new Art. 1697 of the Code of Civil Procedure provides that an arbitral award granting interim measures is binding and can therefore be declared enforceable by a state court. Unless stated otherwise by the arbitral tribunal, the court shall enforce such award, irrespective of the country where that award was rendered. Thus, even if arbitral awards granting interim relief are not enforceable *per se*, they should be automatically declared enforceable by State courts. Belgian law thus recognises a great legal force to such awards.

However, arbitral tribunals may not grant attachment orders[45]. These fall under the exclusive jurisdiction of State courts. Moreover, as mentioned above, Belgian law does not allow arbitral tribunals to order *ex parte* interim measures[46]. The possibility for the parties to seek interim relief from State courts, when not excluded by agreement, is therefore of great importance.

In accordance with Art. 1698 of the Code of Civil Procedure, the presiding chair of the court of first instance, when seized of a claim for interim relief in relation to arbitration proceedings, has the same power as when seized of such a claim in relation to court proceedings. Consequently, interim or conservatory measures may be granted by the presiding chair of the court of first instance only if urgency so requires[47]. Where there is an arbitration agreement, this condition of urgency is often interpreted as meaning that the presiding chair of the court of first instance can only grant interim or conservatory measures when it would not be possible to obtain such measures in due time from the arbitral tribunal[48].

Security for costs

Both State courts and arbitral tribunals may grant an order to provide security for costs, as this is a conservatory measure that falls under the broad terms of articles 1691 and 1698 of the Code of Civil Procedure.

Arbitration award

Formal requirements

The arbitral award must be made in writing and must be signed by the arbitrator(s), or by

a majority of them if the reason for any omitted signature is stated[49]. This does not mean that a dissenting opinion must be filed but merely that the award must mention whether an arbitrator has refused to sign or was incapable of signing.

The award must state the decision of the arbitral tribunal[50], including as to which of the parties must bear the costs of the arbitration and in what proportion[51]. The award must also state the reasons on which it is based[52]. Contrary to the UNCITRAL Model Law, Belgian law does not allow the parties to exempt the arbitral tribunal from stating reasons[53].

The award must contain the following information: the names and domiciles of the parties and of the arbitrators; the subject matter of the dispute; the date of the award; and the place of arbitration[54].

The sole arbitrator or the president of the arbitral tribunal must ensure that the award is received by each party in accordance with Art. 1678, and that each party receives an original[55].

Costs for the parties

The parties may recover the costs of the arbitration which, unless otherwise agreed, include the fees and expenses of the arbitrators, the fees and expenses of the counsel and representatives of the parties, the administrative costs of the arbitral institution and all the other costs resulting from the arbitral proceedings[56]. Regarding the shifting of costs, the general practice is to apply the principle that costs follow the outcome, though many arbitral tribunals also take into account the attitude of each party in the arbitration.

Interest

The question of whether the parties to an arbitration are entitled to recover interest is not determined by Belgian law as it depends on the law applicable to the merits of the case. When applicable, Belgian substantive law itself allows parties to recover interest, either as of the deadline for payment or as of the date of the summons when such deadline does not exist or cannot be precisely determined[57]. Consequently, issuing an order to pay interest pursuant to a foreign law applicable to the merits of the case is allowed in Belgian arbitration proceedings, and in practice, arbitrators in Belgium show no reluctance to order the payment of interest.

Challenging an arbitration award

Under Belgian law, an arbitral award may be challenged in three ways.

Firstly, within one month of the communication of the award and unless another period of time has been agreed upon, the parties may request the arbitral tribunal to rectify any material error in the award or, if so agreed by the parties, to give an interpretation of a specific part of the award[58].

Secondly, the parties may lodge an appeal against an arbitral award, which is a challenge of the arbitral award on the merits, but only if such a possibility is provided for in the arbitration agreement[59].

An appeal against an arbitral award cannot be brought before State courts and so must be lodged before an arbitral tribunal composed of different arbitrators. Unless agreed otherwise, such an appeal must be lodged within one month of the communication of the first award. A new arbitration procedure then begins before the new arbitral tribunal.

However, most arbitration agreements do not provide for an appeal and, instead, provide that the award shall be final, *i.e.* the parties cannot request an arbitral tribunal to determine the merits of the case for a second time. Appeals against arbitral awards in Belgium are thus extremely rare.

Thirdly, in accordance with Art. 1717 of the Code of Civil Procedure, the parties may request the court of first instance to set aside the award (*i.e.* to file a claim for annulment)[60].

Under Art. 1717, an award may only be set aside on the following grounds:

i. there is no valid arbitration agreement. This ground may not be invoked by a party who was aware of it during the arbitral proceedings and failed to raise it;

ii. the party making the claim for annulment was not given proper notice of the arbitral proceedings or was otherwise unable to present its case, unless this irregularity had no impact on the award. This ground may not be invoked by a party who was aware of it during the arbitral proceedings and failed to raise it;

iii. the award deals with a dispute that does not fall within the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement (and in that case, only those parts of the award may be annulled if they can be separated from the decisions on matters that *do* fall under the arbitration agreement). This ground may not be invoked by a party who was aware of it during the arbitral proceedings and failed to raise it;

iv. the award does not state reasons;

v. the arbitral tribunal was not set up according to the applicable rules. This ground may not be invoked by a party who was aware of it during the arbitral proceedings and failed to raise it;

vi. the arbitral tribunal has exceeded its powers;

vii. the subject matter of the dispute is not arbitrable;

viii. the award is contrary to Belgian rules of international public policy; or

ix. the award was obtained by fraud.

Pursuant to Art. 1718 of the Code of Civil Procedure, parties who are neither Belgian nor Belgian residents may agree to exclude the possibility to seek annulment of the award. Such agreement must be express and unambiguous. Reference to arbitration rules excluding annulment is not sufficient[61]. The European Court of Human Rights has confirmed that the similar provision in Swiss law was not contrary to the right of access to a tribunal guaranteed by Art. 6 of the Convention[62].

It is uncertain whether the parties may agree to expand the grounds for setting aside the award[63]. In any event, the parties may only do so after the award was rendered. The arbitration agreement may also impose strict duties on the arbitrators, the violation of which constitutes a violation of the arbitral agreement, giving rise to a possible claim for annulment.

Procedure for challenging awards through a claim for annulment

A claim for annulment may only be filed when the award can no longer be challenged before the arbitrators[64]. It must be filed before the court of first instance, by means of a writ of summons and within three months of the communication of the award to the party requesting the award to be set aside[65].

Both a decision on jurisdiction and an award on the merits may be challenged through a claim for annulment. In accordance with Art. 1690.4 of the Code of Civil Procedure, however, an award confirming jurisdiction may only be challenged together with the award on the merits.

When asked to set aside an arbitral award, the court of first instance may suspend the

proceedings for a specific period of time in order to enable the arbitral tribunal to resume the arbitral proceedings or to eliminate the grounds for annulment[66].

In order to prevent an appeal against an enforcement order and a claim for annulment from being brought before different courts, Art. 1717.7 now provides that in case of appeal against an enforcement order, the party against whom the enforcement is sought must file its claim for annulment during the same proceedings. The judgment on the annulment claim cannot be appealed[67] but can form the object of recourse before the Belgian Court of cassation[68]. The 2013 Act eliminated the possibility of lodging an appeal against such judgment as it was an obstacle to Belgium being chosen as a seat for international arbitrations[69].

Enforcement of arbitral awards

In accordance with Articles 1719 to 1721 of the Code of Civil Procedure, authorisation to enforce an arbitral award, either Belgian or foreign, may be requested before the court of first instance by means of an *ex parte* application. An original or a certified copy of the award must be filed. The recognition and enforcement of ICSID arbitral awards is governed by a distinct regime (see below).

Since the entry into force of the 2016 Act, Art. 1680.6 provides that any application for leave to enforce an award *rendered in Belgium* shall be made to the court of first instance whose seat is that of the court of appeal in whose jurisdiction the place of arbitration is fixed. Territorial jurisdiction to file a claim for leave to enforce an award *rendered abroad* will, however, still have to be determined under Art. 1720.2 (*i.e.* the claim will have to be filed before the court of the place where the party against whom enforcement is sought has its domicile or residence in Belgium or, in the absence of such domicile or residence, the place where the applicant wishes to enforce the arbitral award). An original or a certified copy of both the award and the arbitration agreement is no longer required.

Art. 1721(3) of the Code of Civil Procedure provides that a treaty concluded between Belgium and the country where the arbitral award was rendered takes precedence over domestic rules. In this respect, it should be recalled that Belgium has signed five bilateral treaties on recognition and enforcement of arbitral awards with Austria, France, Germany, the Netherlands and Switzerland. This provision must be read together with the 'more favourable law' provision of the New York Convention, which provides that the Convention does not take precedence over legislation that is more favourable to recognition and enforcement.

Art. 1721 of the Code of Civil Procedure provides several grounds for refusing recognition and enforcement that are inspired by Art. 35 of the UNCITRAL Model Law and are to a large extent similar to the ones provided under Art. V of the New York Convention. Enforcement of the award may thus be denied only on the following grounds:

i. the arbitration agreement on which the arbitral award is based is not valid;

ii. the party against whom the claim for leave to enforce is made was not given proper notice of the arbitral proceedings or was otherwise unable to present their case, unless this irregularity had no impact on the award. This ground for denial of enforcement is another illustration of the Belgian legislature's will to safeguard the rights of defence and equality between the parties;

iii. the award deals with a dispute that does not fall within the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement (and in that case, only those parts of the award may be annulled if they can be separated from the decisions on matters that do fall under the arbitration agreement);

iv. the award does not state reasons where it is required to do so by the law applicable to the arbitral proceedings;

v. the arbitral tribunal was not set up according to the applicable rules or if the procedure did not comply with the applicable rules, unless, in the latter case, the irregularity had no impact on the award;

vi. the award has not yet become compulsory for the parties or has been annulled or suspended by a court in the State where it was rendered;

vii. the arbitral tribunal has exceeded its powers;

viii. the subject matter of the dispute is not arbitrable; or

ix. the recognition or the enforcement of the award would be contrary to rules of Belgian international public policy.

As the judgment on the claim for leave to enforce the award is an *ex parte* judgment, it can be appealed by the party against whom enforcement is sought before the same court (the court of first instance) (*i.e.* a third-party opposition may be filed before the same judge).

The judgment cannot, however, be appealed before the court of appeal[70]. It can, however, be contested before the Belgian Court of Cassation[71].

Belgian courts ensure a wide enforcement of both national and foreign arbitral awards in accordance with the regime provided in Articles 1719 to 1721 of the Code of Civil Procedure[72]. They do not apply the grounds for non-enforcement extensively and have not given a wide scope to the public policy ground for non-enforcement. When Belgian courts *do* refuse the enforcement of an award on public policy grounds, it is often due to major procedural failures.

Investment arbitration

Belgium is a party to the ICSID Convention and to more than 60 bilateral investment treaties (BITs), which it negotiates and concludes also on behalf of Luxembourg as the 'Belgo-Luxembourg Economic Union'. Belgium does not have a published model BIT but certain tendencies are followed in the treaty negotiations, such as the wish to include environment and social clauses.

The Act of 17 July 1970 implementing the ICSID Convention in Belgium sets out a specific regime applicable to the recognition and enforcement of ICSID arbitral awards (see question 1). Art. 3 of the Act of 1970 provides that the Ministry for Foreign Affairs is entitled to validate the authenticity of the awards for recognition and enforcement purposes. The certified documents are then transmitted by the Ministry of Justice to the Chief Clerk of the Court of Appeal of Brussels to grant the 'exequatur' to the arbitral awards.

There are no other domestic rules that specifically govern recognition and enforcement or arbitral awards against foreign states. If the award is not an ICSID award, the general rules apply.

Belgium is also a party to the Energy Charter Treaty.

In its recent judgment of 9 December 2016[73], the Brussels court of first instance dismissed Russia's attempt to block *Yukos Universal Ltd* (YUL)'s enforcement proceedings in Belgium. This case dates back to three arbitral awards which cumulatively ordered Russia to pay US$ 50 billion to the benefit of former shareholders of the Russian oil company *Yukos* for violation of the Energy Charter Treaty. On 24 June 2015, the Brussels court of first instance granted exequatur of the award rendered in favour of YUL (one of the three

former shareholders of *Yukos*). Russia subsequently filed third-party oppositions contesting both (i) the legality of the seizures conducted by YUL against assets belonging to Russia and two of its affiliated news agencies, and (ii) the 2015 exequatur order rendered by the court of first instance. In its novel judgment of 9 December 2016, the Brussels court of first instance found in favour of YUL, and declared Russia's third-party opposition against the order granting exequatur inadmissible. During the hearing, YUL argued that Russia's third-party opposition was inadmissible since the applicable convention (the Belgium-Netherlands bilateral Convention of 1925) did not provide for third-party proceedings but only for the possibility to appeal an exequatur order.

Decisions against Belgium

There has not been any arbitral award rendered against Belgium made public so far. An investment arbitration has been started against Belgium under ICSID by the Chinese company Ping An, but the tribunal decided in 2015 that it was entirely without jurisdiction.

* * *

Endnotes

1. See, *e.g.*, *Loi du 25 décembre 2016 modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice*, *M.B.*, 30 December 2016, no. 2016/09669, p. 91963.
2. Art. 1676.7 of the Code of Civil Procedure, as amended by the 2016 Act.
3. *Ibid.*
4. *Loi du 24 juin 2013 modifiant la sixième partie du Code judiciaire relative à l'arbitrage, M.B.*, 28 June 2013, no. 2013009310, p. 41263.
5. Art. 1680.6 of the Code of Civil Procedure.
6. *Loi du 25 décembre 2016 modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice*, *M.B.*, 30 December 2016, no. 2016/09669, p. 91963. See also the parliamentary preparatory works of the 25 December Act: 'Projet de loi', *Doc. Parl.*, Ch., no. 54-1986/1, p. 20.
7. In accordance with Art. 2(2) of the Convention, the Belgian Government declared that in Belgium only the State has, in the cases referred to in Art. I(1), the faculty to conclude arbitration agreements.
8. See the website: http://www.cepani.be/en.
9. See the 2013 CEPANI Arbitration Rules here: http://www.cepani.be/sites/default/files/images/hayez_reglement_arbitrage_cepani_en_dec2014_1.1.pdf.
10. See the parliamentary preparatory works of the 24 June 2013 Act: 'Projet de loi', *Doc. Parl.*, Ch., no. 53-2743/1, p. 8.
11. *Loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques*, *M.B.*, 27 March 1991, no. 1991021064, p. 6155.
12. H. Boularbah, 'Les procédures parallèles et les tiers', *in L'arbitrage et les tiers, Actes du colloque du CEPANI 40 du 28 novembre 2008*, Brussels, Bruylant, 2008, p. 153, no. 4.
13. Art. 1682 of the Code of Civil Procedure.
14. Art. 1700.1 of the Code of Civil Procedure.

15. Art. 1699 of the Code of Civil Procedure expressly states that the fundamental guarantees of due process must be respected, whatever the procedural rules chosen by the parties or by the arbitrators.
16. Art. 1701.2 of the Code of Civil Procedure.
17. D. Philippe, 'Modernisation of the Belgian law on arbitration', *DAOR* 2014/109, 5-20, no. 11.
18. Art. 1710.3 of the Code of Civil Procedure.
19. Art. 1710.4 of the Code of Civil Procedure.
20. Art. 1676.7 of the Code of Civil Procedure, as amended by the 2016 Act.
21. Art. 1676.8 of the Code of Civil Procedure. Those provisions are articles 1682, 1683, 1696 to 1698, 1708 and 1719 to 1722 of the same Code.
22. V. Foncke, 'Evidence in Arbitration under the new Belgian Arbitration act', *b-Arbitra* 2014/1, 29-52, no. 7. Contra: G. Keutgen and G-A Dal, *L'arbitrage en droit belge et international*, t. 1, *Le droit belge*, 3rd ed., Brussels, Bruylant, 2015, p. 3998, no. 489.
23. Art. 1703.2 of the Code of Civil Procedure.
24. D. Matray and G. Matray, 'La conduite de la procédure arbitrale sous l'empreinte du nouveau droit belge de l'arbitrage', *b-Arbitra* 2014/1, 81-120, no. 50.
25. This provision is applicable irrespective of the place of the seat of the arbitration.
26. V. Foncke, 'Evidence in Arbitration under the new Belgian Arbitration act', *b-Arbitra* 2014/1, 29-52, no. 19; D. Matray and G. Matray, 'La conduite de la procédure arbitrale sous l'empreinte du nouveau droit belge de l'arbitrage', *b-Arbitra* 2014/1, 81-120, no. 19.
27. V. Foncke, 'Evidence in Arbitration under the new Belgian Arbitration act', *b-Arbitra* 2014/1, 29-52, no. 30.
28. *Ibid.*, (referring to the existing Belgian case law and legal writings).
29. *Ibid*.
30. Art. 1707.2 of the Code of Civil Procedure.
31. V. Foncke, 'Evidence in Arbitration under the new Belgian Arbitration act', *b-Arbitra* 2014/1, 29-52, no. 30 (referring to the existing Belgian case law and legal writings).
32. G. Keutgen and G-A Dal, *L'arbitrage en droit belge et international*, t. 1, *Le droit belge*, 3rd ed., Brussels, Bruylant, 2015, p. 438, no. 536.
33. Art. 1685.3(a) of the Code of Civil Procedure.
34. Art. 1685.3(b) and (c) of the Code of Civil Procedure.
35. Art. 1686.2 of the Code of Civil Procedure.
36. *Ibid*.
37. Art. 1687.1 of the Code of Civil Procedure.
38. Art. 1687.2 of the Code of Civil Procedure.
39. Art. 1688.1 of the Code of Civil Procedure.
40. Art. 1688.2 of the Code of Civil Procedure.
41. Art. 1686.1 of the Code of Civil Procedure.
42. For instance, the parties can agree to exclude the jurisdiction of State courts ruling in summary proceedings (see the parliamentary preparatory works of the 19 May 1998 Act: 'Projet de loi', *Doc. Parl.,* Ch., no. 49-1374/1).

43. M. Piers and D. De Meulemeester, 'The adoption of the UNCITRAL Model Law encourages arbitration in Belgium', *b-Arbitra* 2013/2, 367-404, no. 68.
44. Art. 1692 of the Code of Civil Procedure.
45. Art. 1691.2 of the Code of Civil Procedure.
46. M. Dal, 'La nouvelle loi sur l'arbitrage', *Journal des Tribunaux* 2013, 785-795, no. 4.
47. M. Piers and D. De Meulemeester, 'The adoption of the UNICITRAL Model Law encourages arbitration in Belgium', *b-Arbitra* 2013/2367-404, no. 68.
48. O. Caprasse, 'Mesures provisoires et conservatoires en présence d'une convention d'arbitrage: conditions d'intervention du juge des référés, *b-Arbitra* 2015/2 346-348.
49. Art. 1713.3 of the Code of Civil Procedure.
50. Art. 1713.4 of the Code of Civil Procedure.
51. Art. 1713.6 of the Code of Civil Procedure.
52. Art. 1713.4 of the Code of Civil Procedure.
53. See the parliamentary preparatory works of the 24 June 2013 Act: 'Projet de loi', *Doc. Parl.*, Ch., no. 53-2743/1, p. 37.
54. Art. 1713.5 of the Code of Civil Procedure, as amended by the 2016 Act.
55. Art. 1713.8 of the Code of Civil Procedure, as amended by the 2016 Act.
56. Art. 1713.6 of the Code of Civil Procedure.
57. See Articles 1146-1155 of the Belgian Civil Code.
58. Art. 1715 of the Code of Civil Procedure, as amended by the 2016 Act.
59. Art. 1716 of the Code of Civil Procedure, as amended by the 2016 Act.
60. Art. 1717 of the Code of Civil Procedure, as amended by the 2016 Act.
61. Brussels Court of Appeal, 22 June 2009 judgment, *Rev. Arb.* 2009, p. 574. See also G. Keutgen and G-A Dal, *L'arbitrage en droit belge et international*, t. 1, *Le droit belge*, 3rd ed., Brussels, Bruylant, 2015, p. 556, no. 698.
62. *Tabbane c. Switzerland (dec.)*, 1 March 2016, no. 41069/12, ECHR 2016.
63. G. Keutgen and G-A Dal, *L'arbitrage en droit belge et international*, t. 1, *Le droit belge*, 3rd ed., Brussels, Bruylant, 2015, p. 531, no. 644.
64. Art. 1717.1 of the Code of Civil Procedure.
65. Articles 1717.2 and 1717.4 of the Code of Civil Procedure, as amended by the 2016 Act.
66. Art. 1717.6 of the Code of Civil Procedure.
67. Art. 1680.5 of the Code of Civil Procedure.
68. M. Dal, 'La nouvelle loi sur l'arbitrage', *Journal des Tribunaux* 2013, 785-795, no. 7.
69. *Ibid*.
70. Art. 1680.5 of the Code of Civil Procedure.
71. M. Dal, 'La nouvelle loi sur l'arbitrage', *Journal des Tribunaux* 2013, 785-795, no. 8.
72. Except for awards rendered in one of the five countries with which Belgium has concluded a bilateral treaty for the recognition and enforcement of arbitral awards, which are recognised and declared enforceable in accordance with the relevant treaty.
73. Court of first instance (Fr) Brussels, 9 December 2016, *unpublished*.

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Canada

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Introduction

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

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

Virtually all of the provinces (except Quebec) have incorporated the UNCITRAL 1985 Model Law into their respective statutes. For example, in British Columbia, the *International Commercial Arbitration Act*[5] largely replicates the provisions of the 1985 Model Law. And recently, Ontario became the first jurisdiction in Canada to amend its international commercial arbitration legislation to reflect the changes made to the Model Law in 2006. The *International Commercial Arbitration Act, 2017* provides that the Model Law has force of law in Ontario, albeit subject to certain exceptions and modifications as set out in the Act.[6]

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

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

And, if parties so desire, they can also avail themselves of the services of international arbitral institutions, such as the International Court of Arbitration of the International Chamber of Commerce or the London Court of International Arbitration, for international arbitrations conducted in Canada.

Arbitration agreements

Formalities

Both the Ontario and the British Columbia statutes governing international arbitration

expressly require arbitration agreements to be in writing, although the writing requirement can be established by an exchange of letters or emails.[7] This is a departure from the statutes governing domestic arbitrations, which do not require an arbitration agreement to be in writing.[8] Because the domestic statutes generally apply to all arbitrations not governed by the international statutes,[9] it may be possible to have an oral agreement to arbitrate an international dispute which would be governed by a domestic statute.

The arbitration agreement may be entered into either before or after the dispute arises. Most commonly, the arbitration agreement is set out in the commercial document which establishes the relationship between the parties (for example, purchase and sale agreement, joint venture agreement, licence agreement, etc.).

Scope and arbitrability

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

The availability of arbitration may be limited by legislation. For example, certain provincial consumer protection statutes have been held to oust the jurisdiction of an arbitrator, at least in connection with that aspect of the parties' dispute that is addressed by the statute.[11]

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

Both the British Columbia statute and the Ontario statute provide that the arbitral tribunal is competent to determine its own jurisdiction, including determinations as to the existence or validity of the arbitration agreement.[12] That principle has been consistently enforced by Canadian courts.[13] A decision by the arbitral tribunal as to its jurisdiction may be appealed to the court within 30 days.[14] At first instance, a court must limit itself to a *prima facie* analysis of the application of the arbitration clause, and must defer all other jurisdictional issues to the arbitration tribunal.[15]

The statutes also provide that an arbitration clause that forms part of a larger contract shall be treated as independent and separable.[16] Again, the Canadian courts have interpreted and applied those statutory provisions in a consistent and predictable manner.[17]

Consolidation or joinder of parties or claims

The Model Law does not provide for consolidation of arbitration proceedings. However, both the Ontario and the British Columbia statutes provide that the court may order consolidation of proceedings, if all parties consent.[18] (Such a consolidation order can be made upon application of all parties.) These provisions are useful in circumstances where the parties have agreed in the arbitration agreement (or subsequently) to consolidation, but cannot agree on the process to be followed, as it provides a mechanism for the court to grant directions. The statutes also provide that parties can agree to consolidate arbitration proceedings without a court order.[19]

Neither an arbitral tribunal nor a court can compel a third party who is not subject to the arbitration agreement to join in the arbitral proceedings. A court also cannot consolidate or join arbitral proceedings unless all parties consent or unless provided for in the arbitration

agreement.[20] For this reason, parties are well-advised to ensure that the arbitration agreement requires all subcontracts or related agreements to contain a consolidated arbitration clause.

Arbitration procedure

Commencement of arbitration

Both the British Columbia and Ontario statutes provide that, unless otherwise agreed by the parties, arbitral proceedings are deemed to commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.[21]

The statutes do not impose any particular requirements with respect to the form of the request or with respect to the manner of delivery, beyond stating that the request can be delivered personally or to the respondent's place of business, habitual residence or mailing address.[22]

However, if the arbitration agreement provides that the initiating request for arbitration is to take a particular form or is to be delivered in a particular manner, or that certain procedural steps must be completed to commence the arbitration, then those requirements must be satisfied. Thus, the Ontario Court of Appeal found that an arbitration had not been commenced within the required 12-month period specified in the contract because the notice of arbitration, despite having been served on the other party, had not been filed with the relevant institution as required by the arbitration agreement.[23]

Following the requirements set out in the arbitration agreement for commencing the arbitration is particularly important in the context of contractual limitation periods (such as the 12-month period in the above-noted case), as well as statutory limitation periods. Canada generally has fairly short limitation periods for properly initiating claims as compared to other countries. (For example, the general limitation period in Ontario and BC is two years from discovery of the claim.[24])

Place of arbitration

The seat or place of the arbitration will determine the procedural law (*lex arbitri*) governing the arbitration (which may be different from the substantive law governing the dispute).[25]

Ordinarily, the hearing will be held in the seat of the arbitration, although the parties can agree otherwise. For example, if an arbitration agreement provides for the arbitration to take place in Toronto, Ontario, the parties could agree for the hearings to be held in Vancouver, British Columbia and be deemed to be taking place in Toronto. In such circumstances, the Ontario statute would still govern the procedure of the arbitration and, if the parties were in need of court assistance (for example, in appointing an arbitrator), they would have to apply to the Ontario courts.[26]

Procedural rules and evidence

With certain minor exceptions,[27] the choice of procedural rules is left up to the parties to decide. Thus, for example, an arbitration agreement can provide that the governing rules shall be those of a particular arbitration institution, for example, the rules of the International Chamber of Commerce (ICC), ADR Institute of Canada, Canadian Commercial Arbitration Centre, British Columbia International Commercial Arbitration Centre, or the London Court of International Arbitration (LCIA), among others.

If, however, the arbitration agreement is silent on the question, then the various statutes generally defer the choice of procedures to the arbitral tribunal.[28] This includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[29] In

that regard, arbitrators in Canada often refer to the IBA *Rules on the Taking of Evidence in International Arbitration* when making decisions about the production and exchange of documents and the admissibility of evidence.

For those arbitrations that may involve the use of expert evidence, the typical practice in Canada is for the parties to exchange expert reports prior to the hearing. It should also be noted that the statutes governing international arbitrations provide that the arbitral tribunal may appoint its own expert to report to it on specific issues, unless otherwise agreed by the parties.[30]

Privacy and confidentiality

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

Both the Ontario and British Columbia statutes are silent on confidentiality, and the Canadian courts have not determined whether an arbitration will be subject to an implied obligation of confidentiality absent an express confidentiality provision in the arbitration agreement. Therefore, if confidentiality is desired and if it is not addressed in the arbitration agreement, it is important that the parties enter into a confidentiality agreement or have the arbitral tribunal issue a confidentiality order.

Arbitrators

The arbitration agreement can specify the number of arbitrators and the method of appointment or can refer to the rules of an institution which will determine the number of arbitrators. Where the arbitration agreement is silent, the Ontario and British Columbia statutes both provide that the arbitral tribunal shall be composed of three arbitrators (this is contrasted with their respective domestic acts which default to a single arbitrator), with one arbitrator being appointed by each of the parties and the third being appointed by agreement of the two appointees.[31] Where there is a failure to comply with the appointment procedure (either the one agreed to by the parties or the one imposed by statute, as applicable), a party may apply to the court for assistance in appointing the tribunal.[32]

Under both the Ontario and the British Columbia statutes, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties.[33] Any challenge to an arbitrator must be advanced within 15 days of the party becoming aware of the issue,[34] and shall be made initially to the arbitral tribunal (or in accordance with the procedure agreed upon by the parties) and, if not successful, to the court.[35]

In determining whether there are justifiable doubts as to the arbitrator's impartiality or independence, Canadian courts have recently begun referring to the 2014 IBA *Guidelines for Conflict of Interest* as an authoritative source.[36] The *Guidelines* are, to a large degree, consistent with the already-developed jurisprudence.

Both the Ontario and the British Columbia statutes provide that an arbitrator's mandate terminates if he or she becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, *and* he or she withdraws from office or the parties agree on the termination.[37] If a dispute remains concerning the arbitrator continuing to act (for example, if only one party alleges that the arbitrator has become unable to act or has unduly delayed), a party may ask the court to decide on the termination of the mandate.[38]

Arbitrators who are acting in a "judicial or quasi-judicial capacity" are generally immune from

civil liability in Canada absent fraud or bad faith.[39] The requirement for acting in a judicial or quasi-judicial capacity means that an arbitrator who is performing a valuation function may not enjoy the benefits of immunity.[40] The factors that must be present for immunity are:

1. there must be an existing dispute which the parties have submitted to the arbitrator;
2. the arbitrator must be acting in a judicial or quasi-judicial manner; that is, he or she receives evidence and hears argument in coming to his or her decision; and
3. the arbitrator must be fulfilling his or her function as an independent party, in compliance with the mandatory provisions of the applicable legislation.[41]

Interim relief

Depending on the terms of the arbitration agreement and the applicable procedural rules, parties to an international arbitration may have access to a broad range of interim relief in Canada. That interim relief may be sought either from the arbitral tribunal or from the courts.[42]

In British Columbia, section 17 of the International Commercial Arbitration Act provides that an arbitral tribunal may order interim relief, unless otherwise agreed by the parties.[43]

In Ontario, the powers to award interim relief have been expanded by the coming into force of the International Commercial Arbitration Act, 2017. The jurisdiction to award interim relief is granted by Article 17 of the Model Law, which permits an arbitral tribunal, at the request of a party, and absent an agreement to the contrary, to "grant interim measures" in order to:

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

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

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

(d) preserve evidence that may be relevant and material to the resolution of the dispute.[44]

Such interim relief may be granted only if the moving party proves that:

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

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

(c) there is a "reasonable possibility" that the moving party will succeed on the merits for the claim;[45] and

(d) the harm is not adequately reparable and order the detention, preservation or inspection of property and/or documents related to the arbitration or maintain or restore the *status quo* pending a determination of a dispute.[46]

The party seeking interim relief shall be liable for any costs and/or damages caused thereby, if the arbitral tribunal later determines that the relief should not have been granted. Such costs or damages may be awarded at any point during the proceedings.[47]

An interim order (other than one granted *ex parte*, discussed below) can be enforced upon application to the Superior Court, unless the tribunal provides otherwise.[48] Enforcement may only be refused in limited circumstances (e.g., incapacity of the responding party, lack of notice, contrary to public policy).[49]

The tribunal may grant interim relief without notice to the other party (unless otherwise agreed to by the parties), provided that the tribunal considers that notice would risk frustrating the purpose of the relief sought.[50] A party seeking such an *ex parte* order must make full disclosure to the tribunal of "all circumstances that are likely to be relevant" to

the request for relief, with that disclosure obligation continuing until the opposing party has had an opportunity to present its case.[51] If relief is granted on an *ex parte* basis, notice shall be given immediately afterwards to the other party,[52] and an opportunity shall be given "at the earliest practicable time" for that party to present its objection to the interim relief.[53] It should be noted, however, that such an order, made without notice, is not enforceable by the court and does not constitute an award.[54]

If the parties have agreed to arbitrate their dispute through an arbitration institution, that institution's procedures regarding interim relief will govern. The ICC International Court of Arbitration has special emergency procedures whereby the ICC can appoint an arbitrator on an urgent basis, where required.[55] Similarly, Article 6 of the International Centre for Dispute Resolution's *International Dispute Resolution Procedures* provides for the appointment of an emergency arbitrator to grant interim relief.[56]

However, parties may be better off seeking interim measures from the courts rather than arbitral tribunals because, unlike arbitrators, courts can make certain orders binding on third parties (e.g., *Mareva* injunctions). Moreover, seeking relief from the courts may be more practical if the matter is urgent and an *ad hoc* arbitral tribunal is still being established without the benefit of a set of rules from an arbitral institution that specifically provide for a process and timetable to seek and be awarded urgent interim relief.[57]

The arbitral award

Both the Ontario and the British Columbia statutes require that the award be in writing and signed by the arbitrator(s).[58] The award must state the date and place of the arbitration, and must set out the reasons for the decision (unless the parties have agreed that no reasons are to be given).[59] The award, once signed by the tribunal, must be delivered to each party.[60] No time limits are imposed for the delivery of the award.

If the matter settles prior to delivery of the arbitral award, the parties can ask the arbitral tribunal to prepare an award reflecting the settlement.[61] Such an award is binding and is of the same force and effect as an award reflecting the arbitral tribunal's decision on the merits.[62]

The Ontario statute is silent with respect to the arbitral tribunal's ability to award costs and interest. As a result, the tribunal's power to award costs and/or interest is determined by the arbitration agreement or by the procedural rules adopted for the arbitration, which may contain specific provisions as to costs.[63] British Columbia's legislation provides that, unless otherwise agreed to by the parties, costs of the arbitration are at the discretion of the arbitral tribunal. It also provides that the costs of the arbitration may include fees and expenses of arbitrators and expert witnesses, legal fees, administration fees and any other expenses incurred in connection with the arbitral proceedings.[64]

The mandate of the arbitral tribunal, along with the arbitral proceedings themselves, are terminated by the tribunal's final award.[65] Alternatively, the arbitral tribunal may terminate the proceedings before giving a final award, if:

1. the claimant withdraws his claim and the respondent does not object;
2. the parties agree on the termination of proceedings; or
3. the arbitral tribunal determines that the continuation of the proceedings is either unnecessary or impossible.[66]

Challenging the arbitral award

Neither the Ontario statute nor the British Columbia statute provide a right of appeal on the

merits of an award.[67] It is not clear whether such a right can be granted by agreement of the parties.[68]

However, a party may apply to the courts to set aside the award.[69] Article 34(2) of the Model Law (adopted as part of the law of Ontario) provides the following grounds upon which an award may be set aside:

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

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

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

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

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

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

(b) the court finds that:

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

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

Applications to set aside an award must be made within three months of the receipt of the award to the courts of the province constituting the seat of the arbitration.[70] The Court may, when asked to set aside an award, where appropriate and if requested by a party, suspend the proceedings to set aside the award for a period of time to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or take other actions, which, in the tribunal's opinion, will eliminate the grounds to set aside the award.[71]

A party may seek to have the arbitral tribunal correct any clerical, typographic or computation errors in an award, or may request the arbitral tribunal to interpret a specific point in the award. Such a request must be made within 30 days of receiving the award.[72] The arbitral tribunal may also correct any clerical, typographic or computation errors on its own initiative within 30 days of the date of the award.[73] The formalities of the award, as set out above, apply equally to any corrections or interpretations made.[74]

Enforcement of the arbitral award

All Canadian provinces and territories, with the exception of Quebec, have adopted and ratified the *New York Convention* allowing for the recognition and enforcement of arbitral

awards from its signatory states. Among the adopting provinces, most have appended the *New York Convention* as schedules to their respective international commercial arbitration statutes, while the remainder have enacted legislation incorporating the *New York Convention*.[75] In Quebec, the *Civil Code of Procedure* provides that foreign arbitral awards will be recognised and enforced, if the matter in dispute is one that may be settled by arbitration in Quebec and if the award is not contrary to public policy. It also provides that the *New York Convention* should be "taken into account" when determining the scope of a party's right to have an award recognised and enforced.[76]

For those provinces that adopted or incorporated the *New York Convention*, it should be noted that Canada made two reservations to the *Convention*: first, the *Convention* will apply only to the recognition and enforcement of awards made in the territory of another contracting state which has signed, ratified or acceded to the *New York Convention*;[77] and second, the *Convention* will apply only to awards that are made in arbitrations that are considered "commercial" under the laws of Canada.[78]

Common to all jurisdictions (other than Quebec) is the requirement that a party seeking to enforce an award must supply an authenticated original award (or a certified copy), and a copy of the arbitration agreement (or a certified copy).[79] If the language of the award is not in English, the party seeking to enforce the award must supply a certified translation of the award.[80]

There are certain limited grounds upon which the court may refuse to enforce an arbitral award. These grounds, as set out in the Model Law,[81] are the same as the grounds noted above for setting aside an award, with the addition that an award may not be enforced if the party against whom the award is invoked furnishes proof that "[T]he award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which or under the law of which the award was made."[82]

The most commonly cited basis for a refusal to enforce a foreign arbitral award is a failure by the arbitral tribunal to adhere to the norms of procedural fairness. Although the courts also have the power to refuse enforcement on the ground of public policy, they have been much more reluctant to invoke that ground for refusing to enforce an award.[83] Thus, for example, in *Corporacion Transnacional de Inversiones S.A. de C.V.* v. *Stet International S.p.A*, it was held that the court will only refuse to enforce an award in circumstances where the award offends the most basic and explicit principles of justice and fairness, or if it "evidences intolerable ignorance or corruption on the part of the arbitral tribunal".[84] Among the (admittedly rare) situations where the court will refuse enforcement based on public policy are situations where enforcement of the award would result in the plaintiff enjoying double recovery.[85]

The Ontario Court of Appeal in *Popack v. Lipszyc* recently held that reviewing courts have a residual discretion to refuse to set aside an award, or enforce an award, even if the court finds that one of the enumerated grounds in articles 34 or 36 has been breached. The court found that this residual discretion is "significantly affected" by the enumerated ground which has been breached.[86] Courts in other Canadian jurisdictions have similarly held that the courts retain a residual discretion to enforce or refuse to set aside an award depending on the effect of the breach.[87]

It should be noted that for most provinces, when a party seeks to enforce a foreign arbitral award, provincial limitation periods apply. For those provinces that have adopted the *New York Convention*, the provincial limitation periods are applicable by virtue of article III of the *Convention*, which provides that each contracting state must recognise arbitral

awards in accordance with the rules of procedure of that territory. The Supreme Court of Canada recently held that "rules of procedure" was broad enough to encompass provincial limitation periods.[88] Accordingly, in most jurisdictions, an arbitral award should be subject to the general limitation period applicable to most causes of action, which in most provinces is two years.

In Ontario and Quebec, however, the situation is slightly different. Ontario's legislation incorporates a ten-year limitation period to commence an application to recognise or enforce an arbitral award. This limitation period commences from the date the award was made or, if proceedings at the place of the arbitration were commenced, the date on which those proceedings concluded.[89] Quebec's statutory provision states that an arbitral award (once recognised by the court) is enforceable in the same manner as a judgment or order of the court.[90] In such circumstances, at least one author has suggested that an argument could be made that the enforcement of arbitral awards should be treated, for limitations purposes, the same as court orders. The limitation period in this respect is 10 years.[91]

Investment arbitration

Investment treaties

In recent years, Canada has emerged as a leading state in international investment arbitration. As of March 1, 2017, Canada has ratified 30 bilateral investment treaties, which are known in Canada as Foreign Investment Promotion and Protection Agreements ("FIPAs"). Notably, Canada has ratified FIPAs with over 30 trading partners, including China and Russia.[92] In addition, Canada has concluded negotiations on (but has not ratified) a further nine FIPAs[93] and is in the process of negotiating nine more.[94]

Canada has also ratified 11 free trade agreements ("FTAs"), including the North American Free Trade Agreement ("NAFTA").[95] And it is a signatory to (but has yet to ratify) the Comprehensive Economic and Trade Agreement with the European Union. That agreement was recently approved by the European Parliament[96] and is now being considered by the national parliaments of EU Member States.[97] Finally, Canada is a signatory to the Trans-Pacific Partnership ("TPP").[98] However, given the United States' recent withdrawal from the TPP, the future of that agreement is in serious doubt.

The FIPAs and FTAs to which Canada is a signatory generally provide that investors may submit a claim to arbitration under:

1. the International Centre for Settlement of Investment Dispute ("ICSID") rules – which are appropriate for matters arbitrated under the ICSID *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*;
2. the ICSID *Additional Facility Rules* – which are appropriate if one (but not both) of the parties to the dispute is a contracting member state or a national of a contracting member state under the ICSID *Convention*;
3. the UNCITRAL Arbitration Rules; or
4. another body of rules approved by the parties to the agreement (e.g., the London Court of International Arbitration Rules).[99]

In addition, Canada has ratified the ICSID *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*. Pursuant to the ICSID *Convention*, Canadians who invest in other ICSID member states[100] and who find themselves in a dispute relating to that investment may rely upon an arbitration under the ICSID *Convention* to resolve their disputes.[101] However, unless the investor has the consent of the other parties

to the dispute, it is open to a contracting state to ask the investor first to exhaust local administrative or judicial remedies before having recourse to the ICSID process.[102] Foreign investors who are nationals of ICSID member states also have reciprocal rights under the ICSID *Convention* in Canada.[103]

According to the information made public by the Canadian Government, as at March 1, 2017, Canada is a party to 11 active investment arbitration disputes. Ten of those disputes were brought under Chapter 11 of NAFTA.[104] The remaining dispute, which was commenced within the last year, was brought by Global Telecom Holding S.A.E., an Egyptian-based telecommunications services company, under the Canada-Egypt FIPA and claims damages of "at least $1.32 billion CAD".[105]

Canada's Model FIPA

The Canadian government introduced its "Model FIPA" in 2004.[106] Although the FIPAs that Canada has entered into with major trading partners, such as China and Russia, typically provide for their own customised procedures for arbitration claims, the FIPAs that Canada has entered into with many smaller countries adopt the procedures set out in the Model FIPA. Such agreements provide for, among other things, fair and equitable treatment in accordance with international law, public access to hearings and a procedure to be followed in accordance with the ICSID Rules, the UNCITRAL Arbitration Rules or another body of rules approved by the parties to the agreement (e.g., the London Court of International Arbitration Rules).

Canada's enforcement of investment arbitration awards

Canada is generally an enforcement-friendly jurisdiction. For example, in *United Mexican States v. Cargill Inc.*,[107] Mexico sought to set aside part of a US$77m arbitral award for losses that Cargill and its Mexican subsidiary sustained when Mexico imposed additional duties and permit requirements on the importation of high fructose corn syrup into Mexico. The arbitral tribunal, which was seated in Toronto, determined that Mexico had breached Chapter 11 of NAFTA when it imposed restrictions on the importation of the corn syrup. The tribunal awarded damages for "downstream losses" that Cargill's Mexican subsidiary suffered, as well as for "upstream losses" that the U.S. parent company suffered when it could no longer sell the corn syrup to its Mexican subsidiary.

Mexico applied to the Ontario Superior Court to set aside the US$41m portion of the arbitral award that related to upstream losses, on the basis that these damages were sustained by a U.S. producer and were therefore unrelated to an "investment" in Mexico as defined in article 1139 of NAFTA. The application judge dismissed Mexico's application on the basis that Mexico's objection went to the merits of the decision, which was beyond the scope of review for the court.[108]

Mexico's subsequent appeal to the Ontario Court of Appeal was dismissed. The Court of Appeal determined that the proper standard of review was "correctness", but held that the arbitral tribunal was correct in holding that it had jurisdiction to decide the scope of damages suffered by Cargill and that NAFTA imposes no territorial limit on those damages.[109] The Supreme Court of Canada subsequently rejected Mexico's application for leave to appeal.[110] The decision in *Cargill* is consistent with the long-standing approach of Canadian courts, which is to proceed on the basis "that an expert international arbitral tribunal acted within its authority", and that judicial interference should be limited to extraordinary cases.[111] As is the case with international arbitration awards generally, the Canadian courts are loath to interfere with investment treaty arbitration awards, and deference is afforded to the arbitral decision provided that the arbitration has followed the correct procedures and conducted a fair hearing.[112]

Endnotes

1. *Commercial Arbitration Act*, R.S.C. 1985, c. 17, as amended, s. 5(2).
2. The province of Quebec does not have an international arbitration statute. Instead, all arbitrations that take place in the province are subject to the provisions of the *Civil Code of Quebec*, CQLR c. C-1991, Part XVIII and other sections, including section 2895, 3121, 3133 and 3148.
3. *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 2(1), which states that the act applies to all arbitrations in the province unless its application is excluded by law, or unless the *International Commercial Arbitration Act* applies.
4. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, s. 5(3).
5. *International Commercial Arbitration Act*, R.S.B.C. 1996, chapter 233.
6. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, s. 5(1).
7. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter II, Art. 7(2), see also International Commercial Arbitration Act, R.S.B.C. 1996, C. 233, part 2, s. 7(3).
8. *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 5(3), see also *Arbitration Act*, R.S.B.C. 1996, C. 55, s. 1 definition of "arbitration agreement".
9. *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 2(1), see also *Arbitration Act*, R.S.B.C. 1996, C. 55, s. 1 definition of "arbitration agreement".
10. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter I, Art. 1(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 1, s. 1(1). The British Columbia statute provides a non-exclusive list of when an arbitration will be considered "commercial", for example, disputes relating to a trade transaction for the supply or exchange of goods or services, a joint venture, construction, insurance, licensing, financing, banking, etc. (*International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 1, s. 1(6)). The various domestic arbitration statutes are not limited to "commercial" arbitration.
11. *Seidel v. TELUS Communications*, 2011 SCC 15.
12. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV, Art. 16(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 4, s. 16(1).
13. See, for example, the Supreme Court of Canada decision of *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801 and the *Ontario Court of Appeal decision of Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135.
14. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV, Art. 16(3), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 4, s. 16(6).
15. *Dell Computer Corp v. Union des Consommateurs*, [2007] 2 S.C.R. 801.
16. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV, Art. 16(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 4, s. 16(1).
17. *DG Jewelry Inc. v. Cyberdiam Canada Ltd* (2002), 21 CPC (5th) 174 (Ont. S.C.J.) para 20, *Krutov v. Vancouver Hockey Club Ltd.* 1991, 30 A.C.W.S. (3d) 164, para 15.
18. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, s. 8(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 5, s. 27(2)
19. *International Commercial Arbitration Act*, 2017, S.O. 2017 c. 2, s. 8(2) and 8(3), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 5, s. 27(3).

20. *Liberty Reinsurance Canada v QBE Insurance and Reinsurance (Europe) Ltd* (2002), 42 C.C.L.I. (3d) 249 (Ont. S.C.J.) para 22-23.
21. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 21, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 5, s. 21.
22. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter I, Art. 3, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 1, s. 3.
23. *Bell Canada v The Plan Group*, 2009 ONCA 548.
24. *Limitations Act*, 2002, SO 2002, c. 24 schedule B, s. 4; *Limitation Act*, SBC 2012, c. 13, s. 6. Limitation periods vary by province.
25. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (New York: JurisNet, LLC, 2011) at 56; McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations*, (Toronto: Canada Law Book 2014) at 7:10.
26. See, e.g., *United Mexican States v Karpa* (2005), 136 A.C.W.S. (3d) 200 (ONCA), para 1.
27. For example, the parties cannot contract out of the requirement that the parties be treated with equality and that each party be given a full opportunity of presenting his or her case (*International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 18, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 5, s. 18).
28. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 19, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 5, s. 19.
29. *International Commercial Arbitration Act*, R2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 19(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 5, s. 19(3).
30. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 26, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 5, s. 26.
31. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter II, Art. 10 and 11, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 3, s. 10 and 11.
32. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter II, Art. 11, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 3, s. 11.
33. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter III, Art. 12(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 3, s. 12(3).
34. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter III, Art. 13(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 3, s. 13(2).
35. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter III, Art. 13, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 3, s. 13.
36. *Jacob Securities Inc. v Typhoon Capital BV*, 2016 ONSC 604, para 41.
37. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter

III, Art. 14(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 3, s. 14(1).

38. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter III, Art. 14(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 3, s. 14(2).
39. See, for example, *Flock v Beattie, 2010 ABQB 193*. Although this case was an Alberta case regarding the Alberta domestic Act, it also canvasses the applicable Canadian and international law.
40. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (New York: JurisNet, LLC, 2011) at 154.
41. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (New York: JurisNet, LLC, 2011) at 154, citing Sport Maska Inc. v. Zittrer, [1988] 1 SCR 564 and certain English cases.
42. With respect to the courts' jurisdiction to grant interim relief, see: *African Mixing Technologies (PTY) Ltd. v. Canamix Processing Systems Ltd.*, 2014 BCSC 2130 at para. 55; and see: *TLC Multimedia Inc. v. Core Curriculum Technologies Inc.,* [1998] B.C.J. No. 1656 at para. 35 (S.C.). In addition, in Ontario, the *International Commercial Arbitration Act*, 2017 expressly provides that interim relief can be sought from the courts. S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 J.
43. Section 17 of the *International Commercial Arbitration Act* R.S.B.C. 1996, chapter 233.
44. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17.
45. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 A(1).
46. Section 9 of the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9.
47. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 G.
48. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 H(1).
49. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 I.
50. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 B.
51. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 F(2).
52. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 C(1).
53. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 C(2).
54. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 C(5).
55. ICC Rules, Art. 29.
56. ICDR Rules, Art. 6.
57. Kenneth J. McEwan, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book, 2004+) at 6-31.
58. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter

VI A, Art. 31(1). see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Article 31(1). In Ontario, in proceedings with more than one arbitrator, the signatures of the majority of the tribunal is sufficient, so long as the reason for any omitted signature is stated.

59. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. Art. 31(2) and (3), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 31(3) and (4).
60. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 31(4), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 31(5).
61. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 30(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 30(2).
62. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 30(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 30(4).
63. J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd Ed., (New York: JurisNet, LLC, 2011), s.8.6.2, pgs. 362-363; McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations,* (Toronto: Canada Law Book 2014) at 11:20.10.
64. *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, s. 31(7) – (8).
65. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 32(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 32(1).
66. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 32(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 32(2).
67. Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd Ed., (New York: JurisNet, LLC, 2011), s. 8.10, p. 372, s. 9.2.2 p. 392.
68. Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd Ed., (New York: JurisNet, LLC, 2011), s. 8.10, p. 372, s. 9.2.2 p. 393. In *Hall Street Associates L.L.C. v. Mattel Inc. 128 S. Ct. 1396*, the United States Supreme Court concluded that it was not open to the parties to expand the powers of review granted by statute. See also McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book 2014) at 10:50.20.
69. International Commercial Arbitration Act, R.S.O. 1990 c. I.9, Model Law, Chapter 2, Art. 6, wherein the Court is defined as the Superior Court of Justice; see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 7, Art. 34(2) wherein the Court is defined as the Supreme Court.
70. Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd Ed., (New York: JurisNet, LLC, 2011), s. 10.3.2, p. 439-440; *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VII A, Art.34(3), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 7, Art. 34(3).
71. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VII A, Art. 34(4), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 7, Art. 34(4).
72. *International Commercial Arbitration Act*, R.S.O. 1990 c. I.9, Model Law, Chapter VI-A, Art. 33(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 33(1) and (2).

73. *International Commercial Arbitration Act*, R.S.O. 1990 c. I.9, Model Law, Chapter VI-A, Art. 33(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 33(3).
74. *International Commercial Arbitration Act*, R.S.O. 1990 c. I.9, Model Law, Chapter VI-A, Art. 33(5), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 33(7).
75. Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd Ed., (New York: JurisNet, LLC, 2011), s.10.3.1, p. 437. Ontario's *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, most recently incorporated the New York Convention as Schedule 1.
76. *Code of Civil Procedure*, R.S.Q. c. C-25.01, s. 948-949.
77. McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book 2014) at 1:40.
78. The term commercial applies broadly to contractual and non-contractual commercial relationships such as leasing, construction, investment, financing, etc., but does not include labour and employment disputes or consumer claims. McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book 2014) at 1:80; *Boroski v. Heinrich Fiedler Perforiertechnik GmbH* (1995), 29 C.P.C. (3d) 264 (Alta. Q.B.), see also *Patel v. Kanbay International Inc.* (2008), 93 O.R. (3d) 88 at paras. 12-13 (C.A.).
79. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art. Art. 35(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 8, Art. 35(2).
80. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art.. 35(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 8, Art. 35(3).
81. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art. 36(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 8, Art. 36(1).
82. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art. 36(1)(a)(v), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 8, Art. 36(1)(a)(vi).
83. See, for example, *Schreter v. Gasmac Inc.,* [1992] O.J. No 257 at paras. 47-52 (Gen. Div.), see also *Beals v. Saldhana* [2001] O.J. No. 2586 at paras. 34-35, 84-86 (C.A.).
84. *Corporacion Transnacional de Inversiones S.A. de C.V. v. Stet International S.p.A* [1999] O.J. No. 3573 at para. 30 (S.C.J.) and see *Quintette Coal Limited v. Nippon Steel Corp. et al.,* [1990] B.C.J. No. 2241 at paras. 27 and 32 (C.A.).
85. *Subway Franchise Systems of Canada Ltd. v. Laich,* 2011 SKQB 249 at para. 40; and see *Lambert Re:*, [2002] O.J. No. 3163 (C.A.), affirming *Lambert Re:*, [2001] O.J. No. 2776 at para. 76 (S.C.J.).
86. *Popack v. Lipsyzc*, 2016 ONCA 135, affirming *Popack v. Lipsyzc*, 2015 ONSC 3460 at para. 28-29.
87. *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664 at para. 127-129; *Rheaume v. Société d'investissements l'Excellence Inc.*, 2010 QCCA 2269 at para. 61.
88. *Yugraneft Corp. v. Rexx Management Corp.* 2010 SCC 19 at paras. 14-23, see also Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd Ed., Jurisnet, 2011, at s. 10.4.2, p. 454-455.
89. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, part III, Art. 10.

90. *Code of Civil Procedure*, R.S.Q. c. C-25.01, s. 951.2.
91. Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd Ed., (New York: JurisNet, LLC, 2011), at s. 10.4.2, p. 455. Given that the Quebec statutory provision appears to presume that the foreign arbitral award has already been recognised by the local courts, it is not clear whether one would succeed in an argument that there is no limitation period for an application to recognise a foreign arbitral award (as opposed to an application to enforce an award that has already been recognised). See also, *Civil Code of Quebec*, CQLR c. C-1991, Art. 2924.
92. Canada also has FIPAs in force with the following countries: Argentina; Armenia; Barbados; Benin; Cameroon; Costa Rica; Côte d'Ivoire; Croatia; Czech Republic; Ecuador; Egypt; Hong Kong; Hungary; Jordan; Kuwait; Latvia; Lebanon; Mali, Panama; Peru; Philippines; Poland; Romania; Senegal; Serbia; Slovak Republic; Tanzania; Thailand; Trinidad and Tobago; Ukraine; Uruguay; and Venezuela. See: Global Affairs Canada, "Trade and Investment Agreements", (6 March 2017) online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.
93. Canada has signed (but has not yet ratified) FIPAs with Burkina Faso, Guinea, Mongolia and Nigeria. Canada has concluded FIPA negotiations (but has not yet signed FIPAs) with Albania, Bahrain, Madagascar, Moldova and Zambia. See: Global Affairs Canada, "Trade and Investment Agreements", (6 March 2017) online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.
94. Canada is in the process of negotiating FIPAs with Ghana, India, Kazakhstan, Kenya, Kosovo, Macedonia, Pakistan, Tunisia and the United Arab Emirates. See: Global Affairs Canada, "Trade and Investment Agreements", (6 March 2017) online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.
95. Canada also has FTAs with the following countries and organisations: Chile; Colombia; Costa Rica; European Free Trade Association (consisting of Norway, Switzerland, Iceland and Liechtenstein); Honduras; Israel; Jordan; Korea; Panama; and Peru. See: Global Affairs Canada, "Trade and Investment Agreements", (6 March 2017) online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng.
96. Global Affairs Canada, "Canada-European Union Comprehensive Economic and Trade Agreement (CETA)", (6 March 2017) online: http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng.
97. See: Justin Trudeau, Prime Minister of Canada, News, "Next steps for the Canada-EU Comprehensive Economic and Trade Agreement", 30 October 2016, online: http://pm.gc.ca/eng/news/2016/10/30/next-steps-canada-eu-comprehensive-economic-and-trade-agreement.
98. See: Global Affairs Canada, "Trade and Investment Agreements", (6 March 2017) online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.
99. See, for example, Government of Canada, "Agreement between Canada and [State] for the Promotion and Protection of Investments", (2004), online: http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf [Model FIPA] at pages 26-27; see also: Global Affairs Canada, "Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments", (signed 30 November 2014) online: http://www.treaty-accord.gc.ca/text-texte.aspx?id=105176&lang=eng at Article 27; see also Global Affairs Canada, "Agreement Between Canada and the Republic

of Peru for the Promotion and Protection of Investments", (signed 14 November 2006) online: http://www.treaty-accord.gc.ca/text-texte.aspx?id=105078&lang=eng at Article 27.

100. There are currently 161 ICSID member states. A full list can be found at: International Centre for Settlement of Investment Disputes, "Database of ICSID Member States", online: https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

101. Article 25 of the ICSID Convention.

102. Article 26 of the ICSID Convention.

103. Article 25 of the ICSID Convention.

104. Global Affairs Canada, "Cases Filed Against the Government of Canada", (1 January 2005) online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng.

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

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

107. *United Mexican States v. Cargill Inc.*, 2011 ONCA 622, leave to appeal to SCC refused, [2011] S.C.C.A. No. 528.

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

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

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

111. *United Mexican States v. Cargill Inc.*, 2011 ONCA 622 at para 33; see also *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.,* 2016 ONSC 7171 at para. 34; and see *Canada (Attorney General) v. Mobil Investments Canada Inc*., 2016 ONSC 790 at para. 34.

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

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Cayman Islands

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Introduction

The primary sources of arbitration law in the Cayman Islands are the Arbitration Law, 2012 (the **Law**) and the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the **FAAEL**), which gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the **New York Convention**). The Cayman Islands has been a party to the New York Convention since 1981. The Law, which came into force on 2 July 2012 and applies to all Cayman-seat arbitrations commenced after that date, completely overhauled the arbitration regime in the Cayman Islands and brought it in line with the UNCITRAL Model Law; it also draws on the arbitration laws of other common law jurisdictions, including the English Arbitration Act 1996 (the **English Act**). The Law is expressly founded on the following principles, which are considered a hallmark of modern arbitration: the fair resolution of disputes by an impartial tribunal without undue delay or expense; maximum party autonomy, subject only to such safeguards as are necessary in the public interest; and limited judicial intervention.

Arbitration agreement

An arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement. The Law stipulates that the arbitration agreement must be in writing and contained in: (i) a document signed by the parties; or (ii) an exchange of correspondence or other means of communication that provides a record of the agreement, although there are also a number of exceptional circumstances in which an arbitration agreement will be deemed to exist. A Schedule to the Law contains a model arbitration clause, which parties are encouraged to adopt or adapt.

There are no legal impediments to arbitrating any type of dispute which the parties have agreed to submit to arbitration, unless the arbitration agreement is contrary to public policy or such dispute is not capable of determination by arbitration by virtue of any other law of the Cayman Islands.

The Cayman Islands recognise the principle of competence-competence, a principle central to international commercial arbitration, by expressly providing in the Law that the tribunal has the power to rule on its own jurisdiction, including objections as to the existence or validity of the arbitration agreement. Therefore, any jurisdictional objections must first be raised with the tribunal itself. The tribunal may choose to rule on jurisdictional objections either as a preliminary question or as part of its final award on the merits.

The Cayman Islands also recognise the doctrine of separability, by providing in the Law that for the purposes of allowing the tribunal to rule on its own jurisdiction, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other

terms of the contract. This ensures that the arbitral proceedings may continue, regardless of any arguments regarding the invalidity of the underlying agreement.

Arbitration procedure

In conducting the arbitration proceedings, the tribunal is required to: (i) act fairly and impartially; (ii) allow each party a reasonable opportunity to present its case; (iii) conduct the arbitration without unnecessary details; and (iv) conduct the arbitration without incurring unnecessary expense. Subject to these rules, the parties are largely free to agree the procedure to be followed by the tribunal. In practice, the parties will usually select a set of procedural rules in the arbitration agreement, either by reference to and incorporation of a recognised body of institutional rules or by devising tailor-made rules. If the parties fail to agree on the procedural rules to be followed, the tribunal may conduct the arbitration in such a manner as it considers appropriate, subject to relevant provisions of the Law.

Pursuant to the Law, unless agreed otherwise, an arbitration commences when: (i) one party gives notice of an intention to submit a dispute to arbitration; (ii) one party serves on the other party a notice requiring him to appoint or concur in appointing an arbitrator; or (iii) the arbitrator is named in the agreement and one party serves a notice to the other requiring him to submit the matter to the named arbitrator. The parties may agree the deadlines by which the statement of claim and defence shall be presented to the tribunal (failing which, the deadlines will be determined by the tribunal) and the parties must submit all documents which they consider to be relevant with their statements. Subject to any contrary agreement by the parties, the tribunal will decide if the proceedings are to be conducted by oral hearing for the presentation of evidence; on the production of documents; and on the use of telecommunications technology. Unless the parties have agreed that no hearings shall take place, the tribunal must hold hearings at appropriate stages, upon the request of a party.

The tribunal may make procedural orders or give directions for security for costs; the discovery of documents and interrogatories; the giving of evidence by affidavit; requiring a party or witness to be examined on oath or affirmation; and for the purposes of asset preservation. The tribunal may also appoint one or more experts to report to it on specific issues, and may require a party to provide any relevant information or documents to the expert.

Tribunals in Cayman seat arbitrations usually take the following approach to the taking of evidence:

(i) parties or party officers will tender sworn affidavits or witness statements and may be cross-examined upon request by the other party;

(ii) party-appointed experts are preferred to tribunal-appointed experts, whose evidence will be admitted similarly to party witnesses;

(iii) the tribunal will not insist on inspection of documents; and

(iv) the tribunal will be inclined towards reducing the scope and extent of discovery generally at the request of a party.

The parties may also agree what powers may be exercised by the tribunal in the event that one party fails to take a required step. For example, unless otherwise agreed, where the claimant fails to provide its statement of case by the agreed time or the deadline provided by the tribunal, the tribunal may terminate the proceedings; where the respondent fails to provide its defence within the required deadline, the tribunal may continue the proceedings without treating the failure as an admission of the claim.

The assistance of the Cayman court can be sought in certain circumstances during the arbitration process, including to compel disclosure from third parties or to order a person to attend before the court to produce certain documents. The court may also exercise general powers in support of arbitral proceedings, but the court will only act in the event that the tribunal has no power or is unable for the time being to act effectively.

The tribunal is required to conduct arbitral proceedings in private and confidentially, and disclosure by the tribunal or a party of confidential information relating to the arbitration shall be actionable as a breach of an obligation of confidence unless disclosure is provided with a number of limited exceptions. Where an application is made to the Cayman court, a party may apply for that application to be heard privately and may also seek directions as to whether any, and if so what, information relating to the arbitration proceedings may be published. The court will only publish information if all of the parties agree that such information may be published or the court is satisfied the publication of the information would not reveal any matter that any party reasonably wishes to remain confidential. If a judgment is given in respect of arbitration proceedings which the court considers to be of major legal interest, the court may direct that reports of the judgment be published in law reports or professional publications but that certain information be concealed, or that the reports be published only after the end of an appropriate period of time.

Arbitrators

The parties to an arbitration agreement may choose any number of arbitrators they wish; in the absence of agreement, the Law provides for the appointment of a single arbitrator. There are no restrictions on who may act as an arbitrator and the Law does not impose any limits on the parties' freedom to select arbitrators. The writers would expect any contractually stipulated requirement for arbitrators based on nationality, religion or gender to be recognised in the Cayman Islands, following the English Supreme Court decision in *Jivraj v Hashwani* [2011] UKSC 40. While that decision is not strictly binding on the Cayman court, its reasoning would be highly persuasive and we would expect the Cayman court to follow the same approach.

The parties to an arbitration agreement may agree a procedure for the appointment of arbitrators. In the absence of such agreement, the Law provides that in the case of a single arbitrator, the arbitrator will be appointed by the "appointing authority" (such appointing authority to be chosen by the parties or otherwise chosen by the court). In the case of two or more arbitrators, each party will appoint an arbitrator and agree to the appointment of a subsequent arbitrator or alternatively, two or more parties will agree to the appointment of the required number of arbitrators.

Where a person is approached in connection with his possible appointment as an arbitrator, he must disclose any circumstances which might reasonably compromise his impartiality or independence. This obligation continues from the time of the arbitrator's appointment and throughout the arbitration proceedings.

The authority of an arbitrator appointed by or by virtue of an arbitration agreement is (unless stated otherwise in the arbitration agreement) irrevocable except by leave of the court. An arbitrator's authority may therefore only be challenged in limited circumstances, namely where: (i) circumstances exist that give rise to justifiable doubts about his impartiality or independence; or (ii) he does not possess the qualifications agreed to between the parties. A party may also apply to the court for the removal of an arbitrator: (i) who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts

as to his capacity to do so; or (ii) who has failed or refused to properly conduct the proceedings or to use all reasonable despatch in conducting the proceedings or making an award; *and* where substantial justice has been, or will be, caused to the party. If, however, the parties have vested the power to remove an arbitrator in a specific person, the court will only exercise its power of removal if it is satisfied that the applicant has exhausted every recourse to that person.

An arbitrator will not be liable for any consequences or costs resulting from: (i) negligent acts or omissions in his capacity as arbitrator; or (ii) any mistake of law, fact or procedure made by him in the course of arbitration proceedings or in the making of an arbitral award. Notwithstanding this, an arbitrator may be liable for an act or omission shown to be in bad faith.

Interim relief

Unless otherwise agreed by the parties, the tribunal has the power to grant any interim measure ordering a party to:

(i) maintain or restore the original position of the other party pending determination of the dispute;

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

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

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

The tribunal does not need to seek assistance from the court before granting interim relief, however, the tribunal must be satisfied that: (i) the harm which would likely result if the relief was not ordered would not be adequately remedied by damages; (ii) that harm substantially outweighs the harm that it is likely to result to the party against whom the relief is ordered; and (iii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. Where a request is made for an interim measure in order to preserve evidence or assets, these conditions will only apply to the extent that the tribunal considers appropriate. At the same time as applying for interim relief, a party may also seek from the tribunal a preliminary order directing the other party not to frustrate the purpose of the interim measure. Any interim measure granted by a tribunal will be recognised as binding, and will therefore be enforceable upon application to the court (subject only to the limited grounds on which the court may refuse enforcement of any arbitral award).

The tribunal may make orders and directions in support of the arbitral process, including for asset preservation orders; the discovery of documents and interrogatories; the giving of evidence by affidavit; and security for costs. The power to grant security will not be exercisable merely due to the fact that the claimant is: (i) an individual ordinarily resident outside the Cayman Islands; or (ii) a foreign corporation or association (or whose central management and control is exercised outside of the Cayman Islands).

The Cayman court has broad powers which may be exercised in support of arbitral proceedings, which includes the granting of an interim injunction or any other interim measure. However, the Law expressly provides that if the case is one of urgency, the court may make such orders as it thinks necessary for preserving evidence or assets; if the case is not one of urgency, the court can only act with the permission of the tribunal,

or the agreement in writing of the other parties. In any event, the Cayman court will act only if the tribunal has no power to act or is unable to act effectively for the time being. By this, the Cayman Islands seeks to maintain the balance between the court intervening where necessary in order to provide sufficient support to the arbitral process, and the court intervening too much, such that the arbitral process is undermined.

Section 54 of the Law further provides that the Cayman court has the same power to issue interim measures in relation to arbitration proceedings (irrespective of whether the seat of the arbitration is the Cayman Islands) as it has in relation to court proceedings. The Law provides that the court must exercise those powers "*in accordance with its own procedures and in consideration of the specific principles of international arbitration*". By virtue of section 43(5) of the Law, the Cayman court will only act where a tribunal vested by the parties with power to issue interim measures is unable to do so (for example, where it has not yet been appointed).

The Law does not provide for the appointment of an emergency arbitrator prior to the constitution of the tribunal. However, as discussed above, the Cayman court has the power to issue interim measures in urgent circumstances such as where the tribunal has not yet been appointed.

Pursuant to section 9 of the Law, if court proceedings are initiated despite an existing arbitration agreement, the Cayman court *must* grant a stay of the legal proceedings commenced in breach of that agreement, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. The application must be made to the court after the party has acknowledged service and before the party has delivered any pleading or taken any step in the proceedings to answer the substantive claim.

In recent years, there has been a question mark over the application of the mandatory stay provisions in the Law to winding up proceedings, where a creditor petitions to wind up a company for non-payment of a contractual debt, but that debt is disputed and arises out of a contract containing an arbitration agreement. Until recently, the trend in the Cayman Islands was for the court of first instance to retain its jurisdiction to assess the merits of the dispute in relation to the debt: *Re Duet Real Estate Partners 1 LP* (unreported, 7 June 2011); *In The Matter of Ebullio Commodity Master Fund L.P.* (unreported, 24 May 2013). A stay in favour of arbitration would only be ordered once the court had determined that there was no "genuine and substantial dispute" in relation to the debt; this required the court, in the first instance, to undertake a merits-based assessment of the dispute, which runs counter to the policy of giving absolute primacy to arbitration agreements.

In February 2016, the Cayman Islands Court of Appeal considered this issue in the decision of *Re SphinX Group of Companies* (Cause CICA 06/2015). The Court of Appeal applied and indorsed the reasoning in the English Court of Appeal decision of *Salford Estates (No.2) Limited v. Altomart Limited* [2015] Ch. 589 that whilst petitions to wind up a company for non-payment of a debt do not fall within the statutory provisions mandating a stay in favour of arbitration, the court's power to make a winding-up order is itself discretionary. Therefore, where a debt is disputed and subject to an arbitration clause, unless there are "exceptional circumstances", the court should exercise its discretion to stay or dismiss the petition in order to compel the parties to resolve the dispute by arbitration. In the writers' views, this provides welcome clarification: this pro-arbitration approach will ensure that the primacy of the agreement to arbitrate is recognised and upheld by the Cayman court, whilst allowing the court to retain its discretion to wind up a company in wholly exceptional circumstances.

The Cayman court may also grant an anti-suit injunction to restrain foreign proceedings in appropriate circumstances, where the party acting in breach of the arbitration agreement is subject to its jurisdiction.

Arbitration award

The Law stipulates that an award must be made in writing and shall be signed: (i) by the arbitrator (in the case of a sole arbitrator); or (ii) by all arbitrators or the majority of the arbitrators if the reason for any omitted signature is stated in the award (in the case of two or more arbitrators). The award must state the reasons upon which it is based, unless the parties have agreed otherwise or the award is simply made for recording settlement. The award must also state the date of the award and the seat of the arbitration; the award will be deemed to have been made at the place of the arbitration. The tribunal may make more than one award at different points during the proceedings.

If the tribunal consists of more than one arbitrator, a decision of the tribunal shall be made by all or a majority of the tribunal. If no majority decision can be agreed, the parties may agree on a process to arrive at a final and binding decision; this could be appointing an arbitrator to act as chairman with a casting vote. No specific provision is made in the Law dealing with dissenting opinions.

There is no time limit within which an award must be rendered, unless specified in the arbitration agreement (and any such time limit may be extended by the court, whether that time has expired or not). An application to the court for an extension of time cannot be made unless all available tribunal processes for an extension of time have been exhausted and the court will not make an order unless it is satisfied that substantial justice would not otherwise be done.

The Law provides that the tribunal may award interest on the whole or any part of: (i) the amount which the award orders to be paid, up to the date of the award; (ii) the amount claimed in the arbitration and outstanding when the arbitration began or paid before the tribunal made its award; or (iii) any outstanding amount of any amounts awarded, including any award of arbitration expenses. An award ordering payment of interest may specify the interest rate and the period for which interest is payable. Unless the award states otherwise, an award will carry interest from the date of the award at the same rate as a judgment debt (currently at the rate of 2.375% for judgments in US dollars).

Unless a contrary intention is expressed, every arbitration agreement is deemed to include a provision that the costs of the arbitration will be in the discretion of the tribunal. If the award does not deal with costs, a party may apply to the tribunal for a direction regarding costs within 14 days. The Law does not specify how the tribunal should deal with the issue of costs, but in practice awards as to costs tend to follow the traditional costs rules for litigation.

In the recent English decision of *Essar Oilfields Services v Norscot Rig Management Pvt* [2016] EWHC 2361, the court upheld the decision of the arbitrator to award the successful party its costs of third party litigation funding which it had obtained in order to bring the arbitration, in addition to the award of costs and damages. The arbitrator had concluded that the funding costs fell within the ambit of section 59(c) of the English Act (and the relevant ICC Rules) which defines "costs of the arbitration" as including "legal and other costs". The English court considered the correct test in determining what costs fell within the ambit of "other costs" to be whether those costs were incurred in bringing or defending a claim, and commented that the expression "other costs", "*should not be confined by some legal straightjacket imposed by reason of what a court might or might not be permitted to order*".

This decision is potentially very significant, since, following the English court's reasoning, it appears open to a tribunal to award recovery of other categories of costs (including, for example, a party's uplift in a conditional fee arrangement and/or an after the event insurance premium). The decision of *Essar v Norscot* would be treated as highly persuasive in the Cayman Islands and, in the writers' views, would likely be followed by the Cayman court.

Challenge of the arbitration award

The Law provides that an award is "made" when it is signed and delivered to the parties. An award is final and binding on the parties; once made, it cannot therefore be varied, amended, corrected or added to by the tribunal. The exception to this is that the tribunal has the power to correct any error in computation, any clerical or typographical error or error of a similar nature in the award and/or to give an interpretation of a specific point or part of the award. This may be done upon the request of a party or by the tribunal on its own initiative.

There are only two limited mechanisms by which an award may be challenged or appealed.

First, a party may apply to the court to set aside the award on one of the limited grounds stated in the Law. These grounds include that: (i) a party to the arbitration agreement was under an incapacity or placed under duress to enter into the arbitration agreement; (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under the laws of the Cayman Islands; and (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings. The court may also set aside the award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the Law or the award is contrary to public policy.

Second, unless the parties have agreed to exclude this right of appeal, a party to the arbitration agreement may, with the leave of the court, and upon notice to the other parties and the tribunal, apply to the court on a question of law arising out of an award. Leave to appeal to the court will only be given if the court is satisfied that: (i) the determination of the question will substantially affect the rights of one/more parties; (ii) the question is one that the tribunal was asked to determine; (iii) on the basis of the findings of fact in the award, the decision of the tribunal on the question is obviously wrong or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and (iv) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in the circumstances for the court to determine the question.

If leave is granted, and the appeal proceeds, the court may: (i) confirm the award; (ii) vary the award; (iii) remit the award to the tribunal for reconsideration; or (iv) set aside the award in whole or part (although it will not do the latter unless it is satisfied that it would be inappropriate to remit the matters to the tribunal for reconsideration). Where a party has appealed to the court on a question of law arising out of an award, an application for leave to appeal against the court's decision must be made to the Cayman Islands Court of Appeal. The Court of Appeal will only give leave to appeal if the question of law before it is one of general importance, or is one that for some other special reason should be considered.

A party may only appeal to the court on a question of law, or make an application to set aside an award, if it has first exhausted every available arbitral process of appeal or review and, as detailed above, a challenge may only be brought in limited circumstances. The court may require the party to provide security for the costs of the application or appeal and/or may order that the amount payable under the award be brought into court or otherwise secured pending determination of the application or appeal.

Enforcement of the arbitration award

The Cayman Islands is favourably disposed to supporting the arbitration process by upholding and enforcing arbitral awards, subject only to limited exceptions. The FAAEL gives domestic effect to the New York Convention: an award made under an arbitration agreement in the territory of a state that is party to the New York Convention will be recognised and enforced according to its principles, on production of the original arbitration agreement and award or certified copies. Domestic awards may be enforced pursuant to section 72 of the Law with the leave of the court.

Importantly, the Law goes further than this, by providing that an arbitral award *irrespective of the country in which it was made* shall be recognised as binding and, upon application to the court, will be enforced subject to the provisions of the FAAEL *regardless of whether it is a New York Convention award or not*. Therefore, awards from any foreign state (regardless of whether the state is a contracting party to the New York Convention) may now be easily and swiftly enforced in the Cayman Islands.

The Cayman court may only refuse the enforcement of domestic arbitral awards in circumstances where it is shown that the arbitral tribunal lacked jurisdiction to make the award and, in the case of foreign arbitral awards, on the extremely limited grounds listed in Article V of the New York Convention. Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

In terms of procedure, an application for leave to enforce an arbitral award is a straightforward and inexpensive process in the Cayman Islands. Once leave has been obtained, judgment will be entered in the terms of the award and can be enforced in the same way as a judgment or court order to the same effect. All of the common enforcement mechanisms will then be available, including garnishee orders, charging orders, the appointment of receivers by way of equitable execution, and winding up.

Investment treaty arbitration

Certain multilateral investment treaties have been extended to the Cayman Islands by the government of the United Kingdom, including the Washington Convention of the Settlement of Investment Disputes between States and Nationals of Other States (1965) (**ICSID**) and the Convention Establishing the Multilateral Investment Guarantee Agency (**MIGA**).

No bilateral investment treaties exist directly between the Cayman Islands and any other countries. Certain bilateral investment treaties, between the United Kingdom and other countries, have been extended to the Cayman Islands by the government of the United Kingdom. These include bilateral treaties for the promotion and protection of investments between the United Kingdom and Panama, Belize and St Lucia respectively.

The Cayman Islands is also an associate member of the Caribbean Community (**CARICOM**), which aims to promote economic integration and cooperation among its members. CARICOM in turn has signed individual trade agreements with Columbia, Costa Rica, Cuba, Dominican Republic and Venezuela.

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Congo – D.R.

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Introduction

Over the decades, Africa has emerged as a leading centre of economic growth, driven both by African and foreign businesses. The increase in international commerce that goes with it has resulted in the development of arbitration.

As from 1993, when the Organisation for the Harmonisation of Business Law in Africa ('**OHADA**') was created by a treaty signed in Port-Louis (Mauritius), arbitration has been considered of great importance in reinforcing legal and judicial security in order to guarantee a climate of trust that will contribute to making Africa a centre of development. Both the preamble and Article 1 of the founding treaty clearly state the need to 'promote arbitration as an instrument to settle contractual disputes'.

To this end, the Council of Ministers adopted the Uniform Act on Arbitration[1] on 11 March 1999. OHADA Uniform Acts apply in all OHADA Member States, where they replace pre-existing national standards. But more importantly, the OHADA Treaty itself provides for institutional arbitration under the auspices of the Common Court of Justice and Arbitration. One must therefore be vigilant when envisaging arbitration under OHADA law, as OHADA has created two different sets of legislation applicable to arbitration.

The Democratic Republic of Congo ('**DRC**') ratified the OHADA Treaty in June 2012 and OHADA law has been enforceable as part of DRC law since 12 September 2012.

Consequently, both the OHADA Uniform Act on Arbitration and the OHADA Treaty have been governing arbitration proceedings in the DRC since September 2012[2]. Some provisions of the existing national law on arbitration[3] may also remain applicable, since the Uniform Act on Arbitration must be interpreted as superseding the existing national laws on arbitration, but subject to any provisions of such national laws that do not conflict with the Uniform Act[4].

Several Belgian lawyers have been actively involved in arbitration proceedings relating to the DRC, considering the proximity of both legal systems and the historical relationship between Belgium and the DRC. They thus have a great insight into DRC arbitration law and are involved in the development of international arbitration in the DRC.

OHADA Uniform Act on Arbitration and relevant conventions

The 1999 Uniform Act on Arbitration ('**UAA**'), which is largely based on the UNCITRAL Model Law, governs both national and international *ad hoc* arbitration. It applies as soon as the place of arbitration is located within the OHADA territory (*i.e.* in one of the OHADA Member States)[5], though only to arbitration proceedings that were initiated after its entry into force[6] (*i.e.*, as regards the DRC, after 12 September 2012).

The UAA is divided into seven chapters:

- Scope of Application.
- Constitution of the Arbitral Tribunal.
- The Arbitral Procedure.
- The Arbitral Award.
- Recourse Against the Arbitral Award.
- Recognition and Enforcement of Arbitral Awards.
- Final Provisions.

The DRC has recently ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which applies in the DRC since 2 February 2015. However, the DRC has declared that it would apply the New York Convention on the condition of reciprocity, and only in commercial litigation. The DRC has also restricted the application of the Convention to arbitral awards rendered after 2 February 2015. Finally, arbitral awards that concern belongings of the DRC will not be enforced.

OHADA and DRC international dispute resolution institutions

The Common Court of Justice and Arbitration (**'CCJA'**) was instituted by the 1993 OHADA Treaty, and is notably the OHADA dispute resolution institution. CCJA arbitration is governed by the 1999 **CCJA Arbitration Rules**[7]. One of the particularities of this arbitration institution is that, in accordance with Article 2.1 of the CCJA Arbitration Rules, it is only available for contractual disputes, and only where a party has its domicile or residence in an OHADA Member State or where the contract is to be performed at least partly in the OHADA territory[8].

The CCJA also plays a role in *ad hoc* arbitration governed by the UAA, as a Supreme Court ruling on State courts' decisions on the annulment of arbitral awards (see below).

Other arbitration institutions in the DRC are the Congo Arbitration Centre ('**CAC**') and the National Centre for Arbitration, Conciliation and Mediation ('**CENACOM**'). Arbitrations under the CAC are governed by the **CAC Arbitration Rules**[9] and CENACOM arbitrations are governed by the **CENACOM Arbitration Rules**[10], which are inspired by both the CEPANI and ICC Arbitration Rules. Nowadays, the number of pending CAC arbitration proceedings is very limited. With respect to the CENACOM, some DRC authorities and the FEC, the local Federation of Enterprises, encourage resorting to arbitration under the aegis of the CENACOM. In practice, however, the number of arbitration proceedings currently pending also remains on the low side[11]. Moreover, although most contracts signed between a Congolese party and a foreign party include an arbitration clause, disputes are then generally referred to foreign arbitration institutions such as the ICC, the Swiss Chamber of Arbitration, the CEPANI, etc.

Pursuant to Article 10.1 UAA**,** 'except where the parties expressly exclude the application of certain provisions of the arbitration rules of an institution, submission to this arbitration institution shall bind them to apply the arbitration rules of such institution'.

Arbitration agreement

There is no definition of an arbitration agreement in the UAA. However, it is well established that, as in Belgium, France and most French-speaking African countries[12], an arbitration agreement may be contained in a contractual clause, or constitute a contract as such.

The UAA states the conditions for the validity of an arbitration agreement. To be formally

valid, the arbitration agreement does not have to be in writing. Arbitration agreements by reference are also allowed. For instance, a contract may merely refer to general terms and conditions of one of the parties that contain an arbitration clause[13]. The arbitration agreement may be concluded between the parties even after proceedings have been initiated before State courts[14].

In terms of substantive conditions for the validity of the arbitration agreement, the subject-matter of the agreement must be arbitrable (see below). The nature of the parties involved cannot impact the validity of the arbitration agreement. As expressly stated in Article 2.2 UAA: 'States and other territorial public bodies as well as public establishments may equally be parties to an arbitration without having the possibility to invoke their own law to contest the arbitrability of the claim, their authority to sign arbitration agreements or the validity of the arbitration agreement'. This is of great importance for foreign investors who are willing to enter into a joint venture with a public authority or State-owned company[15].

Arbitrability

In accordance with Article 2 UAA, an arbitration agreement is only enforceable in relation to a dispute that is arbitrable, *i.e.* a dispute that concerns matters on which the parties are entitled to conclude a settlement. This definition may however vary depending on the law of each OHADA Member State. Under DRC law, that covers mainly commercial contracts.

Joinder of third parties and consolidation of proceedings

The possibility for persons who did not enter into the arbitration agreement to take part in the arbitration proceedings relating thereto is said to be very limited[16], but there is no rule on the topic under the UAA or under the CCJA Arbitration Rules. However, third parties to arbitration proceedings may oppose any arbitral award that infringes their rights (see below).

Neither the UAA nor the CCJA Arbitration Rules provide for the consolidation of proceedings. Thus it should not be possible without all parties' consent. Article 3.1 *in fine* of the Rules provides, however, that 'Where several parties [...] have to submit to the Court joint proposals for the appointment of an arbitrator and they do not agree within the prescribed time limit, the Court may appoint all the members of the arbitral tribunal'.

Competence-competence

In accordance with the 'competence-competence' principle, Article 11.1 UAA[17] provides that an arbitral tribunal has jurisdiction to rule on its own jurisdiction, including any question with respect to the existence or validity of the arbitration agreement. A claim that the tribunal does not have jurisdiction must be raised by a party no later than the time of submission of the statement of defence on the substance, except where the facts on which the argument of lack of jurisdiction is based are discovered later.

When a case that allegedly falls under an arbitration agreement is brought before State courts and no arbitration proceedings have been initiated, the State court is required to deny jurisdiction unless the agreement is manifestly void[18]. When a party brings a dispute before State courts despite arbitration proceedings having already been initiated, the State court must deny jurisdiction if so requested by a party[19]. In any event, when a case that allegedly falls under an arbitration agreement is brought before State courts, the latter cannot raise an exception based on the arbitration agreement *ex officio*: this exception must be raised by a party[20].

Separability

In accordance with Article 4 UAA and 10.4 of the CCJA Arbitration Rules, an arbitration agreement contained in another agreement exists independently from the latter agreement.

The arbitration agreement can thus be considered valid even if the rest of the agreement is invalid, provided that the grounds for which the agreement has been found invalid do not also apply to the arbitration agreement (*e.g.* incapacity or duress). Article 4.2 UAA goes even further in stating that the validity of the arbitration agreement is assessed according to the intention of both parties, without reference to the law of a particular State.

Arbitration procedure

Pursuant to Article 14.1 UAA, the parties may either agree on procedural rules or refer to institutional arbitration rules, or to the procedural law of any country.

Failing such an agreement of the parties, Article 14.2 UAA allows the arbitrators to conduct the arbitration proceedings as they consider it appropriate. This is the case in most arbitrations in practice[21].

Either way, the procedural rules chosen by the parties or the arbitrator(s) must respect the principle of due process[22].

Commencing an arbitration

The UAA does not provide for any rule regarding the commencing of an arbitration but, pursuant to Article 14.1, allows the parties to decide when and how the arbitration proceedings are to be initiated. Absent such an agreement, although this is not expressly provided by the UAA, it should logically be for the arbitral tribunal, once constituted, to determine whether the arbitration was validly commenced.

Article 5 CCJA Arbitration Rules provides that a request for arbitration containing several compulsory indications must be sent to the CCJA Secretariat, which will transfer the request for arbitration to the respondent(s). The CCJA Secretariat indicates the date of receipt of the request for arbitration, which constitutes the date of commencement of the proceedings.

Seat of arbitration

The location of the place of arbitration is of great importance, as the UAA only applies if the seat of arbitration is located in an OHADA Member State[23].

The UAA does not state what is meant by 'seat of the arbitration'. It seems that under the UAA, the seat of arbitration is the place where the award is rendered, while a part of the proceedings may occur elsewhere[24].

Applicable law

Applicable procedural rules are those contained in the UAA or the CCJA Arbitration Rules. In the event that the rules are silent, the applicable rules are those agreed by the parties, failing such agreement, by the tribunal[25].

Pursuant to Article 15 UAA, the arbitral tribunal must rule upon the merits of the case in accordance with the substantive law chosen by the parties or, failing such an agreement, the law that the arbitrators find the most appropriate. In that event, the tribunal must take into account the usages of international trade if the parties are involved in a commercial dispute. The parties may also allow the arbitral tribunal to decide on the case as *amiable compositeur* (*i.e.* to rule on equity).

Rather than making a direct determination of the most appropriate *law*, the arbitral tribunal is required, under Article 17 of the CCJA Arbitration Rules, to determine and to apply the *rules of conflict* that it considers to be the most appropriate.

Rules on evidence

Pursuant to Article 14.3 UAA, the parties must prove the facts in support of their claims.

Arbitrators may also invite the parties to provide them with factual explanations, and to bring evidence which they believe will provide a solution to the claim, by any means which are legally admissible[26]. Moreover, any explanations or documents invoked or produced by the parties and retained as evidence by the arbitrator(s) must have been subject to an adversarial procedure[27]. Arbitrators cannot ground their ruling on evidence that the parties have not been able to discuss[28]. This rule on evidence is an application of the principle of the adversarial procedure, according to which the parties must have an equal opportunity to present their case[29]. Finally, the arbitral tribunal may, *proprio motu* or at a party's request, require the assistance of State courts if this appears necessary to the production of evidence (if the arbitral tribunal has no jurisdiction to coerce a person into taking particular action). In the DRC, the court of first instance has jurisdiction over such matters, pursuant to Article 177 of the Code of Civil Procedure.

Privilege

The notion of privilege does not exist under DRC law. The conditions under which a party could otherwise potentially refuse to produce a piece of evidence for the reason that it contains confidential information are not stated by the law.

Disclosure

There is no pre-trial discovery in DRC, whether before State courts or before arbitrators. DRC is a civil law country, where the procedure is adversarial and the legal culture is not favourable to US or English-style discovery proceedings. Thus, it is for the parties to produce evidence to support their claim or defence.

Nevertheless, State courts have the power to order the production of evidence, in accordance with Article 14 UAA. In practice, this possibility is very rarely used.

Expert evidence

In *ad hoc* arbitration proceedings, it is for the parties or the arbitrator(s) to decide on the need for expert evidence and, where relevant, its status.

Under CCJA arbitration, arbitrator(s) may designate one or several experts, state their mission, request a written report, and request the expert's presence at a hearing[30].

Confidentiality

In principle, arbitration proceedings under the UAA are confidential. Pursuant to Article 18 UAA, the deliberations of the arbitral tribunal are secret.

Under CCJA arbitration, unless agreed otherwise by the parties, both the arbitration proceedings (any document or information produced in the course thereof) and the arbitration award are to remain confidential[31].

Arbitrators

Appointments in general

Both the UAA and the CCJA Arbitration Rules provide for either a sole arbitrator or a three-arbitrator tribunal. Under CCJA Arbitration, failing such agreement, the CCJA will appoint a sole arbitrator, unless the circumstances of the case appear to warrant the appointment of three arbitrators. The rules governing the appointment of arbitrators are otherwise similar to the UAA[32].

Article 5.1 UAA allows the parties to agree on the way arbitrator(s) shall be appointed. Failing such an agreement, or if the agreement is not sufficient, the procedure provided for under Article 5.2 UAA applies.

However, the freedom of the parties is limited in that arbitrators may only be natural people who enjoy their civic rights, and arbitrators must remain independent and impartial *vis-à-vis* the parties[33].

Procedure

Pursuant to Article 5.2 UAA, in an arbitration with three arbitrators, each party is to appoint one arbitrator, and the two arbitrators thus appointed are to appoint the third arbitrator. If a party fails to appoint the arbitrator within 30 days from receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days from their appointment, the appointment is to be made upon request of a party by the court having jurisdiction in the Member State party where the place of arbitration is located. In the DRC, the court having jurisdiction is the court of first instance, in accordance with Articles 161.2 and 166 of the Code of Civil Procedure.

In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he or she is to be appointed upon request of a party by the court having jurisdiction in the Member State where the seat of the arbitration is located.

Where the parties designate the arbitrators in even numbers, the arbitral tribunal is to be completed by one arbitrator, chosen either in accordance with the agreement of the parties or, in the absence of such agreement, by the arbitrators appointed or, where they are unable to agree on the arbitrator, by the court having jurisdiction in the Member State where the seat of arbitration is located[34].

These rules only apply in the absence of a specific agreement of the parties or where the parties have not submitted the arbitration to the arbitration rules of a specific arbitration institution.

Challenging an arbitrator

The parties may agree upon a procedure for removing arbitrators[35]. If they have not done so, the court having jurisdiction in the Member State where the seat of arbitration is located is to decide on the challenge[36]. In the DRC, the court having jurisdiction is the court of first instance, in accordance with Articles 177 and 166 of the Code of Civil Procedure. This court's decision is not subject to any appeal[37].

Any grounds for challenging an arbitrator must be disclosed without delay by the party who intends to challenge the arbitrator[38], and the challenge is only admissible for reasons that became known after the arbitrator's appointment.

As the UAA does not contain a list of reasons for the removal of an arbitrator, various grounds can be invoked[39]. The lack of impartiality of the arbitrator is, in any event, a valid reason for challenge (see below).

Impartiality of arbitrators

Pursuant to Article 6.1 UAA, an arbitrator must remain independent and impartial throughout his or her mission.

According to Georges-Albert Dal and François Tchekemian, while it is conceivable that the parties agree on the appointment of an arbitrator who is not independent, the arbitrator must in any event remain impartial[40].

Pursuant to Article 7 UAA, an arbitrator is to inform the parties of any potential ground for his or her removal, and may only accept to act as an arbitrator if all parties have given their written consent to that effect.

CCJA challenges

The CCJA Arbitration Rules do not list grounds for challenging an arbitrator either. Various

grounds may thus be invoked. However, Article 4.2 of the CCJA Arbitration Rules mentions the arbitrator's lack of independence as a possible ground.

The procedure for challenging an arbitrator is provided for under Article 4.2 of the Rules. A challenge must be communicated to the Secretariat of the CCJA in writing and must describe the facts and circumstances on which it is based. Such challenge must also be communicated by a party either within 30 days from receipt by that party of the notification of the arbitrator's appointment, or within 30 days of the date on which that party was informed of the facts and circumstances which it invokes in support of its challenge. The Secretariat then invites the arbitrator in question, the other parties and the other arbitrators (if any) to present their written observations. The file is then transferred to the CCJA. The CCJA decides on the challenge of an arbitrator, without any appeal possible, in accordance with Article 4.6 of the CCJA Arbitration Rules.

Immunity of arbitrators

The concept of 'immunity' of arbitrators does not exist as such under DRC law. However, under CENACOM arbitration, Article 35 excludes any liability of arbitrators, bodies of the CENACOM and the CENACOM itself for any act or omission relating to a CENACOM arbitration.

Secretaries to the arbitral tribunal

Neither the UAA nor the CCJA Arbitration Rules provide for any rule governing the existence or the conduct of secretaries to the arbitral tribunal. However, the CCJA plays an important role in the procedure of CCJA arbitrations.

Interim relief

Powers to grant interim relief

Both the UAA and the CCJA Arbitration Rules provide for parallel jurisdiction of both arbitral tribunals and State courts[41].

Pursuant to Article 13.4 UAA, the principle is that the arbitral tribunal has jurisdiction to grant interim measures[42]. However, the existence of an arbitration agreement is not an obstacle to the State courts' power to grant interim measures requested by a party if this does not involve any review of the merits of the case, and only in cases where urgency is demonstrated or in cases where the interim measures are to be enforced in a non-OHADA State.

Under the CCJA Arbitration Rules, the arbitral tribunal itself is also empowered to order interim measures, unless agreed otherwise by the parties[43]. If an exequatur is necessary for the enforcement of such measures, it may be requested immediately before the CCJA[44]. State courts only have jurisdiction to grant interim measures before the file has been handed to the arbitral tribunal or, after that, where urgency is so that the arbitral tribunal would not be able to issue a decision in due time, or if the parties have so agreed[45].

Arbitration award

Formal requirements

In accordance with Article 21 UAA, the arbitral award must be rendered in writing and must be signed by the arbitrator(s). However, in arbitral proceedings with several arbitrators, the award may be signed by only a majority of the members of the arbitral tribunal, if the award mentions the refusal of the other arbitrator(s) to sign the award.

The award must state the decision of the arbitral tribunal and the reasons on which it is based[46].

The award must contain the following details: the full name of the arbitrator or arbitrators; the date of the award; the seat of the arbitral tribunal; the full names of the parties, as well as their residence or registered office; where necessary, the full names of counsels or any person having represented or assisted the parties; and the statement of the respective claims of the parties, their arguments as well as the stages of the procedure[47].

Under the CCJA Arbitration Rules, pursuant to Article 22, the award must state the reasons on which it is based. It must result from the decision of the majority of the arbitral tribunal. If no majority can be found, the chairperson of the arbitral tribunal is to decide alone, and then sign the award alone. Otherwise, the award is to be signed by all arbitrators, or at least by the arbitrators who agree with the award. The other arbitrators may issue a dissenting opinion which will be attached to the award.

Moreover, pursuant to Article 23 of the CCJA Arbitration Rules, draft awards on jurisdiction, draft final awards and draft partial awards that decide on any claim in a definitive manner are subject to the CCJA's review before signature[48]. The CCJA may only comment on the formal aspects of the draft award and indicate the costs of arbitration (such as the amount of the arbitrators' fees).

Costs for the parties

The UAA does not provide for any rule on the shifting of the costs of the arbitration.

Under the CCJA Arbitration Rules, the parties may recover the costs of the arbitration. Pursuant to Article 24.1 of the CCJA Arbitration Rules, the final award must determine the costs of arbitration and decide which parties are to bear those costs, and in what proportion. Pursuant to Article 24.2, the costs of the arbitration include the fees and expenses of the arbitrators, the fees and expenses of the counsels and representatives of the parties (to the extent that the arbitral tribunal finds them reasonable), the administrative costs of the arbitral institution and all other costs resulting from the arbitral proceedings. The arbitrators' fees are those stated in the CCJA pay scale, unless otherwise justified by exceptional circumstances[49].

Interest

The question of whether the parties to an arbitration are entitled to recover interest is not determined by the UAA, as it depends on the law applicable to the merits of the case.

Challenge of the arbitration award

Under the UAA, arbitral awards may not be appealed, but the parties may request State courts to annul an award, pursuant to Article 25.2 UAA. The parties cannot agree to exclude the possibility to file a claim for annulment[50].

An award may be annulled (*i.e.* to be set aside) only on the following grounds[51]:

- there is no (valid) arbitration agreement. The inexistence of an arbitration agreement is rare. More often, though, it may be that the arbitration agreement is not valid. This includes situations where the validity of the arbitration agreement was limited in time and has become outdated, or where the deadline for rendering the award has expired[52];
- the arbitral tribunal was not set up according to the applicable rules or the sole arbitrator was irregularly appointed, whether in terms of quality of the arbitrator(s) or of the appointment procedure (which must, above all, respect the equality between the parties);
- the arbitral tribunal has decided on the case without conforming to its mission;

- the arbitration did not comply with the principle of adversarial procedure, according to which the parties must have an equal opportunity to present their case;
- the award is contrary to the international public policy of the OHADA Member States. When the dispute is national, it is the national public policy of the relevant Member State that is taken into account instead[53]; or
- the award does not state reasons. This ground includes reasons which are so contradictory or so insufficient that this amounts to an absence of reasons[54].

An award may also be challenged by any third party that has not been called to arbitration proceedings if the award affects its rights. Such challenge is brought before the arbitral tribunal itself[55]. It is unclear whether this action is available to any person who was not a party to the arbitration agreement or only to parties to the arbitration agreement who did not take part in the arbitration proceedings[56].

Finally, the arbitral award may be subject to an application for review before the arbitral tribunal itself, when new facts are discovered that may have a decisive influence and that were unknown to both the arbitral tribunal and the party applying for review before the award was rendered[57].

Under the CCJA Arbitration Rules, failing another agreement of the parties, they can request the annulment of an award before the CCJA on the following grounds (which are the same as those justifying a refusal of exequatur under the CCJA Arbitration Rules − see below):

- there is no (valid) arbitration agreement;
- the arbitral tribunal has decided on the case without conforming to its mission;
- the arbitration did not comply with the principle of adversarial procedure, according to which the parties must have equal opportunity to present their case; or
- the award is contrary to international public policy[58].

In a much criticised 2015 decision, the CCJA annulled an award on the grounds that the arbitrators, by entering into a separate fee agreement with the parties to the arbitration, had exceeded their mandate[59].

CCJA awards may also be subject to third-party opposition and review[60].

Proceedings for challenging awards through a request for annulment

A claim for annulment is to be filed with the court having jurisdiction in the Member State where the seat of arbitration was located. In the DRC, the court of appeal has jurisdiction over such claims, pursuant to Article 192 of the DRC Code of Civil Procedure.

In accordance with Article 27 UAA, a claim for annulment is admissible as soon as the award is rendered. It ceases to be admissible if it has not been made within one month after notification of the award.

Except where the provisional enforcement of the award has been ordered by the arbitral tribunal, a claim for annulment suspends any enforcement of the award until the court has ruled on said claim[61]. In that regard, the court having jurisdiction over a claim for annulment also has jurisdiction over a dispute concerning provisional enforcement[62].

If the award is annulled, it is up to the party that so wishes to initiate other arbitration proceedings in accordance with the UAA[63].

The only remedy available against the decision of the State court having jurisdiction on a claim for annulment is a *cassation* appeal before the CCJA[64].

Under CCJA arbitration and as stated under Article 29 of the CCJA Arbitration Rules, a claim for annulment is admissible as soon as the award is rendered, and provided that the parties did not agree to exclude the possibility of claiming an annulment. It ceases to be admissible if it has not been made within two months from notification of the award.

The CCJA decides on the claim for annulment according to its rules of procedure[65].

If the CCJA decides to annul the award, the parties may request the CCJA to rule on the case itself. Arbitration proceedings are otherwise meant to resume their course at one party's request, starting over at the last procedural act that was validly taken[66].

Enforcement of the arbitration award

Pursuant to Article 30 UAA, the award can only be subject to compulsory enforcement in an OHADA Member State by virtue of an exequatur awarded by the State court having jurisdiction. In the DRC, pursuant to Article 184 of the Code of Civil Procedure, the request for exequatur is to be brought before 'the president of the tribunal having jurisdiction', *i.e.* the court of first instance chosen by the parties, in accordance with Article 166.

The party requesting an exequatur must file an original copy of the award and of the arbitration agreement, or copies of these documents satisfying the conditions required for their authenticity[67]. Where the documents are not written in French, the party must produce a translation certified by a translator registered on the list of experts established by the courts having jurisdiction[68].

The sole ground for refusal of recognition provided for in the UAA concerns the case where the award is manifestly contrary to the international public policy of OHADA Member States[69]. However, it is also generally accepted that an award may not be enforced in a Member State if the same award has previously been annulled in another Member State[70].

The only appeal against a judgment refusing to grant an exequatur of the award is a *cassation* appeal before the CCJA. No appeal is possible against a judgment granting an exequatur. However, a claim for annulment of the award automatically entails an appeal against the court decision allowing the exequatur[71], while the rejection of a claim for annulment confirms the decision granting the exequatur[72].

Pursuant to Article 34 UAA, awards rendered on the basis of rules different from those provided for by the UAA are recognised as binding within the OHADA Member States under the conditions set out in applicable international conventions. The conditions contained within the UAA apply in the absence of applicable conventions on the subject-matter.

Under the CCJA Arbitration Rules, an award can only be subject to compulsory enforcement in an OHADA Member State by virtue of an exequatur awarded by the chairperson of the CCJA, following unilateral proceedings[73].

Whether the exequatur is granted or denied, the parties may appeal such decision before the CCJA, which will decide based on an adversarial procedure, in accordance with Article 30.4 of the CCJA Arbitration Rules.

The exequatur may be denied based on the reasons justifying invalidity of the award pursuant to Article 30.6 of the CCJA Arbitration Rules, *i.e.*:

- there is no (valid) arbitration agreement;

- the arbitral tribunal has decided on the case without conforming to its mission;
- the arbitration proceedings did not comply with the principle of adversarial procedure, according to which the parties must have equal opportunity to present their case; or
- the award is contrary to international public policy.

The exequatur may also be denied if the proceedings have been started with a view to challenging the validity of the award, in accordance with Article 30.3 of the CCJA Arbitration Rules. In such an event, the proceedings are consolidated and the resulting decision cannot be challenged[74].

Investment arbitration

The DRC is a party to the ICSID Convention and to five bilateral investment treaties ('**BIT**s') concluded notably with the United States, France and Belgium[75].

The DRC does not have a model BIT, but the Southern African Development Community, of which it is a member, does[76].

The DRC has also adopted an Investment Code[77], which applies to both national and foreign direct investments, but not to certain areas such as the mining industry and the insurance sector. That Code provides for a procedure for the admission of investments in the DRC, contains certain rules for the protection of investors such as a non-discrimination rule except in tax matters and a fair and equitable treatment rule, and institutes a National Agency for the Promotion of Investments, the 'Anapi', which is working to attract new investments notably through administrative simplification. The Code also contains an arbitration clause, stating that disputes between the DRC and investors on the application of the Code are subject to ICC or ICSID arbitration. The *Abou Lahoud v. DRC* case was started on the grounds of that arbitration clause.

The DRC has been a respondent in nine ICSID arbitrations. It lost three of them[78], but one of those three awards was annulled[79]. The tribunal found that it had no jurisdiction in two cases[80], and the four other cases were discontinued[81].

Decisions against the DRC

Two ICSID awards were rendered against the DRC, in the cases *AMT v. Zaïre*[82] and *Antoine Abou Lahoud v. the DRC*[83].

* * *

Endnotes

1. See http://www.ohadalegis.com/anglais/AUArbitrage_gb.pdf.
2. See Art. 35 UAA.
3. See Title V of the Decree of 7 March 1960 on the Code of Civil Procedure.
4. CCJA, Advisory opinion No. 001/2001/EP of 30 April 2001.
5. Art. 1 UAA. As of today, there are 17 Member States of the OHADA, the DRC being the last state to have joined the organisation.
6. Art. 35 UAA. See also CCJA, judgment No. 23/2004 of 17 June 2004, *Parti Démocratique de Côte d'Ivoire v. Société J & A International Compagnie*, JURIDATA No. J023-06/2004.

7. Règlement d'arbitrage de la Cour Commune de Justice de l'OHADA du 11 mars 1999, *J.O. OHADA*. 15 May 1999, No. 8, p. 9.
8. Art. 2.1 CCJA Arbitration Rules.
9. See http://cac-rdc.net/reglement_arbitrage.pdf.
10. See http://www.cenacom.cd.
11. It seems that only seven CENACOM arbitration proceedings were initiated in 2014.
12. G-A. Dal and F. Tchekemian, 'Le droit OHADA de l'arbitrage', *DAOR*, 2014, pp. 161-183, No. 10.
13. B. Le Bars, 'Regard à partir du droit de l'arbitrage OHADA', *in* Cadiet L. (éd.), *Droit et attractivité économique: le cas de l'OHADA*, Coll. Bibliothèque André Tunc, T. 48, Paris, IRJS Editions, 2013, p. 104.
14. Art. 4.2 UAA.
15. B. Martor, N. Pilkington, D. Sellers, S. Thouvenot, *Le droit uniforme africain des affaires issus de l'OHADA*, Paris, éditions du Jurisclasseur, 2004, p. 253.
16. B. Le Bars, *op. cit.,* p. 113.
17. See also Article 21 CCJA Arbitration Rules.
18. Art. 13.2 UAA.
19. Art. 13.1 UAA; CCJA, judgment No. 9 of 29 June 2006, *F.K.A. vs H.A.M.*, JURIDATA No. J009-06/2006 (*Contra* the English text of Art. 13.1 UAA).
20. Art. 13.3 UAA; CCJA, judgment No. 9 of 29 June 2006, *op. cit.*
21. G-A. Dal and F. Tchekemian, *op. cit.,* No. 43.
22. *Ibid*.
23. Art. 1 UAA.
24. G-A. Dal and F. Tchekemian, *op. cit.,* No. 50.
25. Article 14 UUA; Article 16 CCJA Arbitration Rules.
26. Art. 14.4 UAA.
27. Art. 14.5 UAA.
28. Art. 14.6 UAA.
29. N. Angelet, 'L'Acte uniforme relatif au droit de l'arbitrage', *in* P. De Wolf and I. Verougstraete (eds.), *Le droit de l'OHADA: son insertion en République Démocratique du Congo*, Brussels, Bruylant, 2012, p. 114.
30. Art. 19.3 CCJA Arbitration Rules.
31. Art. 14 CCJA Arbitration Rules.
32. See Article 3 CCJA Arbitration Rules. Please note however that in case of any failure of the parties, the necessary appointments will have to be made by the CCJA and not by the national court.
33. Art. 6 UAA.
34. Art. 8.2 UAA.
35. Art. 5.1 and 7.3 UAA.
36. *Ibid*.
37. *Ibid*.

38. Art. 7.4 UAA.
39. Art. 7.5 UAA.
40. G-A. Dal and F. Tchekemian, *op. cit.*, No. 37.
41. G. Affaki and A. Koenig, 'Nouvelles tendances de l'arbitrage international en Afrique: le cas des litiges financiers', *Rev. Arb*., 2014, p. 578, no. 41.
42. G. Affaki and A. Koenig, 'Nouvelles tendances de l'arbitrage international en Afrique: le cas des litiges financiers', *Rev. Arb*., 2014, p. 578, no. 41.
43. Art. 10.5 CCJA Arbitration Rules.
44. Art. 10.5 and 30.2 CCJA Arbitration Rules.
45. Art. 10.5 CCJA Arbitration Rules.
46. Art. 20 UAA.
47. Art. 20 UAA.
48. The other draft awards are only communicated to the CCJA for its information.
49. Art. 24.3 CCJA Arbitration Rules.
50. CCJA, judgment No. 010/2003 of 19 June 2003, *Delpech v. Soctaci*, JURIDATA No. J010-06/2003.
51. Art. 26 UAA.
52. See Art. 12 and 16 UAA, and CCJA, judgment No. 044/2008 of 17 July 2008, *SARCI Sarl v. Atlantique Telecom SA and Telecel Benin SA*, JURIDATA No. J044-07/2008.
53. G-A. Dal and F. Tchekemian, *op. cit.* No. 65.
54. *Ibid*.
55. Art. 25.4 UAA.
56. N. Angelet, *op. cit.,* p. 110.
57. Art. 25.5 UAA.
58. See Art. 29 CCJA Arbitration Rules.
59. The CCJA decision has not been published but the arbitrators reportedly published an open letter denouncing what they called a 'judicial heresy'. See http://kluwerarbitrationblog.com/2016/02/10/a-step-back-for-ohada-arbitrations/.
60. See Art. 32 and 33 CCJA Arbitration Rules.
61. Art. 28.1 UAA.
62. Art. 28.2 UAA.
63. Art. 29 UAA.
64. Art. 25.3 UAA.
65. See http://www.droitcongolais.info/files/0.2.80.2.-Traite-OHADA_Cour-de-justice_Reglement. pdf.
66. Art. 29.5 CCJA Arbitration Rules.
67. Art. 31.2 UAA.
68. Art. 31.3 UAA.
69. Art. 31.4 UAA.
70. N. Angelet, *op. cit.*, p. 118.
71. Art. 32 UAA.

72. Art. 33 UAA.
73. Art. 30.1 and 2 CCJA Arbitration Rules.
74. B. Le Bars, *op. cit.,* p. 115.
75. Although it has signed 11 other BITs not (yet) in force.
76. See http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875.
77. The 004-2002 Act containing the Investment Code.
78. *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997; *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award, 9 February 2004; *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award, 7 February 2014, which the *ad hoc* committee refused to annul (Decision on Annulment, 29 March 2016).
79. *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.
80. *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award on Jurisdiction, 1 September 2000; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction, 29 July 2008.
81. *Ridgepointe Overseas Developments, Ltd. v. Democratic Republic of the Congo and Générale des Carrières et des Mines*, ICSID Case No. ARB/00/8; *Miminco LLC and others v. Democratic Republic of the Congo*, ICSID Case No. ARB/03/14; *Russell Resources International Limited and others v. Democratic Republic of the Congo*, ICSID Case No. ARB/04/11; *International Quantum Resources Limited, Frontier SPRL et Compagnie Minière de Sakania SPRL v. République démocratique du Congo*, ICSID Case No. ARB/10/21.
82. *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997.
83. *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award, 7 February 2014, which the *ad hoc* committee refused to annul (Decision on Annulment, 29 March 2016).

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Cyprus

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Introduction

There has been a large increase in the use of arbitration as a commercial dispute resolution method in Cyprus because of its development as an international business centre, but Cyprus has not yet succeeded in becoming a popular venue for international arbitrations. However, an increase in the initiation of litigation proceedings seeking interim relief of foreign arbitration procedures can also be identified.

Domestic arbitration in Cyprus is governed by the 1944 Arbitration Law, Cap. 4 (the "**Arbitration Law**"). The International Arbitration in Commercial Matters Law 101/1987 (the "**IACM**") applies exclusively to international commercial disputes and it can be argued that it is similar, if not identical, to the UNCITRAL Model Law of 1985 (the "**UNCITRAL Model Law**"). According to section 3(1) of the IACM Law, the IACM Law applies solely to arbitrations that are of both an international and commercial nature. Furthermore, section 2 of the IACM Law sets out an exhaustive list of definitions and examples which clarify when a dispute is considered as international and/or commercial. Specifically, a dispute is considered as 'international' if the parties had their place of business or relevant commercial relations in different countries when they entered into the contract and a dispute is considered 'commercial' if it relates to matters that arise from relationships of commercial nature, whether contractual or not.

In *Lucan Invest Ltd v. Alverstone Trade & Invest Ltd* (decision of the District Court of Nicosia, dated 28 August 2012), it was held that a shareholders' dispute is of a commercial nature.

It must be stated that Cyprus is also a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "**New York Convention**") which has been ratified and implemented in Cyprus with the Law on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Ratification) 84/1979 (the "**Ratification Law**"). It should be noted, however, that the IACM Law mirrors the New York Conversion.

In addition, Cyprus is party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

There is neither a statutory international arbitration body in Cyprus, nor a special Court on arbitration. However, the most prominent alternative dispute resolution mechanisms established to administer arbitration proceedings in Cyprus are the Cyprus Chamber of Commerce and Industry (the "**CCCI**"), the Cyprus Eurasia Dispute Resolution and Arbitration Centre (the "**CEDRAC**") and the Cyprus Arbitration and Mediation Centre (the "**CAMC**"). However, the focus in Cyprus remains on Cypriot Courts' assistance by way of interim reliefs in aid of foreign arbitrations, and on enforcement of foreign arbitration

awards. The reason for this is that shareholders' and other agreements in relation to Cyprus Holdings Companies often contain an arbitration clause in favour of foreign arbitration venues, the London Court of International Arbitration being the most common one.

Arbitration agreement

An arbitration agreement is a written agreement which submits present or future disputes to arbitration and, under common law principles, an arbitration agreement has to be clear and certain.

According to section 2(1) of the Arbitration Law, an arbitration agreement is a written agreement which submits present or future disputes to arbitration. Similarly, section 7 of the IACM Law states that in order for an arbitration agreement to be valid it must be in writing. Also, the same requirement for a written arbitration clause can be found in section 2(2) of the New York Convention which, as stated above, was ratified in Cyprus by the Ratification Law. Pursuant to section 2(2) of the Ratification Law:

> "*[T]he term agreement in writing shall include an arbitral clause in a contract of an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*"

However, it can be argued that, according to the common law principles, in order for an arbitration agreement to be valid, its terms must be clear and certain since an arbitration agreement will be void if its terms are uncertain. Furthermore, the parties can select the seat and language of the arbitration, the number and powers of the arbitrators as well as their appointment procedure, the applicable law and regulations.

An agreement is considered to be in writing if it is contained in a document signed by the parties, or in exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. In *Finnegan v Sheffield City Council (1988) 43 B.L.R. 124*, the Court held that when it is not clear whether the dispute under a contract is referred to arbitration, the arbitration clause cannot be deemed as valid.

The Cypriot Courts respect the parties' choice to enter into arbitration agreements and if they are satisfied of the intention of the parties to resolve their disputes through arbitration, the Cypriot Courts will try to interpret the arbitration clause in the most suitable manner in order to be valid and enforceable. An example of the willingness of the Courts to meet the need of the parties to arbitrate is the 'doctrine of separability', with which the Courts can uphold an agreement to arbitrate even when there is a clause which one of the parties is in breach of. In this case, the arbitration clause will survive, but the remaining contracts will be deemed as invalid. Hence, an arbitration agreement may be in the form of an arbitration clause which is duly incorporated in the agreement or stands alone as a separate agreement.

According to section 16 of the IACM Law, the arbitrators appointed can determine their own competence, thus they are able to determine their own jurisdiction. This is known as the 'doctrine of competence-competence'.

Furthermore, there are particular statutory issues as to the content of an arbitration clause apart from evidencing the intention of the parties to submit all or any present or future differences or disputes to arbitration. It is advisable, however, to include specific details as to the procedure to be followed in the proposed arbitration, such as the specific arbitral rules under which the proceedings will take place, the appointment, number and powers of arbitrators, and the seat and language of the arbitration.

Cypriot Courts generally take an approach to the construction of arbitration clauses that is friendly to arbitration and there is no particular wording that must be used, but the more specific the terminology used the better, in order to include, for example, torts.

The formalities of international arbitration are based on an agreement between the parties which will clarify that, when a dispute arises on any matter under a contract, those parties (1) will submit their dispute to an arbitral tribunal instead of going to Court; (2) the arbitrator(s) will resolve the dispute based on the relevant laws; and (3) the decision of the arbitrator(s) will be final and binding on both sides.

Any matter concerning criminal law, matrimonial and family law or which may have public policy implications is considered to be non-arbitrable. In addition, a Tribunal will have limited powers to make orders which affect the status of a Cyprus Company such as a winding up order or rectification of a company's register of members, though the substantive dispute may be arbitrable. Further, the Arbitration Law provides that when a question of fraud of one of the parties is raised, Courts have the competence to decide the question and to cease the effects of any arbitration agreement.

A third party cannot be bound by arbitration proceedings to which he has not consented or by an arbitration clause in a contract to which he is not party, since for a contract to be valid and legally binding, the free consent of parties competent to contract is required under section 10(1) of Contracts Law, Cap. 149. However, a third party may voluntarily join and/or participate in the arbitration process, provided that the other parties consent to their participation.

Arbitration procedure

Pursuant to section 24(3) of the Arbitration Law, arbitral proceedings are deemed to be commenced when one of the parties to the arbitration agreement serves the other party or parties with a notice of dispute. This will also depend on the particular arbitral rules provided for in the contract.

There are no specific procedural rules which apply in international commercial arbitrations, hence the parties are free to select the rules which will be followed.

In the absence of an agreement between the parties, the Tribunal can decide the admissibility and relevance of any evidence brought in front of it or may request the assistance of the Court. The Tribunal may also order disclosure of any documents which may be relevant to the dispute.

It must be stated that arbitrations are confidential since they are conducted in private. Also, the professional privilege imposes the rule that all communications are deemed as confidential. Such privilege can only be waived upon the consent of the party concerned or where it will be illegal to act otherwise. Consequently, the duty of confidentiality is not absolute since disclosure is permitted: (1) where it is reasonably necessary for the protection of the parties; (2) for the purposes of invoking the supervisory roles of the Court over arbitration awards for the purpose of enforcing the award itself; (3) where the public interest or the interests of justice require such disclosure; and (4) where there is an express or implied consent of the parties concerned.

Furthermore, the IBA Rules are considered as useful guidance to documents and evidence and may be taken into account, at the discretion of the arbitral tribunal or if so agreed between the parties.

As far as expert evidence is concerned, article 26 of IACM empowers the arbitral tribunal, unless otherwise agreed by the parties, to appoint experts to report on specific issues and to

require a party to provide the expert with any relevant information or to produce or provide access to any relevant documents, goods or other property for his inspection.

Arbitrators

There are no provisions in the domestic legislation limiting the freedom of the parties to arbitration proceedings to select arbitrators. As well as domestic legislation, the parties in international commercial disputes can select anyone as an arbitrator. The parties shall have equal rights in arbitration proceedings.

Section 11(3) of the IACM Law provides that, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the remaining arbitrator will be selected by the appointed arbitrators. If a party fails to appoint the arbitrator within 30 days of the receipt of a request to do so from the other party, or in the event that the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made by the Court upon the request of either party. However, in an arbitration with one arbitrator, in the case of a disagreement between the parties, the arbitrator shall be appointed by the Court upon request of either party. Similarly, according to section 11(4) of the IACM Law and section 10 of the Arbitration Law, the Cypriot Courts have the power to intervene in the appointment of an arbitrator if a party fails to act according to the arbitration agreement, if the parties or the two appointed arbitrators are unable to proceed as agreed, or where a third person, natural or legal, fails to act according to procedure.

Furthermore, as section 12 of the IACM Law states, an arbitrator shall possess the necessary skills and knowledge and shall remain impartial and independent at all times, otherwise a party can seek his removal and, according to section 13 of the IACM Law, a party which intends to challenge an arbitrator, shall, within 15 days after becoming aware of any circumstances that give rise to justifiable doubts to the above, make a proposal for challenging the arbitrator to the arbitral tribunal. Then the arbitral tribunal will reach a decision which will be final.

If there is no agreement between the parties, the Tribunal has the power to issue interim protective measures.

The IACM Law expressly provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, and also requires a Court or other authority to have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, when appointing an arbitrator. Further, the IACM Law transposes the disclosure requirement of the UNCITRAL Model Law and imposes an obligation on a person who is approached in connection with his possible appointment as an arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence. While the IBA Guidelines are not binding, they may be taken into account as relevant guidance.

Interim relief

It is relatively common for Cyprus Courts to be requested to provide assistance in aid of foreign arbitrations in the form of interim relief just before or pending foreign arbitration proceedings. Such an interim relief may take the form of injunctions restraining a Cyprus Company involved in foreign arbitration proceedings from disposing of assets, so as to ensure that a successful party will not be frustrated in its attempt to enforce a possible arbitration award in its favour. The legal basis for an application for such interim relief

in the context of an international arbitration is section 9 of the IACM Law, which reads as follows:

> "*It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure.*"

The requirements for granting interim relief in the context of an international arbitration are found in section 32 of the Courts of Justice Law, N.14/1960 (the "**CJL**"), which reads as follows:

> "*(1) In the application of any procedural rule, every court, in the exercise of its civil jurisdiction, may issue a prohibitive order interim, permanent or prohibitive or to appoint a receiver in all cases where the court may deem this to be just or beneficial, even if no damages or other remedy are sought or awarded with the same.*
>
> *It is provided that an interim prohibitive order shall not be issued unless the court is satisfied:*
>
> *(1) that there is a serious issue to be tried during the hearing process,*
>
> *(2) that there is a possibility that the applying party is entitled to the remedy,*
>
> *(3) that unless an interim prohibitive order is issued it shall be difficult or impossible to disseminate full justice at a later stage, and*
>
> *(4) that in all circumstances the balance of convenience lies in favour of the granting of the injunction*."

Procedurally, an application for interim relief in aid of foreign arbitration is made under Order 48 Rule 2 of the Civil Procedure Rules and section 4 of the Civil Procedure Law, and such an application must be supported by an affidavit stating the facts of the case and showing that the application satisfies the requirements set out in section 32 of the CLJ, as described above.

Provided that the applicant satisfies the Court that there is an element of urgency, the Cyprus Courts have jurisdiction to grant interim relief in aid of foreign arbitration proceedings, as provided in section 9 of the IACM Law, even on an *ex parte* basis and without notice to the Respondent.

In case the Applicant applies *ex parte* for interim relief in aid of foreign arbitration proceedings, the Applicant is under a duty to disclose at the *ex parte* hearing, fully and frankly, all material facts and documents of the case to the Court. Any failure or omission to comply with this duty will inevitably result in the automatic cancellation of the *ex parte* obtained interim orders by the Court. What constitutes material facts, and documents, depends on the decision of the Court and not what the Applicant or his lawyers consider as such.

It is an absolute requirement of Cyprus law that the Applicant files a counter-security in order to cover all losses to be caused to the Respondent, due to the issue of the injunctions or the interim orders, in the event that the same is found by the Court at a later stage than they were issued, without any reasonable cause or *mala fides*. The amount, as well as the form of such counter-security, is at the discretion of the Court (a counter-security may take the form of a cash deposit with the Court Registrar, or of a letter of bank guarantees to be issued by a Cyprus bank, or a written undertaking of the Applicant). For Applicants outside Cyprus or the EU, the counter-security usually takes the form of a letter of bank guarantee. A Respondent has the right to apply for the increase of the amount of the counter-security, or its form, provided that there is supporting evidence for such a request, but again, any decision for the increase or the form of the counter-security is at the discretion of the Court.

Among others, the following types of interim orders can be issued by Cyprus Courts in aid of foreign arbitration proceedings:

(a) *Freezing injunctions of assets*: Such injunctions can be issued in relation to assets situated within Cyprus or in relation to assets situated outside Cyprus, but under the control of persons residing in Cyprus, and they are subject to the *in personam* jurisdiction of the Cyprus Courts.

(b) *Prohibiting orders*: Interim orders prohibiting the exercise of certain acts or the implementation of certain steps. The Court may grand such interim orders prohibiting, for example, the convention of a General Meeting of a Cyprus Company, the implementation of corporate decisions of a Cyprus Company, etc.

(c) *Appointment of Interim Receiver*: In appropriate circumstances, Cyprus Courts have jurisdiction to appoint an interim receiver over the assets of a Respondent, as an ancillary relief in order to support the protective regime imposed by a freezing order or any other interim order, including in relation to a Cyprus Company, by granting to the interim receiver the right to exercise the voting rights of holding companies in their subsidiaries in order to protect their assets, etc.

(d) *Chabra Orders or Garnishee Orders*: The Cyprus Courts have jurisdiction to issue Chabra Orders, where there are grounds to believe that a co-respondent is in possession or control of assets to which the principal Respondent is beneficially entitled, although the co-respondent may be no party to the foreign arbitration proceedings.

Under the IACM Law, a Tribunal, without the assistance of the Court, has the power to order interim protection for any of the parties if an agreement does not exist and can also request guarantees from any of the parties regarding such relief.

For the protection of arbitration proceedings, the Court has, in international arbitrations, the power to issue such related measures at any time and during the arbitration proceedings. Regarding domestic arbitrations, the Court has the power to issue different types of preliminary or interim relief during the arbitration proceedings (security costs, discovery of documents, securing the amount of the dispute, etc.). The Courts will issue such interim reliefs when and if the requirements provided by the applicable laws are satisfied. These interim reliefs are not final.

Arbitration award

An arbitral award must be in writing and signed by the arbitrator, shall state the reasons upon which it is based, unless the parties agree that no reasons are to be given or the award is a consent award, and shall be dated and state the place where it was made. A copy of the award has to be sent to each party and the Tribunal has authority to award costs. A costs order requires the losing party to pay part or all of the successful party's legal and arbitration expenses. The Tribunal has the power to make an award of simple or compound interest if the rules do not provide for this.

A Court application to set aside an arbitral award has to be made within three months of the notification of the award, otherwise it is inadmissible. In the case that an application for a corrective/supplementary award is made, the three-month deadline starts from the day that the arbitral tribunal decides upon the application.

In accordance with Arbitration Law, any provision in an arbitration agreement as to costs of the reference or award shall be void. As such, the costs of the reference and award shall be at the discretion of the arbitrators who shall direct to whom and in what manner such costs shall be paid. If no provision is made by an award with respect to the costs of the

reference, any party to the reference may, within 14 days of the publication of the award (or such further time as a Court may direct), apply to the arbitrator for an order directing by and to whom such costs shall be paid, and thereupon the arbitrator shall amend the award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference to arbitration. There are no similar provisions to this effect in the IACM Law. Regardless, the "loser pays" or "costs follow events" rule is a usual practice in Cyprus; however, the losing party may be reimbursed a fraction of the fees and costs if the prevailing party is deemed to be contributorily liable.

Challenge of the arbitration award

Even if the arbitration agreement provides that the decision of the arbitrator is final, the UNCITRAL Model Law sets out the basis for challenging an arbitral award. Hence, an arbitration award may only be set aside only on proof that: (1) a party to the arbitration agreement was under a legal incapacity; (2) the agreement is invalid; (3) the party was not given notice of the arbitration; (4) the party was not permitted to present its case; (5) the decision is outside the arbitrator's jurisdiction under the agreement; (6) the subject matter of the dispute cannot be settled by arbitration; and (7) the award is in conflict with public policy.

In domestic arbitrations, the parties are entitled to appeal the arbitral award: (1) in the case of misconduct by the arbitrator; (2) if the arbitration was conducted irregularly; and (3) if the arbitral award was issued irregularly.

The deadline for an application for the annulment of an award is three months after the award is issued by the Tribunal. The Court can order for any payment until the final issuance of a judgment.

Enforcement of the arbitration award

The Cyprus Courts have shown a supportive approach to the enforcement of foreign arbitral awards, as the vast majority of challenges to a foreign arbitration award are rejected, and the strong presumption in favour of registering and enforcing a foreign arbitration award has been reiterated in a number of cases, the most notable being the decision of the Supreme Court in *The Attorney General of the Republic of Kenya v. Brauw Bank of Austria* [1999] 1 CLR 585. In this case, the Supreme Court stated that the only reasons under which an application for the recognition and enforcement of an award may be refused are those provided in Article V. 1 (a) to (e) of the New York Convention.

The Cyprus Court will only enquire as to whether the correct procedure has been followed, meaning that the pre-requisites to enforcement set out in the New York Convention have been complied with. In *Re Beogradska Banka D.D.* (1995) 1 CLR 737 at p.756, it was held that:

> "*Judicial examination of the arbitral award which is made in accordance with articles IV and V of the Convention is in my view supervisory, it has a procedural character and it does not encroach upon the decision of the arbitrators. Some departure may be said to exist in respect of the provisions of para 2(b) of article V of the Convention which relates to matters of public order, which is examined ex proprio motu by the court. But again this is procedural and although the court examines the content of the decision of the arbitrators it limits itself only to the issue of determining whether the arbitral award is contrary to public policy and it does not embark upon a diagnosis of the substance of the award ... the court does not enter into the substance of the case or the wisdom of the arbitral award. The court does not determine the rights of the parties and no rights of action arise out of the recognition and enforcement*."

The Ratification Law contains two sections which aid the enforcement of international arbitration awards in Cyprus.

Section 6 of the said Law, which is restrictive in nature, states:

> "*In matters governed by this Law, no Court shall intervene except where so provided in this Law*."

Section 34 of the said Law sets out in detail the specific instances in which a national Court may intervene and refuse the recognition of an international arbitral award as follows:

> "*(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside in accordance with the following provisions of this section.*
>
> *(2) An arbitral award may be set aside by the Court only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in section 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Republic of Cyprus; or (ii) the party making the application was not given proper notice of the appointment of an arbitration or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law, or, failing such agreement, was not in accordance with this Law; or (b) the Court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Cyprus; or (ii) the award is in conflict with provisions relating to public order of the Republic of Cyprus.*
>
> *(3) 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 section 33, from the date on which that request had been disposed of by the arbitral tribunal.*
>
> *(4) 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 in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside*."

The IACM Law is subservient to the New York Convention, in accordance with both Article 169 of the Constitution of Cyprus, which gives precedence to international convention and treaty obligations over local law, and in accordance with section 3 (1) of the IACM Law itself.

Although Cyprus Courts greatly facilitate the enforcement of international arbitral awards and do not deny enforcement and recognition on substantive grounds, an Applicant should comply with the enforcement and the technicalities.

Cyprus Courts have interpreted strictly and narrowly the provisions of Article IV of the New York Convention and consequently debtors, under foreign arbitral awards, have several possibilities to raise objections against recognition and enforcement.

Article IV, paragraph 1, provides that the party applying for recognition and enforcement of a foreign arbitral award shall produce:

(a) the original duly authenticated arbitral award or a duly certified copy thereof; and
(b) the original or a duly certified copy of the arbitration agreement.

For enforcement purposes, "*authenticated*" means that the award must be signed by all the arbitrators and that their signatures must be legalised by the competent authority. A certified copy of the arbitration agreement shall also be legalised.

Pursuant to paragraph 2 of Article IV of the New York Convention, the applicant shall produce translations into Greek of the arbitral award and the arbitration agreement which shall be certified by an official or sworn translator or by a diplomatic or consular agent. Certified translations can be done in Cyprus only by the Press and Information Office which has been designated by the Cyprus Council of Ministers as the competent authority to effect official translations. Translations effected by lawyers or professional translators have been declared by Cyprus Courts as insufficient to meet the requirements of Article IV of the New York Convention.

A dismissal of such enforcement application, on the ground that the applicant has not presented all the required documents under Article IV of the Convention, does not engage the *res judicata* rule, and the applicant may file a new request for recognition or enforcement of such foreign arbitral award.

Since Cyprus has accepted the New York Convention with a specific reservation of reciprocity, Cyprus Courts will enforce foreign arbitral awards originating from a signatory country to the New York Convention. Otherwise, foreign arbitral awards issued in countries which are not signatories to the Convention can only be enforced in Cyprus either by an action based on the award or on the original cause of action, the procedure of which is more lengthy and costly.

Investment arbitration

It must be stated that Cyprus is also a party to bilateral agreements related to arbitration. Such agreements include, among others, Armenia 1996, Bulgaria 1997, Egypt 1999, Czech Republic 2002, Lebanon 2003, Israel 2003 and India 2004. Also, Cyprus has signed multilateral treaties which provide resolution of disputes by arbitration through appropriation of foreign investments.

Conclusion

Cyprus is trying to move forward in order to become a suitable arbitration venue, since arbitration proceedings can be considered a fair process for resolving disputes.

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References

Table of statutes and regulations

1. http://www.cedrac.org.
2. http://www.ccci.org.cy.
3. http://www.ciarb.org.
4. http://www.uncitral.org.
5. Arbitration Law 1944 – Cap. 4.
6. Civil Procedures Rules.
7. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Ratification) 84/1979.

8. Courts of Justice Law N.14/1960.
9. International Arbitration in Commercial Matters Law 101/1987.

Table of Cases

1. *Finnegan v. Sheffield City Council (1988) 43 B.L.R. 124*.
2. *Lucan Invest Ltd v. Alverstone Trade & Invest Ltd (2012), Judgement of the District Court of Nicosia, dated 28/08/2012, in the Application No. 1183/2011 [unreported]*.
3. *The Attorney General of the Republic of Kenya v. Brauw Bank of Austria (1999) 1 CLR 585*.
4. *Re Beogradska Banka D.D. (1995) 1 CLR 737*.

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Egypt

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Introduction

Arbitration proceedings seated in Egypt are governed by the Egyptian Act on Arbitration in Civil and Commercial Matters (Law No. 27 of 1994) ("Arbitration Act"). Apart from domestic arbitrations, the Arbitration Act further governs arbitration proceedings not seated in Egypt, where the parties have agreed to conduct the arbitration according to its provisions.

The Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("UNCITRAL Model Law"). The Arbitration Act departs from the UNCITRAL Model Law in some respects, such as the stipulation that the arbitral tribunal may only grant interim relief if it is expressly empowered by the parties to do so, and that an award may be annulled if the arbitrators failed to apply the law agreed on by the parties to govern the merits the dispute.

Egypt is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention") without reservations. Egypt is also a party to the Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards ("Arab League Convention"). In addition, Egypt is a party to several bilateral treaties on judicial cooperation in civil and commercial matters.

The Cairo Regional Centre for International Commercial Arbitration ("CRCICA"), established in 1979, is the main arbitration institution in Egypt. CRCICA adopted the UNCITRAL Arbitration Rules with minor modifications. The present CRCICA Arbitration Rules, which entered into force in 2011, are based on the new UNCITRAL Arbitration Rules as revised in 2010. CRCICA administers institutional arbitrations and provides assistance in *ad hoc* arbitral proceedings upon the request of the parties.

While there are no special courts for arbitration in Egypt, the Arbitration Act provides that the Cairo Court of Appeal shall have jurisdiction over certain arbitration matters, including matters arising in the context of institutional arbitrations located in or outside Egypt and arbitrations seated outside Egypt where the parties have agreed to conduct the arbitration according to the Arbitration Act.

Arbitration agreement

The Arbitration Act defines an arbitration agreement as "an agreement between the parties to resort to arbitration to settle all or certain disputes that have arisen or that may arise between them in relation to a contractual or non-contractual legal relationship".

Arbitration agreements must be concluded by natural or juristic persons having legal capacity, and must be in writing. An agreement is considered to be in writing if it is

included in a document signed by the parties or in correspondence exchanged between them. Furthermore, the parties may conclude an arbitration agreement by referring in their contract to a document containing an arbitration clause and by stipulating expressly that the arbitration clause shall apply. The parties may also conclude an arbitration agreement by adopting a model contract, international convention or other documents including an arbitration clause.

The Arbitration Act stipulates that matters which cannot be settled by compromise are not arbitrable. Under Egyptian law, matters that cannot be settled by compromise are, in particular, those relating to personal status or public policy.

The Arbitration Act is silent on the joinder or consolidation of third parties in arbitral proceedings. In this regard, the Egyptian Court of Cassation has decided that a parent company may be joined to an arbitration agreement concluded by its subsidiary only in certain cases. In particular, the parent company may be joined if it is party to the arbitration agreement, if it agrees to the application of the arbitration agreement, if it has interfered in the conclusion, performance or termination of the contract, or if there is confusion as to the intentions of the parent company and its subsidiary in concluding the contract.

The separability of the arbitration agreement is recognised by the Arbitration Act. Accordingly, the nullity, rescission or termination of the main contract does not affect the arbitration clause contained in it, provided that the arbitration clause itself is valid.

Arbitration procedure

The arbitration proceedings commence on the day that the respondent receives the notice of arbitration, unless the parties agree otherwise.

The parties may agree on the seat of the arbitration, which may be in Egypt or abroad. Absent an agreement between the parties, the arbitral tribunal may determine the seat of the arbitration, taking into consideration the circumstances of the case and the convenience of the seat for the parties. Notwithstanding the seat of the arbitration, the proceedings, including hearings, may be conducted at any location decided by the arbitral tribunal.

The Arbitration Act affords the parties the power to agree on the procedure governing the conduct of the arbitration, including the selection of procedural rules applied by an arbitration institution located in or outside Egypt. The parties' agreement must, however, respect the mandatory rules of the Arbitration Act, particularly the rule that the parties must be treated equally and given an adequate and full opportunity to present their case.

Absent an agreement between the parties on procedure, the rules of the Egyptian Code of Civil Procedure and the Egyptian Law of Evidence do not apply by default to the arbitration proceedings. Rather, the Arbitration Act empowers the arbitral tribunal to determine the procedural rules of the arbitration as it sees fit, while taking into consideration the provisions of the Arbitration Act.

The Arbitration Act includes, for example, the following procedural rules:

- Regarding documentary evidence, the Arbitration Act stipulates that the parties may rely on copies of documents, subject to the arbitral tribunal's right to require the submission of the originals.
- Witnesses and experts are not heard under oath, which is a departure from the rules of evidence applied in court proceedings.
- If a witness fails to appear before the arbitral tribunal or refuses to answer questions, the tribunal may request the court to impose a fine on the witness.

- A party may request the arbitral tribunal to order the other party to disclose documents in its possession. Absent an agreement between the parties, however, it is unclear whether the arbitral tribunal may order the disclosure of documents at its own initiative. The Arbitration Act only regulates the case where a party fails to disclose documents when so requested. It states, in this regard, that the arbitral tribunal may continue the proceedings and render an award based on the evidence submitted. It is uncertain whether this provision recognises the arbitral tribunal's general power to order the disclosure of documents, or whether it only applies in case of an agreement by the parties empowering the tribunal to do so.
- As regards expert evidence, the Arbitration Act empowers the arbitral tribunal to appoint experts to provide oral or written reports on any issue in the arbitration. The arbitral tribunal is required to submit to the parties a copy of its decision setting out the scope of the expert's mission. The parties must provide the expert with any requested information and allow the expert to examine the documents, goods or assets related to the dispute. The parties are entitled to receive a copy of the expert's report, make comments and examine the documents relied on by the expert. A hearing to take the expert's testimony may also be held upon the request of a party or at the arbitral tribunal's own initiative. Unless agreed otherwise, the parties may examine the witness or present their own expert to opine on the issues dealt with in the tribunal-appointed expert's report.
- Regarding confidentiality, the Arbitration Act stipulates that an award or any part of it may only be published with the consent of both parties. The documents of the arbitration, including the award, may, however, become public if they were submitted before the court in arbitration-related proceedings. The Arbitration Act does not contain any provisions on the arbitral tribunal's power to protect confidential information, or on privilege.

Arbitrators

The parties may agree on the number of arbitrators. If the parties agree that the arbitral tribunal shall comprise more than one arbitrator, the number of arbitrators must be an odd number. This rule is stipulated in the Arbitration Act and is mandatory. Absent an agreement between the parties, the default rule is the appointment of a three-member arbitral tribunal.

Similarly, the parties may agree on the appointment of the arbitrators. They may also delegate to a third party, such as an arbitration institution, to make the appointment. If the parties fail to agree on the appointment of arbitrators, the provisions of the Arbitration Act would apply. In case a sole arbitrator is to be appointed, the competent court shall appoint the arbitrator upon the request of a party. When the arbitral tribunal is to be constituted of three or more members, each party nominates an arbitrator and the party-nominated arbitrators appoint the chairperson. If, however, a party fails to nominate an arbitrator, or if the arbitrators fail to appoint the chairperson, either party may request the competent court to appoint the arbitrator or chairperson. The court is required to proceed with the appointment promptly.

Arbitrators must accept their appointment in writing and must disclose any circumstances which may give rise to doubts regarding their impartiality or independence. If an arbitrator fails to disclose any such circumstances, which remained unknown to the parties until the rendering of the award, the parties may start annulment proceedings on the grounds that the arbitrator's appointment was unlawful.

An arbitrator may be challenged if there are circumstances giving rise to serious doubts as to their impartiality or independence. A party may only challenge an arbitrator it appointed for reasons that arose after the appointment. The courts have held that to be independent, arbitrators must not be employed by one of the parties, have financial interests in relation to any of the parties, be influenced by or dependent on any of the parties.

To challenge an arbitrator, a party must submit a written, reasoned application to the arbitral tribunal within 15 days from the date that the tribunal was constituted or when the applicant became aware of the reasons giving rise to the challenge. The challenged arbitrator may withdraw within 15 days, failing which the application is to be referred to the competent court. The decision of the court is not subject to appeal. Furthermore, a party may not challenge the same arbitrator more than once in the same proceedings. An application challenging an arbitrator does not cause the suspension of the proceedings. However, if the challenge is accepted and the arbitrator is removed, all actions undertaken by the arbitral tribunal before the removal, including any award rendered, will be void.

An arbitrator's mandate is terminated upon his resignation following a challenge by one of the parties. Furthermore, the parties may agree to terminate the arbitrator's mandate. Any of the parties may also apply to the competent court to terminate the arbitrator's mandate in other cases where the arbitrator is unable or fails to perform his duties, leading to an unjustifiable delay in the proceedings.

The Arbitration Act is silent on the liability of arbitrators, and there are no rules or guidelines in Egypt governing the use of secretaries to the arbitral tribunal.

Interim relief

According to the Arbitration Act, the parties can apply to the competent court to issue interim relief either before or during the arbitration. An arbitral tribunal may also order interim relief, if the parties agree to empower the tribunal to do so. The selection of arbitration rules providing for the power of the arbitral tribunal to order interim relief incorporates such an agreement.

The arbitral tribunal may order security of the costs of the interim relief.

If the party against whom an order for interim relief is issued fails to comply therewith, the arbitral tribunal may, if so requested, allow the other party to take the necessary measures to enforce the order. This party may also apply to the competent court to issue an enforcement order.

The Arbitration Act is silent on the types of interim relief available to the parties in arbitration.

A court seized with a case filed in violation of an arbitration agreement is required to dismiss the claim as inadmissible if so requested by a party. The plea for inadmissibility must be raised before the party submits any request or defence in the court proceedings. When an arbitration agreement is in place, bringing an action before court does not prevent the other party from commencing or continuing an arbitration and does not preclude the rendering of an award.

Arbitration award

In arbitrations involving an arbitral tribunal with more than one arbitrator, the award must be rendered by a majority of votes after deliberations, unless the parties agree that a unanimous vote is required. The award must be in writing and signed by the arbitrators or by a majority

of them. The award must further be reasoned, unless the parties have agreed otherwise, or if the law applicable to the proceedings does not require that the reasons of the award are stated therein. In addition, the following information must be included in the award: (i) the names and contact details of the parties; (ii) the names, contact details and nationality of the arbitrators; (iii) the arbitration agreement; (iv) a summary of the parties' claims, statements and documents; (v) the order of the arbitral tribunal and its underlying reasons, if required; and (vi) the date and place of issuance of the award.

Regarding the timeframe for the award, the Arbitration Act stipulates that the award must be rendered within the period agreed by the parties. Absent an agreement, the award is to be rendered within a period of 12 months from the commencement of the arbitration. The arbitral tribunal may, at its discretion, extend this period by a further six months, unless the parties have agreed on a longer period. If the award is not rendered within the timeframe prescribed by the Arbitration Act, either of the parties may request the competent court to issue an order to extend the timeline of the award or to terminate the arbitration proceedings. The Egyptian Court of Cassation has decided that these provisions are not mandatory, and that the parties are at liberty to determine the timeframe for the award. The 12-month period stipulated in the Arbitration Act applies only in the absence of an agreement between the parties in this regard.

The Arbitration Act does not regulate the allocation of costs. Arbitral tribunals sometimes refer to the rules on cost allocation contained in the Egyptian Code of Civil Procedure. The general rule is that the losing party bears the costs of the proceedings. The court may, however, make an order of costs against the successful party, if its actions have produced unnecessary costs or if it failed to inform the other party of a decisive document in its possession. If a party succeeds only in relation to some of its claims, the court may order that each party carries its own costs or may apportion the costs between the parties at its discretion.

Pursuant to the Arbitration Act, if the arbitral tribunal fails to issue an order for costs as requested by the parties during the proceedings, the parties may request the tribunal to issue a supplementary award on costs.

As for awards on interest, the arbitral tribunal's power to order interest depends on the law applicable to the merits, subject to the rules of Egyptian public policy. In arbitrations seated in Egypt, the courts may annul an arbitral award *ex officio* if the award violates Egyptian public policy. Furthermore, the courts may decline to enforce a domestic or foreign award in Egypt, if a violation of public policy is involved.

Public policy is violated according to some case law, if the mandatory restrictions on interest collection under the Egyptian Civil Code are not complied with. These restrictions reflect the Islamic law influences on the drafting of the Civil Code. Under the Civil Code, contractual parties may agree on interest, provided that the interest rate agreed on does not exceed 7%. A party may, however, collect compensation for damage exceeding 7% interest if the debtor caused the additional damage in bad faith. The Civil Code further prohibits the collection of compound interest or interest exceeding the principal amount. These restrictions do not apply in case contrary commercial customs or practices are in place (e.g. banking operations).

Challenge of the arbitration award

Arbitration awards cannot be appealed or challenged on the merits in Egypt. The Arbitration Act expressly excludes the means of recourse provided for in the Egyptian Code of Civil Procedure.

According to the Arbitration Act, an action to annul an arbitration award may be brought before court within 90 days from notifying the award to the losing party. An award may be annulled on limited grounds, which are provided for in the Arbitration Act on an exclusive basis.

These grounds are as follows:

- If there is no arbitration agreement, or if the agreement is void, voidable or its duration has expired.
- If one of the parties was incapacitated at the time of concluding the arbitration agreement, according to the law governing its legal capacity.
- If one of the parties was unable to present its case because it was not properly notified of the appointment of an arbitrator or of the arbitration proceedings or for any other reason outside that party's control.
- If the arbitration award failed to apply the law that the parties agreed on to govern the merits of the dispute.
- If the arbitral tribunal was constituted or the arbitrators appointed in violation of the law or the parties' agreement.
- If the arbitral award decides issues outside the scope of the arbitration agreement or if it exceeds the limits of the arbitration agreement. But if the parts of the arbitral award containing the violation can be separated from the remainder of the award, then the award may only be annulled in part.
- If the arbitral award or the arbitration proceedings affecting the award contain a violation that causes nullity.

The court may also, at its own initiative, annul an arbitration award that is contrary to Egyptian public policy.

The arbitral tribunal may correct typographical errors in its award, including calculation or clerical errors, at its own initiative or upon the request of a party. The tribunal may decide to correct the award, without holding a hearing, within a period of 30 days from the issuance of the award or the submission of a request for correction. This time limit may be extended by a further period of 30 days, if the tribunal deems the extension appropriate. The arbitral tribunal's decision must be in writing and must be notified to the parties within 30 days. If the tribunal exceeds its powers in correcting the award, its decision may be challenged in annulment proceedings under the Arbitration Act.

A study of 200 annulment proceedings, which was published in the *Journal of Arab Arbitration*, found that the arbitral award was annulled in 35% of cases, while 65% of the attempted challenges were unsuccessful. Among the successful challenges, 90% of the cases concerned awards rendered in domestic proceedings, while 10% concerned awards rendered in international proceedings, i.e. proceedings involving parties of different nationalities. The most important grounds on which the awards were annulled were as follows:

- nullity of the arbitral award or a violation in the arbitral proceedings causing nullity of the award;
- constitution of the arbitral tribunal or appointment of arbitrators in violation of the law or the parties' agreement;
- violation of public policy in Egypt;
- absence, nullity or expiry of the arbitration agreement;

- failure to apply the law agreed on by the parties to govern the merits of the dispute; and
- ruling on issues outside the scope of the arbitration agreement or exceeding the limits of the arbitration agreement.

Regarding the unsuccessful challenges, 75% of the cases concerned awards rendered in domestic proceedings, while 25% concerned awards rendered in international proceedings. In these cases, the court rejected the annulment claim for different reasons including the following:

- The annulment claim was not based on one of the grounds listed under the Arbitration Act.
- The claimant continued the arbitration proceedings without making a timely objection to a violation of the arbitration agreement or the Arbitration Act, which is considered a waiver of the right to object.
- The arbitration proceedings did not contain any violation because the parties were properly notified, and the claimant was given the opportunity to present its case and documents.
- The award was adequately reasoned.
- The parties agreed to apply the procedural rules of an arbitration institution which do not specify a time limit for the award and thereby excluded the application of the Arbitration Act provisions, stating that the award must be rendered within 12 months from the commencement of the arbitration.
- The award did not violate public policy principles by granting interest exceeding the maximum limit provided for in the law because the arbitral tribunal was authorised to decide as *amiable compositeur*.
- The objection to the jurisdiction of the arbitral tribunal was rejected because the claimant acknowledged the arbitral tribunal's jurisdiction by presenting its case to the tribunal and proceeding with the arbitration without raising any objections regarding jurisdiction.
- The annulment proceedings were not timely started within 90 days from the date of notifying the award to the losing party, as stipulated in the Arbitration Act.
- The court was not competent to hear the case because the award was rendered in arbitration proceedings seated outside Egypt and not governed by the Arbitration Act.
- The annulment action concerns an interim or partial award and not a final award as required by the Arbitration Act.

Enforcement of the arbitration award

Foreign arbitration awards can be enforced in Egypt under the New York Convention, which applies to the enforcement of awards rendered in signatory states thereof, or under the Arab League Convention, which applies to the enforcement of arbitral awards rendered in member states of the Arab League. In addition, Egypt concluded a number of bilateral treaties on judicial cooperation in civil and commercial matters, which enable the enforcement of arbitration awards rendered in the signatory states.

Regarding the requirements of enforcement, the Arbitration Act provides for the enforcement of awards rendered in arbitration proceedings seated in Egypt or where the parties agree to conduct the arbitration according to the Arbitration Act. The Egyptian Code of Civil Procedure, on the other hand, includes provisions on the enforcement of foreign arbitration awards.

It has been long debated in Egypt whether the provisions of the Arbitration Act or those of the Egyptian Code of Civil Procedure apply to the enforcement of foreign arbitration awards. The New York Convention, which applies in Egypt, stipulates that arbitral awards shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon, provided that the enforcement in this case is not subject to substantially more onerous conditions than the enforcement of domestic awards. On this basis, the Egyptian Court of Cassation held that foreign arbitration awards are to be enforced under the Arbitration Act because its provisions on enforcement are less onerous than the provisions of the Egyptian Code of Civil Procedure. Therefore, the Arbitration Act applies to the enforcement of foreign arbitration awards rendered in the signatory states of the New York Convention.

Pursuant to the Arbitration Act, the recognition and enforcement of arbitration awards follows in three steps: (i) deposit of the award with the court; (ii) submission of a petition for an order of execution; and (iii) issuance of a writ of execution.

First, the award must be deposited with the court. If the award was rendered in a language other than Arabic, a certified Arabic translation of the award must be deposited. The Arbitration Act does not provide for a specific period during which an award must be deposited with the court. The award may, therefore, be deposited at any time within the general prescription period under Egyptian law, which is 15 years.

Second, an application must be made by a party to the presiding judge of the court to issue an order of execution. The application must be submitted in the form of a petition describing the circumstances and grounds for the application for enforcement.

To rule on the petition, the judge decides on the court's jurisdiction to issue an order of execution. As a second step, the judge examines whether the requirements of issuing an order of execution are fulfilled. Pursuant to the Arbitration Act, these requirements are as follows:

- the deadline to bring an annulment action, namely 90 days from the notification of the award to the losing party, has expired;
- the award does not contradict any previous decision rendered by the Egyptian courts in the same matter;
- the award does not violate public policy in Egypt; and
- the award was properly notified to the losing party.

If these requirements are fulfilled, an order or execution will be issued. It is, however, within the discretion of the judge reviewing the petition to decline to issue an order of execution, even if the requirements are fulfilled, if a reason for annulment is discernible on the face of the award. The order of execution can be appealed in all cases.

Third, after the order of execution is issued, a writ of execution is granted within 30 days. A writ of execution will be granted notwithstanding that the order of execution is subject to appeal or that it was, in fact, appealed.

By applying the New York Convention, which is in force in Egypt, an arbitral award cannot be enforced in Egypt if it has been set aside by the courts at the seat of the arbitration.

Egyptian courts will generally grant an application for enforcing a foreign arbitration award, if the above-mentioned requirements are fulfilled. In practice, however, enforcement can be a long and burdensome process, given the multitude of avenues for procedural challenges of enforcement that the losing party may use.

Investment arbitration

Egypt has concluded 114 bilateral investment treaties. Of these treaties, 27 treaties are, however, not in force and 14 treaties are terminated.

In addition, Egypt is a signatory to several multilateral investment treaties including, most notably, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 (ICSID Convention), the Unified Agreement for the Investment of Arab Capital in the Arab States of 1980 and the Convention on the Settlement of Investment Disputes Between Host States of Arab Investments and Nationals of Other Arab States of 1974. Egypt is not a signatory of the Energy Charter Treaty.

To date, Egypt has been involved in a large number of investment arbitrations, with a total of 29 cases against Egypt registered with the ICSID Centre, including 17 cases registered since 2011. There are currently seven cases pending, while six cases were settled and three cases were discontinued. Furthermore, in one case, which was concluded, the arbitral tribunal held that the tribunal and the ICSID Centre lacked jurisdiction over the claim.

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England & Wales

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Introduction

London continues to be a major hub for the resolution of commercial disputes, particularly by way of arbitration. As a result, the English courts are frequently faced with issues that are both central and ancillary to international arbitral proceedings. In such matters, the English courts have a long tradition of seeking to support arbitration and enforcing arbitral agreements and awards.

Underpinning the courts' approach is the Arbitration Act 1996 (the "**1996 Act**"), which still provides a sound framework for arbitration users and the courts. In addition, the United Kingdom has a suite of legislation in place to assist with the enforcement of arbitral awards.

England (in particular, London) remains one of the leading international arbitration centres of the world and is frequently selected as a seat of arbitration.[1]

The 1996 Act and relevant conventions

While not structurally based upon the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "**1985 Model Law**"), the 1996 Act shares many of the main features of the 1985 Model Law. The 1996 Act is split into three parts:

- Part I (sections 1–84) sets out the structure to support anticipated or on-going arbitral proceedings, including provisions as to appointment of a tribunal and the powers of the English court to support on-going arbitral proceedings;
- Part II (sections 85–98) primarily concerns domestic arbitration, including consumer arbitration agreements and statutory arbitrations; and
- Part III (sections 99–104) concerns the recognition and enforcement of foreign arbitral awards.

The United Kingdom (which includes the jurisdiction of England & Wales) signed and ratified the New York Convention in 1975. The United Kingdom has also signed and ratified the Geneva Convention on the Execution of Foreign Arbitral Awards 1927.

With regard to other reciprocal arrangements, the Foreign Judgments (Reciprocal Enforcement) Act 1933 provides for the enforcement of arbitral awards from certain former Commonwealth countries. The Arbitration (International Investment Disputes) Act 1966 makes provision for the recognition and enforcement of ICSID awards. Under section 99 of the 1996 Act, the Arbitration Act 1950 (the predecessor to the 1996 Act) remains in effect with regard to the enforcement of certain awards that do not fall under the New York Convention.

London-based international dispute resolution institutions

London has emerged as a key seat for arbitration, and a number of leading institutions are

based in London. The London Court of International Arbitration ("**LCIA**") is a renowned international arbitration institution with an impressive history and, as of 1 October 2014, a newly revised set of arbitration rules. The Chartered Institute of Arbitrators ("**CIArb**") administers arbitrations under its own rules and acts as an appointing authority. The Centre for Effective Dispute Resolution ("**CEDR**") is a London-based mediation and alternative dispute resolution body which administers arbitration under UNCITRAL Rules.

There are also a number of institutions catering for disputes arising in a particular trade area or industry. The London Maritime Arbitrators Association ("**LMAA**") has been the longstanding leading arbitral institution with respect to maritime disputes, with its own set of procedural rules. Commodity disputes are regularly conducted under the rules applicable to that commodity, for example, the London Metal Exchange ("**LME**").

Arbitration agreement

The formalities surrounding an arbitration agreement are similar under English law as to other jurisdictions. Section 5 of the 1996 Act requires an arbitration agreement to be in writing or evidenced in writing. This requirement reflects section 7 of the 1985 Model Act (and the 2006 version of the UNCITRAL model act, the "**2006 Model Act**"). Section 5 of the 1996 Act allows for unsigned agreements, an exchange of communications, or an agreement "*evidenced in writing*". The English courts have interpreted "writing" to mean a record kept by any means, including electronic records or communications including email.[2]

Arbitrability

The arbitration agreement is defined in section 6 of the 1996 Act as "*an agreement to submit to arbitration present or future disputes (whether they are contractual or not)".*

The parties may decide to include all disputes arising between them to be decided by arbitration, or they may limit the recourse to arbitration strictly to one type of dispute or to disputes concerning the breach of one contract.

However, some types of dispute cannot be referred to arbitration by reason of mandatory law and/or public policy. The English Court of Appeal observed in the case of *Fulham Football Club Ltd v Richards & Anr*[3] that arbitrability will be determined by considering whether:

"…the matters in dispute… engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process".[4]

Joinder of third parties and consolidation of proceedings

Section 35 of the 1996 Act provides that arbitral tribunals shall not have the power to consolidate proceedings unless the parties agree to confer such power on the tribunal. Selection of the arbitration rules of an arbitral institution, where such arbitration rules allow for consolidation, can be seen to be an indirect conferral of such powers by the parties on the arbitral tribunal. Powers of consolidation can be found in many arbitration rules maintained by leading arbitral institutions. For example, the updated arbitration rules of the LCIA (which entered into force from 1 October 2014) provide at Article 22 for joinder and consolidation in particular circumstances.

Competence-Competence

Section 30 of the 1996 Act clearly sets out that, unless otherwise agreed by the parties, the arbitral tribunal has the power to rule on its own substantive jurisdiction, including deciding: (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly

constituted; and/or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. Alternatively, if the arbitral tribunal gives its permission (or if the parties agree), the English court can determine a preliminary issue of jurisdiction. This latter power of the English courts is set out in section 32 of the 1996 Act.

Separability

Separability of the arbitration agreement is preserved by section 7 of the 1996 Act, together with the approach of the English courts in associated case law. Section 7 of the 1996 Act states:

"*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*."

The English courts have upheld the approach reflected in this wording in cases such as the case of *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Limited & Ors*,[5] where it was held that the arbitration agreement was valid even where the underlying guarantee agreement was illegal as a matter of Chinese law (China being the place of performance of the underlying agreement).

Arbitration procedure

Commencing an arbitration

Section 14 of the 1996 Act provides that arbitral proceedings are commenced by a written notice to the other party/parties or the appointing authority. This is the default procedure unless the parties agree otherwise. Institutional rules can add further requirements as to the content of such notice and payment of any initial institutional fees.

Seat of arbitration

For international arbitrations seated in England & Wales, the typical seat of arbitration selected by the parties or the court is London. There is no requirement under English law that procedural and evidential hearings physically take place at the seat of arbitration.

Applicable law

The arbitral tribunal will apply the substantive law chosen by the parties to the merits of the dispute.[6] Further, if the parties agree, the tribunal may determine the dispute in accordance with other considerations such as rules UNIDROIT, etc. Where the parties have not chosen or agreed to the substantive law, section 46 requires that the tribunal apply the substantive law identified by the conflict of laws which are applicable.

Following the decisions of *Sulamérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A*[7] and A*rsanovia Ltd v Cruz City 1 Mauritius Holdings,*[8] the English commercial court in *Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd*[9] held the proper law of the arbitration agreements to be determined by undertaking a three-stage enquiry into: (i) express choice; (ii) implied choice; and (iii) the law with which the arbitration agreement has the closest and most real connection.

Rules on evidence

Section 34 of the 1996 Act sets out the evidential matters over which the tribunal has authority, including: the form of written statements of case and submissions; the location and timing (and form) of hearings; the extent of document production; all issues as to

admissibility and weight of evidence; the manner in which evidence shall be tendered or exchanged; and the extent to which the arbitrators should take the initiative in ascertaining the facts and the law.[10]

Arbitration rules chosen by the parties along with procedural guidelines such as the IBA Rules on the Taking of Evidence in International Arbitration (2010) (the "**IBA Rules**") will guide the arbitral tribunal on the rules of procedure and evidence. The arbitral tribunal will set down the procedural timetable along with additional rules on evidence (if any) that would be adopted.

Privilege

English law recognises the existence of legal privilege, a right which enables a person to resist compulsory disclosure of certain categories of information. However, the 1996 Act is silent on the existence and treatment of issues of privilege. Most often, the question as to which rules of privilege to apply to a given set of communications will be determined by the tribunal.[11] If the parties so agree, the tribunal might also be guided by the IBA Rules.

Disclosure

The English Civil Procedural Rules (CPR Rule 31.16) provide that the court may order disclosure by a party prior to the commencement of proceedings, with the aim of encouraging early resolution of the dispute, assisting procedural fairness and saving costs. However, these rules do not apply to arbitration proceedings.[12] As stated above, it is ultimately for the tribunal to decide on the scope of document production.

Generally an arbitral tribunal would take into account that the scope of document production will differ according to the legal and cultural backgrounds of the parties and the seat of arbitration. The approach of tribunals in England is generally conservative and "fishing expeditions" are not welcome and, indeed, are positively discouraged.[13]

Expert evidence

Section 37 of the 1996 Act gives the power to the tribunal to appoint its own expert(s), but each party shall be given a reasonable opportunity to comment on any information, opinion or advice offered by the expert. Section 37 is not a mandatory section.

As with many other matters of procedure, it is at the tribunal's discretion which rules to follow regarding expert evidence. Arbitral institutional rules such as those of the LCIA or the ICC may guide the tribunal, or similarly other rules agreed by the parties such as the IBA Rules.

There is an increasing trend among arbitrations seated in England & Wales (as with international arbitrations seated elsewhere) towards attempting to get opposing expert witnesses to find common ground. This can lead to methods proposed or imposed by the arbitral tribunal such as "hot tubbing" and expert witness conferencing, under which experts are questioned simultaneously with a view towards identifying any common ground together with, generally, getting results from the two experts which are directly comparable and based on the same set of parameters and assumptions.

Confidentiality

The 1996 Act has no provision relating to confidentiality. Under English common law there is an implied term of the arbitration agreement that the arbitration is private and the evidence, along with the pleadings, are considered to be confidential.[14] There are certain exceptions to the implied term. The details of arbitral proceedings may become public due to a court order for disclosure or if it is necessary for the protection of the legitimate interests of one of the parties, or where there is public interest in disclosure.[15]

In an LCIA arbitration, arbitration proceedings are considered to be private unless the parties consent or the arbitral tribunal directs.[16] Further, Article 30 of the LCIA rules provides that parties as a general rule must undertake to keep all awards, along with materials in the proceeding created for the arbitration, as confidential.

Guidelines for counsel

All English solicitors are bound by ethical rules under English law. However, in international arbitration in any jurisdiction there are difficulties, as lawyers from different jurisdictions operate under different ethical codes and boundaries.

The new guidelines under the 2014 LCIA Rules (General Guidelines for the Parties' Legal Representatives, Annex to the LCIA Rules) seek to level this playing field. Those guidelines state that counsel should not: (1) engage in activities intended unfairly to obstruct the arbitration or jeopardise the finality of the award (for example, by repeated challenges which the legal representative knows are unfounded); (2) make false statements; (3) rely upon false evidence; (4) conceal any document ordered to be produced by the tribunal; or (5) make unilateral undisclosed contact with any member of the arbitral tribunal.[17]

The LCIA guidelines are mandatory and apply to any counsel acting in any LCIA arbitration proceedings commenced under the new rules.

In case of misconduct, the LCIA Rules provide at Article 18.6 for the following sanctions: (1) a written reprimand; (2) a written caution as to future conduct; and (3) a reference to the legal representative's regulatory and/or professional body.

The IBA Guidelines on Party Representation 2013 is another set of guidelines which seek to apply a uniform standard to counsel in international arbitrations. However, such guidelines are only applicable if the parties specifically agree to them for a given dispute.

Arbitrators

Appointments in general

Parties to an arbitration in England & Wales are free to agree on the number of arbitrators, the appointment of arbitrators and whether a chairman or umpire is to be appointed to the tribunal.[18] Parties may also impose restrictive qualifications on the appointment of arbitrators. The UK Supreme Court case of *Jivraj v Hashwani*, exemplifies the notion that parties are free to impose (by virtue of agreement) a criteria or necessary qualification on the appointment of arbitrators.[19]

Procedure

Article 16 of the 1996 Act states that the default position is that an arbitral tribunal will generally consist of a sole arbitrator unless the parties to the arbitration request otherwise, or else if it is determined that a three-member tribunal is appropriate for the matter at hand.[20] In case of sole arbitrator, the parties must jointly appoint the arbitrator within 28 days of service and in case of three arbitrators, each party shall appoint one arbitrator within 14 days. The two appointed arbitrators shall appoint a third arbitrator as the chairman of the tribunal.[21]

Challenging an arbitrator

Parties to a proceeding may challenge the appointment of an arbitrator if that arbitrator has not acted fairly and impartially in his treatment of the parties. The Arbitration Act imposes a duty upon arbitrators to treat the parties fairly and equally.[22]

Under the LCIA Rules, prior to appointment, the prospective arbitrator candidate has to

sign a declaration that no circumstances known to him are likely to give rise to any justified doubts as to his impartiality or independence, other than those disclosed by him.[23] This duty is a continuing duty as arbitrators appointed to proceedings must also disclose any circumstances that arise after the date of declaration and prior to the arbitration conclusion, which may affect their impartiality.

Section 24 of the 1996 Act allows the party to an arbitral proceedings to apply to the court to remove an arbitrator on the grounds that the arbitrator is not impartial or independent; does not possess the qualifications; has failed to conduct the proceedings in a proper manner; and mental or physical incapacity. The court will not exercise this power if the arbitral tribunal or the institution has the power to remove arbitrators, unless it is satisfied that the parties have exhausted any recourse to that institution or person.

Common law on impartiality and IBA Guidelines on conflicts of interest

The English common law provides for a general test for impartiality. In *R v Gough* it was that there should exist a real danger of bias.[24] The later judgment of *Locabail v Bayfield*[25] serves to provide practical guidance on the timing and level of disclosure.

The IBA Guidelines on Conflicts of Interest in International Arbitration, provides a number of provisions which directly address the issue of how and when impartiality may exist and what are the requirements imposed on the arbitrators. The IBA guidelines are considered a reflection of actual practice incorporated into the arbitration by the parties. Usually, arbitral tribunals in England & Wales, especially the LCIA, will on occasion refer to the IBA guidelines to provide clarity, but it is not bound by the guidelines.

LCIA challenges

The Arbitration International Journal in its special 'Challenges' issue,[26] has published digests of reasoned arbitral challenge decisions of the LCIA court. A challenge of an arbitrator is most often resolved by the president or vice president of the LCIA court or by means of a division of the court consisting of three or five members, appointed by the president or the vice president. In practice, challenges are most commonly resolved by a division of the court. The usual practice for submission and resolution of a challenge is for written submissions and supporting documents to be submitted by the challenging party, the challenged arbitrator and the other party or parties. Challenges are usually resolved on paper as oral submissions are a rare alternative taken by the court.[27]

Immunity of arbitrators

Section 29 of the 1996 Act grants immunity to the arbitrator unless bad faith is proven. The LCIA and the ICC Rules similarly exclude liabilities where fraud, misconduct or bad faith have not been proven. This is most often seen as a consequence of the consensual nature of arbitral proceedings and the trust placed in tribunals to resolve disputes. Immunity as such helps to provide a degree of finality to the proceedings by preventing parties from holding the arbitrators liable where they disagree with the result of proceedings.[28]

Secretaries to the arbitral tribunal

There are no rules governing the conduct of the secretaries to the arbitral tribunal. In practice, there are instances of arbitrators appointing arbitral secretaries under the LCIA Rules. The LCIA in the FAQ section of the website lays down the function of administrative secretaries by confining: "*their activities to such matters as organising papers for the Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, keeping the Tribunal's time sheets and so forth*".[29]

A survey conducted by White & Case and Queen Mary University,[30] held that the use of

tribunal secretaries is most common in arbitrations of Latin American respondents (62%), while least common in arbitrations of respondents from North America (23%) and Asia (26%).[31]

Interim relief

Interim relief is available from both the English courts and London-seated arbitral tribunals.

The English courts have broad powers under section 44 of the 1996 Act as to interim relief in support of arbitral proceedings. These powers are typically invoked on an urgent basis before an arbitral tribunal has been composed and, once an arbitral tribunal is constituted, the court will only act where the tribunal has no power or is unable to act effectively (section 44(5)). The court's powers under section 44 can be exercised in support of foreign-seated arbitrations if the court considers that it is appropriate to do so (section 2(3)).

Similarly, section 38 of the 1996 Act specifies that arbitral tribunals have broad powers as to interim relief (including the power to order security for costs), although such powers can face limitations due to practical considerations, such as the ability to enforce an interim order such as an asset-freezing injunction against third parties which are not party to the arbitral proceedings. An arbitral tribunal might also choose to issue an interim award against one party for the payment of sums, pursuant to section 39 of the 1996 Act.

Broad powers to grant interim relief

The English courts have interpreted their powers under section 44 broadly. For example, section 44(3) states that the court may make orders in cases of urgency for the purposes of preserving "*evidence or assets*". The courts have interpreted "*assets*" to include contractual rights.

English courts also allow an injunction against court proceedings ("anti-suit injunctions") by which the contractual rights of the parties that include the right to have disputes referred to and resolved by arbitration are protected.

Following the ECJ decision in *Allianz SpA and Others v West Tankers Inc*,[32] the English courts may not grant an anti-suit injunction to restrain proceedings commenced in the court of another EU member state. However, anti-suit injunctions remain available in respect of proceedings brought outside the EU.[33] If no arbitration proceedings have commenced and none are intended (thereby precluding an application under section 44 of the 1996 Act), but a party nonetheless seeks to protect its rights under an arbitration agreement, the courts have jurisdiction to award a final anti-suit injunction under section 37 of the Senior Courts Act 1981.[34]

English courts can order anti-arbitration injunctions in aid of domestic litigation, but rarely do so. *Excalibur v Texas Keystone Inc*,[35] is one of the rare examples of the Commercial Court intervening in an arbitration that was subject to oversight by the New York, not English, courts.[36]

The powers of the court do not extend to ICSID arbitrations, where any relief should be sought from the tribunal.[37]

Although the 1996 Act applies mainly to arbitrations seated in England and Wales, there are some provisions which apply even if the seat is elsewhere or has not been determined. These powers mainly relate to applications to stay court proceedings brought in breach of an arbitration agreement (section 9) or in order to exercise the English court's powers to secure the attendance of witnesses (section 43) or to grant injunctive relief in support of the arbitration (section 44).

The rules of a number of arbitral institutions, such as the LCIA and the ICC, now also provide for the appointment of an emergency arbitrator to grant interim relief in situations where the arbitral tribunal has yet to be appointed.

Security for costs

Under section 38(3) of the 1996 Act, the arbitral tribunal can pass an order for security of costs of the arbitration. There are no grounds given under section 38(3), but they usually relate to the claimant's inability to pay, and classic examples include the claimant's insolvency or likely refusal to pay, and the consequent difficulties of enforcement.

Section 68(3) only allows the tribunal to order the claimant to provide the security for costs. The LCIA Rules under Article 25, however, allow the tribunal to ask for security for costs of the arbitration and legal fees, as well as security for all or part of the dispute.

Arbitration award

Formal requirements

The parties are free to agree on the form of the award.[38] In the absence of any agreement, the award must be in writing and signed by all the arbitrators (or all those assenting to it). Further, unless it is an agreed award or the parties have agreed to the contrary, the award must contain reasons and state the seat of the arbitration and the date on which it is made.[39] The award will take effect from the date on which all the above conditions are met.

The tribunal is not subject to a time limit in rendering its award. If the arbitration agreement imposes such a time limit, upon application by the tribunal or by any party to the proceedings, the court may extend such time limit if it is satisfied that a "*substantial injustice*" would otherwise result.[40]

Costs for the parties

Unless otherwise agreed by the parties, the tribunal may make an award allocating the costs of the arbitration between the parties.[41] Under the 1996 Act, costs of the arbitration include the arbitrators' fees and expenses, those of any arbitral institution used during the proceedings, and the legal or other costs of the parties; for example, translators, venue hire, travel expenses.[42]

Unless the parties otherwise agree, the tribunal will award costs of the arbitration on the basis of the general principle that costs should "follow the event", *i.e.* that the unsuccessful party should pay the successful party's recoverable costs.[43]

Interest

The parties are free to agree on the tribunal's power to award interest under section 49 of the 1996 Act. The default position is that the tribunal may award simple or compound interest at such rates and with such rests as it considers appropriate, up to the date of the award and from the date of the award to the date of payment, on: the whole or part of any amount awarded in respect of the principal claim; and any award as to costs.[44] No mandatory or customary rate of interest is applicable.

Challenge of the arbitration award

The English courts have generally followed a policy of non-interference in the arbitral process with respect to challenges to arbitral awards. Such challenges are rarely successful.

There are three grounds on which a party may appeal (or challenge) an award made under the 1996 Act:

- The tribunal lacked substantive jurisdiction under section 67.
- A party may challenge an award on the grounds of serious irregularity under section 68.
- An appeal to the court under section 69 on a question of law arising out of an award made in the proceedings.

Section 67: Substantive jurisdiction

Under section 67, an award can be challenged on the basis that it was made without jurisdiction. The award could be the substantive award on the merits of the claims, or may be a separate preliminary award containing the tribunal's ruling on its own jurisdiction.

Section 67 is mandatory and parties cannot contract out of the right to challenge an award on the basis of substantive jurisdiction.[45] The phrase "*substantive jurisdiction*" is defined in section 30(1) and section 82 of the 1996 Act. Thus a challenge can be made on:

- existence or validity of the arbitration agreement;
- constitution of the tribunal; and
- scope of the arbitration agreement.

The validity of the arbitration agreement can be called into question under section 67. It may be argued that the arbitration agreement is invalid due to some flaw with the contract in which it is contained. The principle of separability, however, would generally mean that the invalidity of the contract does not affect the arbitration agreement, unless the basis of invalidity may be such as to render both the contract and the arbitration agreement invalid – for example, lack of capacity.[46]

In *B v A*,[47] the court held that an error by a tribunal in the application of the chosen law does not lead to a lack of substantive jurisdiction. The House of Lords in *Fiona Trust & Holding Corp v Privalov*[48] held that the parties to an arbitration agreement, as rational businessmen, should be assumed to have intended that any dispute arising out of the relationship into which they had entered, or purported to have entered, should be decided by the same tribunal. This assumption can only be departed from in case the arbitration agreement makes it clear that the parties intended to exclude certain questions from the arbitral jurisdiction.

The hearing under section 67 is a full one. Each party has the right to put to the court all arguments and evidence (and evidence not presented to the tribunal). The process is not a judicial review but a complete retrial.[49]

Section 68: Serious irregularity

Section 68 is also a mandatory section and the parties cannot contract out of it. The serious irregularity could be related to the award or proceedings or to the tribunal. The irregularity should cause or would cause "*substantial injustice*". It requires a high threshold for the courts to set aside the award under section 68.

Section 68(2) lists a few of the following kinds of irregularities, which is exhaustive in nature:

- Failure by the tribunal to comply with section 33 of the 1996 Act (which sets out the tribunal's general duties, such as the duty to give each party a reasonable opportunity to put its case).
- The tribunal exceeding its powers (other than in relation to its substantive jurisdiction).
- Failure by the tribunal to deal with all the issues that were put to it.
- The award being obtained by fraud or in a manner contrary to public policy.

In *Fidelity Management SA v Myriad International Holdings BV*,[50] Morrison J held that section 68 was a "*long stop*" to deal with "*extreme cases where ... something ... went seriously wrong with the arbitral process*".[51]

In a recent case of *Lorand Shipping v Davof Trading (Africa) B.V. (MV "Ocean Glory")*,[52] there was a rare example of a successful application under section 68.

Section 69: Appeal on a point of law

Section 69 of the 1996 Act allows the parties to arbitral proceedings to appeal to the court on a question of law. This is one of the most controversial sections with respect to international arbitration. This section is not mandatory and can be excluded by agreement between the parties. Arbitral rules like the LCIA and the ICC Rules exclude any appeal on a question of law.[53]

The reported decisions under section 69 tend to be in the field of shipping/maritime, commodities, construction and rent review cases.[54] The appeal can be only against English law and not a foreign law. Thus appeal under section 69 is not available if it has been determined according to the law of another jurisdiction or another system.[55] There will also be no appeal on questions of fact.

An appeal under section 69 can be brought with the agreement of all the other parties to the arbitration or with the leave of the court. Pursuant to section 69(3), permission to appeal will only be granted if all of the following requirements are satisfied:

- That the determination of the question will substantially affect the rights of one or more of the parties.
- That the question of law is one which the tribunal was asked to determine.
- The decision of the tribunal is obviously wrong; or the question is one of general public importance and the tribunal's decision is open to serious doubt.
- That, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper for the court to determine the question.

Procedure for challenging awards

Any application to challenge an award or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.[56]

Further, no application or appeal under sections 67, 68 or 69 may be brought unless the applicant or appellant has first exhausted any available arbitration process of appeal or review and any available recourse for correction of the award under section 57.[57]

The court may order, on any application under section 67, 68 or 69, security for costs of the application or appeal. The application may even be dismissed if such an order is made and not complied with.[58]

Section 70(6) provides that on any application under sections 67, 68 or 69, the court may order the applicant or appellant to provide security for the costs of the application or appeal. The application or appeal may be dismissed if such an order is made and then not complied with.

Enforcement of the arbitration award

Most international arbitration awards in the United Kingdom will be enforced under the 1975 New York Convention. Further, as noted above, the UK is also party to the 1927

Geneva Convention on the Execution of Foreign Arbitral Awards. However, very few states are signatories to the Geneva Convention and not to the New York Convention.

Other reciprocal arrangements under which international arbitration awards may be enforced exist, such as the 1933 Foreign Judgments (Reciprocal Enforcement) Act, which provides for the enforcement of arbitral awards from certain former Commonwealth countries.

The enforcement of awards delivered by ICSID Tribunals will be take place pursuant to the 1996 Act.

The 1996 Act incorporates into English law the provisions for the recognition and enforcement of awards which are found in the New York Convention.[59] In particular, pursuant to section 102, a party seeking the recognition or enforcement of a New York Convention award must produce: (i) the duly authenticated original award or a duly certified copy of it; and (ii) the original arbitration agreement or a duly certified copy of it.

Further, if the award or agreement is in a foreign language, the party must also produce a certified translation of it.

As a practical note, assuming the enforcement proceedings are not contested, enforcement should be a matter of weeks and the costs should be relatively minimal. The courts retain the discretion to enforce an award that has been set aside or suspended by the courts in the seat of arbitration,[60] but in practice this is quite rare.

In England & Wales the courts generally adopt a pro-arbitration approach and are in favour of the enforcement of international arbitration awards. The courts very rarely refuse to enforce awards on public policy grounds.[61]

One particular case in which the enforcement of an ICC award was refused is the case *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan.*[62] In this case the award was refused enforcement on the grounds, *inter alia*, that the Government of Pakistan had not been a party to the operative arbitration agreement. The Supreme Court applied French law as the governing law, concluding that there was no evidence of a common intention on the part of Dallah and the Government of Pakistan to make the Government a party to the arbitration agreement.

Investment arbitration

The United Kingdom drafted its first Model Agreement for the Promotion and Protection of Investments ("**IPPA**") in 1971, which led to negotiating IPPAs with various developing countries.[63] The first IPPA was with Egypt in 1976.[64] At the moment, UK has signed 110 IPPAs or Bilateral Investment Treaties ("**BITs**").[65]

The UK government is generally favourable to investment treaty arbitration. It ratified the ICSID convention on 23 December 1981 and implemented the Washington Convention by the Arbitration (International Investment Disputes) Act 1966.

The only multilateral investment protection treaty to which the United Kingdom is a party is the Energy Charter Treaty ("**ECT**"), which entered into force in 1998.

Features of the Bilateral Investment Treaties

- *Investor*

As regards companies, most of the UK's BITs define "*Investor*" as a company incorporated or constituted under the laws of a Contracting Party. This even includes companies incorporated or constituted in territories to which the BIT is extended; for example, Jersey, Guernsey, the Isle of Man expressly.

- *Definition of investment*

The Model UK IPPA defines the term "*investments*" broadly:

"*Every kind of asset and in particular, though not exclusively ... (i) movable and immovable property and any other property rights such as mortgages, liens, or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money and to any performance under contract having a financial value; (iv) intellectual property rights, goodwill, technical processes and know-how; and (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*"[66]

All UK BITs refer to a non-exhaustive list of eligible assets under the definition, but make no reference to indirectly controlled assets. The ECT, on the other hand, refers to indirectly controlled assets: "*every kind of asset, owned or controlled directly or indirectly*".[67]

- *Fair and equitable treatment*

The majority of the UK's BITs, (and the ECT) provide that each Contracting Party shall accord fair and equitable treatment to investment. Article 2(2) of the UK Model BIT states:

"*Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment ...*"

The fair and equitable treatment standard in the UK BIT is not linked with international law or customary law.

- *Umbrella clause*

Most UK BITs consists of an umbrella clause. Article 2(2) of the UK Model BIT states:

"Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."

- *Expropriation*

Article 5(1) of the UK Model BIT covers expropriation:

"Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph."

That expropriation should be for a public purpose related to the internal needs of the Contracting Party is common to UK BITs. Some of the BITs lay down more specific conditions in which expropriations may be carried out; for example, the UK-India BIT permits expropriations "*related to the internal requirements for regulating economic activity*". In the UK-China BIT, the term "*market value*" has not been included to define compensation for expropriation.[68]

Another feature of the expropriation clauses under some UK BITs is that they also protect the minority shareholders.[69]

National treatment and most-favoured nation

All UK BITs include national treatment and most-favoured nation (MFN) clauses.

Article 3(1) of the Model UK BIT is the national treatment clause:

"Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State."

Article 3(2) of the Model UK BIT provides:

"Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State."

These provisions do not extend to the benefits of membership of a customs union, a monetary union or a free trade area, nor to taxation agreements.[70] Further, Article 3(2) clarifies that these provisions will not extend on account of the UK's membership to the European Union.

Procedural rights under the BIT

Article 8 of the Model UK BIT contains two versions. The first provides resolution of disputes under the ICSID Convention where both states have signed the ICSID Convention. The investor shall bring the claim to the ICSID if the claim is not resolved in three months' time.

The second version provides that after three months, the investor can submit to investment arbitration. The parties may agree to any of the three institutions: ICSID, the ICC International Court of Arbitration, or an *ad hoc* tribunal constituted under the UNCITRAL Rules. If parties fail to agree within three months, the investor can refer the dispute to arbitration under the UNCITRAL Rules.

Decisions against UK

There has been no publicly available award against UK. There has been only one case, *Ashok Sancheti v United Kingdom,*[71] where an English court addressed issues relating to a UK BIT where the claimant sought to stay proceedings as he had filed a request for arbitration under the UK-India BIT. The English Court refused to grant the stay on the grounds that the Corporation of London (which was the defendant in the court proceedings) was not a party to the arbitration agreement under section 9 of the BIT.

There have been other instances where an English court has ruled on issues related to investment arbitration but a UK bilateral treaty was not involved.[72]

* * *

Endnotes

1. In the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration prepared by the School of International Arbitration, Queen Mary, University of London, in partnership with White & Case, London was listed as the most used (45%) and most preferred (47%) seat of arbitration.
2. *Bernuth Lines Ltd v High Seas Shipping Ltd* [2006] 1 Lloyd's Rep 537.

3. [2011] EWCA Civ 855.
4. *Fulham Football Club*, per Patten J. (at paragraph 40).
5. [2013] EWHC 1063 (Comm).
6. Section 46 of the 1996 Act.
7. [2012] EWCA Civ 638.
8. [2013] 2 All ER 1.
9. [2013] EWHC 4071 (Comm).
10. Joseph Tirado, Sherina Petit, *et al*., Chapter 23: Factual Evidence in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England, with chapters on Scotland and Ireland,* Kluwer Law International 2013 pp. 483-550.
11. *Ibid* at fn 15.
12. See *EDO Corporation v Ultra Electronics Limited [2009] EWHC 682* (Ch) and subsequently in *Travelers Insurance Company Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC) (6 September 2010), the courts held that a claim for pre-action disclosure cannot be entertained where the underlying dispute is going to be referred to arbitration. In sum, the power to order pre-action disclosure in accordance with the Senior Courts Act 1981, s. 33(2) can only be invoked by an applicant who appears likely to be a party to subsequent court proceedings.
13. Tirado, Petit, *supra* at fn 15.
14. See *Michael Wilson & Partners Ltd v Emmott* [2008] EWCA Civ 184 and *Ali Shipping Corporation v 'Shipyard Trogir'* [1999] 1 WLR 136.
15. Julian D.M. Lew, Chapter 21: Confidentiality in Arbitrations in England in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England, with chapters on Scotland and Ireland*, Volume (© Kluwer Law International; Kluwer Law International 2013) pp. 441-454.
16. Article 19 of the LCIA Rules.
17. See Sapna Jhangiani, "How Far Do The New LCIA Guidelines For Parties' Legal Representatives and the IBA Guidelines On Party Representation go?", Kluwer Arb Blog http://kluwerarbitrationblog.com/blog/2014/05/21/how-far-do-the-new-lcia-guidelines-for-parties-legal-representatives-and-the-iba-guidelines-on-party-representation-go/.
18. Article 15 of the 1996 Act.
19. *Jivraj v Hashwani*: Parties to arbitral proceedings had entered into a joint venture agreement which provided for an *ad-hoc* arbitration in London. The agreement stipulated that the arbitral tribunal must belong to a particular religious set (i.e. Ismaili Muslims). The claimant argued that the stipulation was contrary to the Employment Equality (Religion and Beliefs) Regulations Act 2003. The Supreme Court held that arbitrators are not employees and are not therefore covered by the aforesaid Act. Therefore, qualifications concerning religion, beliefs, or otherwise, can be justly imposed upon the arbitral tribunal by agreement of the parties to the proceedings.
20. The default position under the LCIA Rules 2014 is also that unless parties have agreed otherwise, a sole arbitrator will be appointed.
21. Section 16(5) of the 1996 Act.
22. Section 33 of the 1996 Act.

23. Article 5.4 of the LCIA Rules.
24. *R v Gough* [1993] AC 658, House of Lords case − on appeal from the Court of Appeal. The appellant claimed that a member of the jury present at the first instance was biased towards him due to the fact that he and the jury member were neighbours, and that due to a lack of impartiality the judgment should be overturned. The appeal was dismissed under the notion that a "real danger of bias" must exist and that bias should be established on the basis of the possibility (rather than the probability) of bias.
25. [1999] EWCA Civ 3004. The court held that the notion of judge in regards to impartiality is extended to include all judicial decision-makers, including arbiters, jurors, etc. Impartiality will automatically result in disqualification if any pecuniary or proprietary interest is held by the decision maker in the claimant.
26. Volume 27 Number 3, 2011.
27. Oral submissions are very rare − only two so far: LCIA REF NO UN 7949 (3 December 2007) and LCIA ref no 3488 (11 July 2007).
28. Redfern & Hunter, Oxford University Press 2009, para 5.55.
29. See http://www.lcia.org/Frequently_Asked_Questions.aspx#Secretaries.
30. 2012 Current and Preferred Practices in the Arbitral Process: International Arbitration Survey.
31. See also Berwin Leighton Paisner's 2016 International Arbitration Survey which focuses on the role of tribunal secretaries in international commercial arbitration.
32. C-185/07 [2009] AC 1138.
33. See, for example, *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66; *Shashoua and ors v Sharma* [2009] EWHC 957 (Comm).
34. *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647.
35. [2011] EWHC 1624 *(Comm).*
36. 78 Arbitration, Issue 1 t 2012, Chartered Institute of Arbitrators (2012).
37. *ETI Euro Telecom International NV v Republic of Bolivia & Anor* [2008] EWCA Civ 880.
38. Section 52(1) of the 1996 Act.
39. Sections 52(3)-(5) of the 1996 Act.
40. Section 50 of the 1996 Act.
41. Section 61(1) of the 1996 Act.
42. Section 59 of the 1996 Act.
43. Section 61(2) of the 1996 Act.
44. Sections 49(3) and 49(4) of the 1996 Act.
45. Robert Merkin and Louis Flannery, Arbitration Act 1996, 5th Edition, Informa Law, p.292.
46. David Wolfson and Susanna Charlwood, Chapter 25: Challenges to Arbitration Awards in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England, with chapters on Scotland and Ireland*, (© Kluwer Law International; Kluwer Law International 2013) pp. 527-562.
47. [2010] EWHC 1626 (Comm).

48. [2007] UKHL 40.
49. Robert Merkin and Louis Flannery, *Arbitration Act 1996*, 5th Edition, Informa Law, p. 296.
50. [2005] EWHC 1193 (Comm).
51. David Wolfson and Susanna Charlwood, Chapter 25: Challenges to Arbitration Awards in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England, with chapters on Scotland and Ireland*, (© Kluwer Law International; Kluwer Law International 2013) pp. 527-562.
52. [2014] EWHC 3521 (Comm).
53. See Art. 34(6) of the ICC Rules and Art 26.8 of LCIA Rules.
54. Robert Merkin and Louis Flannery, *Arbitration Act 1996*, 5th Edition, Informa Law, p. 322.
55. David Wolfson and Susanna Charlwood, Chapter 25: Challenges to Arbitration Awards in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England, with chapters on Scotland and Ireland*, (© Kluwer Law International; Kluwer Law International 2013) pp. 527–562. See also *Schwebel v. Schwebel* [2010] EWHC 3280 (TCC).
56. Section 70(3) of the 1996 Act.
57. Section 70(2) of the 1996 Act.
58. Section 70(6) of the 1996 Act.
59. Sections 101-103 of the 1996 Act.
60. Section 103(2)(f) of the 1996 Act.
61. See, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 WLR 811, where enforcement was ordered despite public policy considerations relating to alleged illegality.
62. [2010] UKSC 46.
63. Alejandro Escobar and Kate Hill, Chapter 14: Multilateral and Bilateral Investment Treaties and the United Kingdom in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England,* with chapters on Scotland and Ireland, Kluwer Law International 2013 pp. 267–292.
64. *Ibid*.
65. See http://investmentpolicyhub.unctad.org/IIA/CountryBits/221#iiaInnerMenu.
66. Article 1(a) of Model BIT.
67. Article 1(6) of the ECT.
68. Alejandro Escobar and Kate Hill, Chapter 14: Multilateral and Bilateral Investment Treaties and the United Kingdom in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England, with chapters on Scotland and Ireland*, Kluwer Law International 2013 pp. 267-292.
69. A Contracting Party which expropriates a company incorporated or constituted in accordance with its own laws, and in which nationals of the other Contracting Party own shares, shall ensure that the expropriation provision of the BIT is applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of such shares.
70. Further See Article 7 of Model UK BIT: "*The provisions of this Agreement relative to the*

grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order, nor shall these provisions be construed to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from: (a) any existing or future customs, economic or monetary union, a common market or a free trade area or similar international agreement to which either of the Contracting Parties is or may become a party, and includes the benefit of any treatment, preference or privilege resulting from obligations arising out of an international agreement or reciprocity arrangement of that customs, economic or monetary union, common market or free trade area; or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation; or (c) any requirements resulting from the United Kingdom's membership of the European Union including measures prohibiting, restricting or limiting the movement of capital to or from any third country."

71. [2008] EWCA 1283.

72. See *Occidental Exploration & Production Co. v Ecuador* [2005] EWCA Civ. 1116; *Czech Republic v European Media Ventures SA* [2007] EWCA 2851; *ETI Euro Telecom International NV v (1) Bolivia (2) Empresa Nacional de Telecommunicaciones Entel SA* [2008] EWCA Civ 880.

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Finland

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Introduction

Arbitration in Finland is governed by the Arbitration Act of 1992 (967/1992 as amended). The Act was 'inspired' by the UNCITRAL Model Law in place at the time, but did not correspond to it word for word. Nevertheless, it did not conflict with the Model Law, nor has its interpretation been considered to conflict with how arbitration practice has evolved since then, either domestically or internationally. The Arbitration Act contains a few sections applicable to foreign arbitral proceedings and awards. Only minor amendments have been made since its enactment.

As a general rule, if a civil law case may be settled outside of court, the case is arbitrable. The exception is that consumers are not bound by arbitration agreements concluded before the dispute has arisen. Arbitration is not applicable to non-discretionary (indispositive) matters. The arbitral award may not be appealed, although it can be set aside based on the set of grounds elaborated below.

The judiciary's attitude towards arbitration is quite positive, and attorneys also tend to recommend arbitration in business-to-business disputes due to the advantages afforded by arbitration. The fact that state courts often have limited knowledge of industry realities, despite otherwise being competent, also plays a role in attorneys' positive attitude towards arbitration. Finland is party to, and has ratified, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The main centre for domestic or international arbitration is the Arbitration Institute of the Finnish Chambers of Commerce. The present Arbitration Rules of Finnish Chambers of Commerce (the "New Arbitration Rules") entered into force as of 1st June 2013. The key objective of the New Arbitration Rules was to address issues such as expediency and cost-efficiency, multi-party administration, arbitrator-ordered interim relief and increased confidentiality.

The New Arbitration Rules now stipulate a sole arbitrator to be the default number of arbitrators, unless the parties agree otherwise. If the board of the Institute considers it appropriate, the number of arbitrators may nevertheless be three. The challenge and replacement regimes concerning the arbitrators have also been conformed to the UNCITRAL Rules.

The reduction of the time and cost of proceedings has been addressed by stipulating that a preparatory conference shall be held (Art. 29), a procedural timetable shall be set up (Art. 30), a cut-off date prior to the hearing shall be set (Art. 33), the proceedings shall be officially closed, barring additional statements or claims (Art. 39), and the main rule is now that the award shall be given within nine months from the time at which the tribunal received the case file from the Institute (Art. 42).

The New Arbitration Rules also contain provisions on arbitrator-ordered interim relief. The Arbitral Tribunal may grant "any interim measures" it deems appropriate. What standards should be applied to the evaluation of whether an interim relief measure is appropriate have deliberately been left out in order to allow for flexibility in this respect. According to the New Arbitration Rules, a party may seek a court-ordered interim measure only in appropriate circumstances.

In addition to the above, the Arbitration Institute has also revised the rules for expedited arbitration, although the expedition procedure is quite seldom used.

Arbitration agreement

For an arbitration agreement to be valid, it must be in writing. Arbitration agreements concluded by way of correspondence are also acceptable. Arbitration clauses in wills, deeds of gift, bills of lading or similar documents, in the bylaws of an association, of a foundation, of a limited liability company or of another type of company or corporate entity, and by which the parties or the person against whom a claim is made are bound, shall have the same effect as separately concluded arbitration agreements.

The wording of the arbitration agreement is obviously subject to the normal rules of contract law, and can be interpreted or dismissed entirely if it is found lacking in clarity or enforceability. It is therefore recommended that due care be taken when drafting an arbitration clause. Consumers are not bound by an arbitration agreement made before a dispute has arisen, but are equally bound to an arbitration agreement concluded once a dispute has actualised.

The separability doctrine is applied in Finland. As a result, arbitrators may rule on the validity of a contract which includes an arbitration clause. The invalidity of the contract will therefore not automatically lead to the invalidity of the arbitration agreement. Arbitrators may also rule on their own competency (*kompetenz-kompetenz*).

Although it has not been stated *expressis verbis* in the Arbitration Act, arbitrators are generally considered to have the power to estimate damages when a party is unable to bear its burden of proof to the full extent (even if these powers haven't been granted to the arbitrator in the arbitration agreement). Guidance on the powers of the arbitrators may to this extent be found in the Code of Judicial Procedure.

The New Arbitration Rules include detailed provisions on the constitution of an arbitral tribunal in multi-party cases, joinder of additional parties to pending arbitration proceedings, claims between multiple parties, claims under multiple contracts (including multiple arbitration agreements) and on the consolidation of two or more arbitrations into a single arbitration proceeding.

Arbitration procedure

The Arbitration Act does not contain very many provisions on the procedure of the proceedings. According to the Act, the parties may agree on the procedure to be applied and, in the absence of such an agreement, the arbitrators are empowered to decide on the procedure, taking into account the requirements of impartiality and expediency. The arbitrators may not impose fines or undertake other coercive measures to enforce their procedural orders. The proceedings may physically take place outside the seat of arbitration.

The proceedings are not confidential as such. The arbitrators have a duty of confidentiality, but a corresponding duty concerning the parties must be based on an agreement or applicable arbitration rules.

A party to an arbitration may, if the arbitral tribunal considers it appropriate, petition a court to order the production of documents for the purpose of the arbitration, in which case the court will apply the Code of Judicial Procedure on the matter.

Finland does not have extensive discovery or disclosure proceedings concerning evidence in civil law disputes. The court may nevertheless order a party to present a document or another piece of evidence which may be relevant as evidence in the dispute when petitioned by a party. Refusal may be sanctioned with a fine, and the court may order an executive officer (bailiff) to execute the order.

As the main rule is that a party must be able to present its own evidence in support of its claims, the Code of Judicial Procedure is based on the notion that the requested evidence must be specified and relevant as evidence in the case. Usually the requirement of specificity is quite strictly interpreted. A petition concerning a narrow category of documents may nevertheless be successful, as courts have been somewhat more flexible during the last decade. However, as a rule of thumb it may be stated that the petition, and the subsequent order to produce, should be specific enough for an executive officer to be able to enforce the order by executing it himself. The court may order a third party to produce the evidence as well.

The rules on privilege in the production of documents are for the most part similar to the exemptions of giving testimony in the main hearing. Some information and documentation (such as business and trade secrets) is protected by law and can therefore not be subject to a production order.

A public official, a healthcare professional, an attorney or counsel, a court-appointed mediator or auxiliary mediator may not present a document if it can be assumed that the document contains something on which he or she may not be heard as a witness. In addition, a witness may refuse to give a statement which would reveal a business or professional secret, unless very important reasons require that the witness be heard on the subject matter. Similarly, a party may refuse to provide a document containing this kind of information. The court will examine the grounds for refusal prior to deciding on the issue. Partial production of a document may also be ordered.

There is an exception to the confidentiality obligation and right of an attorney. An attorney might be ordered to testify and produce documents if he has not acted for the client in court proceedings (i.e. only acted in an advisory role) and the testimony relates to investigating an aggravated offence. In-house counsels are considered normal employees of a company and as such, do not enjoy any special confidentiality rights or obligations.

The IBA Rules on the taking of evidence in international arbitration are frequently invoked, especially in disputes involving foreign parties (international arbitration). Even though Finland traditionally has had a rather dismissive stance concerning, for instance, disclosure, the stance on document production has nevertheless loosened up in domestic arbitration as well, and the apprehensive attitude found in the Code of Judicial Procedure no longer corresponds to the attitudes of seasoned arbitrators. An arbitral tribunal is not bound by the Code of Judicial Procedure and is consequently not obligated to apply the principles found in it, even when both parties are domestic.

Adverse inferences may be drawn by the arbitral tribunal if a party refuses to produce the requested evidence (drawing adverse inferences is naturally beset by its own set of problems concerning the conclusions one might be able to draw based on a refusal). Parties are nevertheless quite prone to adhere to orders issued by tribunals, and refusal rarely becomes an issue in proceedings.

Electronic production of documents has not surfaced as a real problem, due to a restrictive view on document production in general. At the moment, no steps are being taken to prepare for possible problems concerning electronic production that might surface in the future.

A party may petition a state court to appoint one or more arbitrators to the tribunal. Correspondingly, a court may relieve an arbitrator when requested to do so by the parties. A court may also enforce the production of evidence (including witness testimony) if it is considered necessary by the arbitral tribunal.

Notwithstanding the *lis pendens* rule applicable to the relationship between the arbitration proceedings and court proceedings, a state court may grant interim relief when petitioned to do so by a party. The Code of Judicial Procedure is applicable to the application for interim relief.

Arbitrators

Unless the parties have agreed otherwise (or applicable institutional arbitration rules provide for rules on the arbitrators), three arbitrators shall be appointed. Foreign nationals are *expressis verbis* allowed. An arbitrator shall be impartial and independent of the parties. Arbitrators have not been afforded immunity and are, as a starting point, liable for their actions.

The arbitration tribunal may rule on an arbitrator challenge. A challenge shall be presented within 15 days from the time at which a party became aware of the grounds for the challenge. Based on the New Arbitration Rules, the Board of the Arbitration Institute may release an arbitrator, if it accepts a challenge made by a party due to e.g. partiality. Where an arbitrator has been replaced, the reconstituted arbitral tribunal shall, after consulting with the parties, decide if and to what extent prior proceedings will be repeated before the reconstituted arbitral tribunal.

National courts will examine the matter only after an award has been rendered.

The IBA Guidelines on conflict of interest are not binding on tribunals or courts. The guidelines are nevertheless invoked quite frequently in challenge cases, and it can be said that the guidelines are taken into account when deciding on a challenge.

Based on the New Arbitration Rules, the arbitral tribunal may, after consulting with the parties, appoint a secretary when deemed appropriate. A secretary shall meet the same requirements of impartiality and independence as any arbitrator. Secretaries for arbitral tribunals are utilised to a certain degree and are more common in complex, high-value disputes involving an abundance of factual issues.

Interim relief

Under the Arbitration Rules of the Arbitration Board of the Finnish Chambers of Commerce, Article 36.5, a party in need of urgent interim measures that cannot await the constitution of an arbitral tribunal may apply for the appointment of an emergency arbitrator in accordance with Appendix III of the Arbitration Rules ("Appendix III"), unless the parties have exercised their right to opt out of the application of the provisions contained in Appendix III, i.e. specifically excluded the possibility of emergency arbitration in the relevant underlying agreement.

If the emergency arbitrator proceedings have not been ruled out, parties normally have the freedom to choose between applying for interim measures from the court from the emergency arbitrator, or even from the arbitral tribunal or arbitrator.

The purpose of emergency arbitrator proceedings is to get access to interim measures where the client's need for interim relief is so urgent that it cannot wait for the constitution of the arbitral tribunal. Where the urgency requirement is not fulfilled, the emergency arbitrator shall dismiss the Applicant's request for interim measures of protection.

The emergency arbitrator shall have the same power to grant any interim measures of protection as the arbitral tribunal. The scope of interim measures available under the New Arbitration Rules is wide, since the arbitral tribunal may, at the request of a party, grant any interim measures it deems appropriate.

The practicability of arbitrator-ordered interim measures is limited by the fact that under the New Arbitration Rules, the arbitral tribunal, and also the emergency arbitrator, shall give the party against which the request is directed an opportunity to submit comments before deciding whether to grant any interim measure. The right to comment on interim measures before they have been ordered may defeat the element of surprise sometimes needed to make full use of such protective measures.

Even if the provisions of the Appendix concerning emergency arbitrator proceedings are applied, the parties are not prevented from seeking urgent interim measures of protection from a competent judicial authority such as the local courts, at any time prior to making an application for the appointment of an emergency arbitrator, and in appropriate circumstances even thereafter.

Interim measures are regulated under Finnish law in the Code of Judicial Procedure, when measures are applied from general courts. Under the Code of Judicial Procedure, the court may order "precautionary measures" in situations set out in Chapter 7 of the Procedural Code. Usually the party petitioning for interim relief must post security for the potential damage an injunction may cause the other party.

The court may order the seizure of property if the petitioner establishes its receivable to be likely, and there is a danger that the other party hides or otherwise acts in a manner that endangers the receivable.

If the petitioner establishes the likelihood of him having some other enforceable right, and there is a danger that the other party, by doing or neglecting to do something, endangers or otherwise diminishes the right from being realised, the court may: (i) under the threat of a fine, order the other party to refrain from doing something; (ii) under the threat of a fine, order the other party to do something; (iii) entitle the petitioner to do something or have something done; (iv) order the property of the other party to be set into the custody of an agent (trustee); or (v) order any other measure which is necessary to safeguard the right which needs to be protected.

The order must be proportional to the right which is to be safeguarded, and may not cause unreasonable harm to the other party. The system for interim relief is quite flexible in that it recognises different kinds of rights and the need to protect them, and has, for instance, successfully been used to prevent a strike by a labour union, although that decision was initially criticised by academics.

Arbitration award

The arbitration award must be made in writing and must be signed by the arbitrators. If an arbitrator refuses to sign the award, an explanation as to the refusal shall be provided. Unless the parties explicitly agree that the arbitrators shall base their award on equity (*ex aequo et bono*), the arbitrators must base their award on the law.

The arbitral tribunal's final decision on the merits of the case constitutes the final award rendered by the tribunal. In addition to final awards, the tribunal may issue separate awards during the course of the proceedings. The tribunal may also render consent awards and additional awards if requested by the parties.

The arbitral tribunal may, by way of a separate award, decide an independent claim presented to the tribunal. A separate award may also be given concerning a part of a claim which has been admitted by the respondent. A separate award may also be rendered, with the consent of the parties, concerning an issue which determines how the rest of the dispute shall be resolved. The tribunal may, for instance, rule on a time-bar issue or divide a damages case by first ruling on the grounds of liability, and only after that rule on the amount of damages.

Additional awards are also possible if the arbitral tribunal neglects to rule on a claim in its actual award. In addition, the arbitral tribunal may correct clerical errors in the award at the behest of a party. The tribunal may also, on its own initiative, correct the clerical error after having heard the parties on the issue.

Based on the New Arbitration Rules, the award shall be rendered within nine months of the tribunal having received the case file from the Arbitration Institute.

Enforcement and challenge of the arbitration award

The enforcement of arbitral awards is decided on by the state courts. As a rule, the state court will apply the *in favorem pro validitate* rule on its deliberation, and the threshold for setting the award aside is quite high. Very many of arbitral proceedings take place in Helsinki, and other district courts may not be as familiar with arbitral law. Thus, it is recommended to seat the arbitration in Helsinki. Finland has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and foreign arbitral awards are therefore enforceable in Finland. Arbitral awards are challenged every now and then, but challenges are quite seldom accepted by the courts. In principle, an award can be enforced even though it has been successfully challenged in the place of arbitration.

An arbitral award can be set aside by the court on the basis of either invalidity or nullity. The award is considered invalid if: (i) the case was inarbitrable; (ii) the award contradicts the foundations of the judicial system (*ordre public*); (iii) the award is so unclear and incoherent it cannot serve as a basis for enforcement; or (iv) the award has not been signed by the arbitrators (majority suffices, but an explanation must be provided for why the minority has not signed the award). The award is considered null if: (i) the arbitrators have exceeded their powers; (ii) the arbitrators have been appointed in the wrong manner; (iii) an arbitrator has been incompetent due to bias; or (iv) the arbitral tribunal has not afforded a party sufficient opportunity to present its case.

Enforcement of a foreign arbitral award can be denied by the court if: (i) the arbitration agreement has been invalid (due to certain grounds); (ii) a party has not been informed of the proceedings or has otherwise been inhibited or unable to present its case; (iii) the arbitral tribunal has exceeded its powers; (iv) the composition of the arbitral tribunal or the arbitration itself has significantly deviated from the arbitration agreement; or (v) the arbitral award has not yet become binding in the country in which it was given, or if it has been set aside in that country. The arbitral award may not be enforced to the extent that the arbitral award contradicts the foundations of the Finnish legal system (*ordre public*).

The party enforcing the award or the judgment always bears the risk for the other party's insolvency. If the execution is unsuccessful due to lack of assets, the party enforcing the

award will have to pay its own legal costs, in addition to not being able to retrieve the claimed amount.

Investment arbitration

Finland has signed the Convention on the Settlement of Investment Disputes between States and National of other States (also known as the ICSID Convention or the Washington Convention) on 14 July 1967 and deposited its instrument of ratification on 9 January 1969. Finland attained status as a Contracting State to the ICSID Convention on 8 February 1969. There is only one case on ICSID record involving parties of Finnish nationality (claimants). The case was largely successful for the claimants.

Finland has signed Bilateral Investment Treaties (BITs) with over 60 countries. Most of these BITs have entered into force and allow recourse to arbitration as a means of dispute resolution.

Finland has also signed the Energy Charter Treaty and ratified it on 16 December 1997.

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France

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The purpose of this paper is to briefly set forth the main features of French arbitration law, a modern legislation which, together with a pro-arbitration case law and the presence of the International Chamber of Commerce, explains why Paris remains at the forefront of international arbitration places.

In the introduction we shall examine why Paris is and remains an attractive place as seat of the arbitration and the main features of French arbitration law that aim at increasing the efficiency of arbitration. The following sections shall address the salient points regarding the arbitration agreement, the arbitration procedure, the arbitrators, interim relief, the arbitral award, the challenge and enforcement of the arbitral award and, finally, investment arbitration.

Unless otherwise provided, references made below to "Articles" are references to articles of the French Code of Civil Procedure as modified by the Decree of 13th January 2011. Quotations of articles of this decree are based on the English version that can be accessed at http://www.parisarbitration.com/wp-content/uploads/2014/02/French-Law-on-Arbitration.pdf.

Introduction

The selection of Paris as the seat of the arbitration

International arbitration is the preferred mechanism for the resolution of commercial or investment international disputes. In order to ensure efficient arbitration proceedings and enforcement of the award, private parties and State entities very often elect for Paris as the seat of their arbitration. Many reasons explain the choice of Paris among all international arbitration places.

1. The drafting of the arbitration clause: the importance of selecting the seat of arbitration

When they opt for arbitration for the resolution of disputes that might occur in connection with their contract, parties are concerned that their case does not end up before a State court that they did not intend to choose in the first place.

This is the reason why they must take particular care when drafting the arbitration clause of their contract. When they opt for institutional arbitration, it is wise to reproduce the standard clause generally proposed by the chosen institution. This will ensure that arbitration will be administered by the proper institution chosen by the parties.

It is also useful to consider supplementing the clause in order to specify the place of arbitration.

This is a point that parties often tend not to address *ab initio*, when they agree on the terms of their contract. In such an event they bear the risk that difficulties arise at the stage of introduction of the arbitration proceedings, at a time when the parties are not likely to agree

on anything. Increased costs and additional delays might result from the selection process of the seat by the institution or by the arbitral tribunal, not to mention a possible intervention of State courts, with the risk that the seat so selected ends up being different from the one that the parties would have otherwise chosen. Careful drafting of the arbitration clause could easily have avoided unnecessary debates and uncertainties that disrupt the arbitral proceedings.

2. What is the seat of arbitration? What are the consequences attached to the seat of arbitration?

The seat of arbitration is the place where the award will be deemed to have been made, and not the place where hearings are actually held (whatever the seat of the arbitration, the arbitrators and the parties are at liberty to select any place(s) they deem convenient to hold their meetings).

The legal consequences attached to the place where the seat is located, is that the *lex loci arbitri* will come into play before and after the award is made by the arbitral tribunal.

Before the award is rendered, the choice of the seat carries the determination of the competence of the State courts in the event of difficulties as early as at the stage of the constitution of the arbitral tribunal, or to order provisional or conservatory measures before the arbitral tribunal is in place; the courts of the seat of arbitration may also be requested to resolve any other difficulties in the conduct of the proceedings (as far as these issues cannot be resolved by the arbitral tribunal or the institution administering the proceedings).

Once the award is rendered and the arbitral tribunal is *functus officio*, proceedings for annulment of the award shall be heard before the State courts of the seat and for the grounds determined pursuant to the law of the seat. Depending on the location selected, and resulting applicable law, these reasons may be very limited or instead allow a full review of the merits of the case. It is thus of the utmost importance to select a seat that authorises the annulment of the award for a limited number of reasons only.

The selection of the seat is thus important for several reasons: when opting for arbitration the parties want a flexible, neutral, fast and efficient procedure. It follows that the intervention of State courts should be as limited as possible and with the aim to promote the smooth conduct of the arbitration proceedings, not to hinder them.

In addition, the parties' intent is to have a binding arbitration award that is enforceable in all countries. As a result, a seat that authorises the annulment of the award for a limited and predetermined number of grounds must be given preference.

3. What are the criteria to be considered for the selection of the seat of arbitration? How to choose a seat of arbitration?

In sum, an arbitration seat that meets the needs of the parties must be located in a State:

- that is a signatory to the New York Convention of 10th June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards;
- whose laws are favourable to arbitration; and
- the courts of which intervene positively in support of arbitral proceedings and do not interfere to derail the arbitration proceedings.

While not the only one, Paris meets all these criteria with the benefit of specialised judges, institutions and arbitration professionals that provide a secure legal environment allowing for the smooth conduct of arbitral proceedings, also meeting the objectives of speed and efficiency. In addition, Paris provides all the logistic advantages that are necessary for the conduct of arbitration proceedings.

To choose Paris as the seat of arbitration, it suffices to add to your arbitration clause: "*The seat of the arbitration shall be Paris, France.*"

French arbitration law aims at increasing the efficiency of arbitration

1. The recent modernisation of French arbitration law

French international arbitration legislation (that is not based on the UNCITRAL Model Law) was introduced in the French Code of Civil Procedure by a Decree N°81-500 enacted on 12th May 1981. This was already a very liberal and pro-arbitration regime that was interpreted by the Paris Court of Appeals (which is the competent judicial court for all applications for the recognition and enforcement of international arbitration awards in France) and by the Cour de Cassation in order to favour the recourse to international arbitration.

This regime was recently reformed by Decree N°2011-48 of 13th January 2011 (which entered into force on 1st May 2011) in order to further modernise the legal framework and incorporate the jurisprudence developed by French courts.

As a result, there is no drastic change in the regime applicable to international arbitration but rather a consolidation of recognised principles of case law such as the recognition of arbitration agreements "by reference" to another document that contains the arbitration clause (Article 1443), and the autonomy of the arbitration clause (Article 1447). It also incorporates both positive (Article 1465) and negative (Article 1448) effects of the well-known (and of French origin) principle of "*compétence-compétence*": it is for the arbitrators to rule on their own jurisdiction and national courts must decline jurisdiction when there is an arbitration agreement (with the exception of cases where the arbitration is manifestly void or inapplicable). It is worth noting in this respect that French courts strictly comply with the negative effect of the principle of *compétence-compétence*.

A number of innovations aiming at increasing efficiency of arbitration proceedings also result from the recent Decree.

2. Some innovations to increase efficiency

The major innovation regarding domestic arbitration is that the appeal of the award is no longer available as of right: it cannot be appealed unless expressly provided otherwise by the parties (Article 1489). This change is in line with the rules of many legal systems and Article 34 of the UNCITRAL Model Law that serves as a basis for arbitration law in many countries.

In international arbitration, the Decree confirms the position of the case law that the "*arbitration agreement shall not be subject to any requirement as to its form*" (Article 1507) and aligns the position of French law to the one of the most modern laws (and competitors in terms of place of arbitration …) such as Swiss law: an application to set aside an award or an appeal against an enforcement order no longer suspends the enforcement of the award (Article 1526), which appears to be the most efficient (and sometimes criticised) measure to achieve greater efficiency of the arbitration process. In the same vein, the Decree provides for the possibility for the parties to an international arbitration to agree at any time to waive their right to set aside an award (Article 1522).

All these provisions contribute to greater efficiency in international arbitration and illustrate the confidence of French arbitration law in the arbitral institution.

There is a very clear line of French case-law establishing that the French courts can recognise and enforce awards which have been set aside elsewhere, including by courts of the seat of the arbitration (see, Norsolor, Cour de Cassation 9th October 1984; Hilmarton, Cour de Cassation 23rd March 1994 and 10th June 1997; Chromalloy, Paris Court of Appeals 14th January 1997; and Putrabali, Cour de Cassation, two decisions of 29th June 2007).

The analysis made by French courts is that the law of the seat of the arbitration is not the source of validity of an arbitral award, and that the law of the country where enforcement is sought is applicable to determine if an award must be recognised and enforced.

French law will thus determine the conditions for the recognition of the arbitral award as part of the French legal order, without regard to the grounds for which the award was set aside by other courts in any other jurisdiction. The rule established by French case law is that an international award is not part of any national legal order, but rather a decision of an autonomous arbitral legal order and must be recognised in France even if it was set aside at the seat of the arbitration.

3. When is arbitration international?

Although the regime applicable to domestic and to international arbitration tends to be fairly similar, the distinction between domestic and international arbitration is maintained. The French Code of Civil Procedure remains divided in two sections dealing respectively with domestic arbitration (Articles 1442 to 1503) and international arbitration (Articles 1504 to 1527). It is specifically provided (Article 1506) that a number of provisions set forth under the section governing domestic arbitration also apply to international arbitration; these provisions are mainly general principles governing any arbitration with a seat in France.

The criterion to characterise international arbitration is of an economic nature: "*an arbitration is international when international trade interests are at stake*" (Article 1504). This is another illustration of the existence of an autonomous legal arbitral order, since it is not for the parties to determine the international character of their arbitration but rather the existence of objective economic criteria resulting from the existence of a flux of services, goods or funds across national frontiers and this irrespective of the nationality of the parties, the law applicable to the merits or to the procedure, or the seat of the arbitration.

In sum, French law appears to offer a regime that is more favourable than the one provided for by the UNCITRAL Model Law as well as the one resulting from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, which France signed on 25th November 1958 and ratified on 26th June 1959.

Arbitration agreement

What are the formalities needed for the arbitration agreement and the drafting of the arbitration clause?

A written arbitration agreement is mandatory for domestic arbitration (Article 1443) but not for international arbitration (Article 1507). The same rules apply to the arbitration clause (i.e. the arbitration agreement agreed upon by the parties at the time they enter into a contract and that shall apply to all disputes that might arise in connection with the contract) and the submission agreement (i.e. the agreement of the parties to submit a specific dispute to arbitration, agreed upon by the parties at the time there is a dispute for which no arbitration clause was concluded) (Article 1442).

In any event, the consent to arbitration must be established and, as a result, it is preferable to provide for arbitration in writing (in the contract at stake, or on invoices, or by reference to another document that includes the arbitration agreement) since this is the best evidence that will be available both before courts or arbitrators (if one party challenges the jurisdiction of the arbitral tribunal) and at the time of recognition and enforcement of the award (since the proof of the existence of an arbitration agreement shall be required along with the award).

French courts will determine the existence of the parties' consent to arbitrate their dispute. In doing so, the assessment of the existence, validity and scope of the conventional power to engage a party to the arbitration is conducted without reference to any national law: "*by virtue of a substantive rule of law in international arbitration, the existence and validity of an arbitration clause shall be assessed without reference to national law, but only under the control of the parties to resort to arbitration in terms of the circumstances of the case*" (see, Shackleton, Cour de Cassation, 16th March 2016, confirming the decision of the Paris Court of Appeals of 24th June 2014).

As outlined above (see Introduction) a specific and detailed agreement agreed upon at the outset will allow the parties to avoid uncertainties, waste of time and money at the time a dispute arises. Such an agreement need not be very long but must clearly record the parties' intent to resort to arbitration and, as a minimum, indicate if the arbitration is institutional (with the exact name of the institution) or *ad hoc*, and in both cases the rules that are applicable, the number of arbitrators, the language of the arbitration and the seat of the arbitration. Finally one might consider adding whether or not the arbitration shall be confidential, since this is not to be taken for granted (and some institutions such as the ICC do not provide for confidentiality in their rules).

What disputes are arbitrable?

Pursuant to Article 2059 of the French Civil Code, parties can opt for arbitration for disputes relating to private patrimonial rights (excluded are, for example, family law, criminal law, succession law, for which the rights cannot be freely disposed of by a party; see Article 2060 of the French Civil Code). Arbitration is not available to public entities in connection with domestic disputes (Article 2060 of the French Civil Code); however, such restriction does not apply to international arbitration.

In its earlier version, Article 2061 of the French Civil Code expressly provided for the validity of an arbitration clause inserted in a contract concluded in connection with professional activities. Pursuant to Article 11 of the Law of "Modernization of Justice in the 21st Century" dated 18th November 2106, this Article 2061 was modified, extending the scope of the arbitration clause. As now drafted, this Article 2061 of the French Civil Code provides that: "*The arbitration clause must have been accepted by the party against whom it is opposed, unless the latter has succeeded to the rights and obligations of the party which originally accepted it. When one of the parties has not contracted in the course of his professional activity, the clause cannot be opposed to him.*" The innovation lies in the fact that this article does not refer to the validity of the arbitration clause but rather its effects (the "opposability") and that as now drafted, consumer disputes can be referred to arbitration, and arbitration proceedings can be commenced so long as the party that "has not contracted in the course of its professional activity" does not object (in which case, the dispute shall be referred to competent courts). This very recent change should not affect international arbitration and its exact consequences remain to be determined by case law. (On this modification, see Charles Jarosson and Jean-Baptiste Racine, *Les dispositions relatives à l'arbitrage dans la loi de modernisation de la justice du XXIe siècle*, Rev. Arb. 2016, pp.1007 *et seq*.).

What rules exist for the joinder/consolidation of third parties?

As a matter of principle, the arbitration agreement is binding on parties to the contract that contains the arbitration clause.

This does not mean that non-signatories cannot be parties to arbitration proceedings. French courts take into account the behaviour of the parties from which acceptance to be bound by

the arbitration clause can be inferred; for example, the non-signatory's involvement in the negotiation, execution or performance of the contract (See, for example, État libyen, Paris Court of Appeals, 28th October 2014).

Do the principles of *compétence-compétence* and separability apply?

1. The principle of compétence-compétence

As already indicated above (see Introduction), the principle of "*compétence-compétence*" is enshrined in the French Code of Civil Procedure in two articles that relate to the positive and negative aspects of this principle and that apply to both domestic and international arbitration.

Article 1465 relates to the positive aspect, pursuant to which it is for the arbitral tribunal to rule on its own jurisdiction ("*the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction*") and Article 1448 relates to the negative aspect of the principle, according to which judicial courts shall decline jurisdiction in the presence of an arbitration agreement ("*when a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction*").

There is very little room left for French courts when parties have provided for arbitration, since the only exception allowing a court to retain its jurisdiction if requested to do so by a party ("*A court may not decline jurisdiction of its own motion.*") is subject to two cumulative conditions: there is no arbitral tribunal seized as yet and the "*arbitration agreement is manifestly void or manifestly not applicable*" (Article 1448).

As a matter of example, the presence of multiple arbitration clauses under various agreements shall not *per se* render the arbitration clause inapplicable.

In a recent decision of 30th March 2016, Inthemix, the Paris Court of Appeals held that the Paris Commercial Court had validly declined its jurisdiction since "*under the terms of Article 1448 of the Code of Civil Procedure, when a dispute subject to an arbitration agreement is brought before a court of the State, it declares itself incompetent unless the arbitral tribunal is not yet seized and if the arbitration agreement is manifestly void or manifestly inapplicable*".

The Court of Appeals held that "*manifest inapplicability of the arbitration clause*" which must be established by the applicant, does not result from *"the interdependence of the three contracts at stake that form a unified economic undertaking according to the will of the parties*" nor from the fact that they are "*signed by different persons, have different objects, relate to different obligations and are subject to distinct disputes*". The Court of Appeals notes that the arbitration clauses at stake "*are not inconsistent with each other to make inapplicable the arbitration clause in the franchise agreement*".

Obviously, the principle of *compétence-compétence* is not designed to deprive the parties of the possibility to obtain interim or conservatory measures from judicial courts, although preference is given to the arbitral tribunal, once constituted.

As long as the arbitral tribunal is not in place, Article 1449 expressly provides for the jurisdiction of courts: "*The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures. Subject to the provisions governing conservatory attachments and judicial security, application shall be made to the President of the Tribunal de Grande Instance or of the Tribunal de Commerce who shall rule on the measures relating to the taking of evidence in accordance with the provisions of Article 1452 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement.*"

2. The separability of the arbitration agreement: the principle of autonomy

French courts have long established that the validity of the arbitration agreement is not affected by the invalidity of the contract in which it is inserted; the arbitration clause is independent from the contract.

The so-called autonomy of the arbitration agreement is now expressly set forth in Article 1447 (applicable to both domestic and international arbitration): "*The arbitration clause is independent from the contract to which it refers. The validity of the former is not affected by the nullity of the latter*."

French case law applies this principle of autonomy in a very pro-arbitration fashion, since the arbitration agreement is also considered to be independent from the law governing the contract, and its validity must be assessed "*subject to the prior application of the mandatory rules of French law and public international order, according to the shared will of the parties, without the need to refer to State Law*" (Dalico, Cour de Cassation, 20th December 1993). Recent case law accepts the "survival" of the arbitration agreement even if the contract is inexistent or never existed (see, for example, So Good International Ltd, Cour de Cassation, 28th November 2006).

Arbitration procedure

How are the arbitration proceedings commenced?

There is no specific requirement to start an arbitration procedure, which usually results from the filing of a request for arbitration with the respondent or the institution referred to in the arbitration clause.

Can hearings take place outside the seat of the arbitration?

As already mentioned in the Introduction above, the seat of the arbitration bears no relevance to the determination of the place where the arbitrators and the parties meet, which can be the same place as the one of the seat, but can also be any place that the parties and the arbitrators deem more convenient.

Procedural rules

The parties, the arbitrators and counsels may have to deal with many procedural matters which, if not properly addressed in due course, can lead to numerous procedural incidents that will entail increased costs and delays.

As part of these questions are:

- What are the rules on evidence?
- What rules are applicable regarding privilege and disclosure?
- Are the IBA Rules on the taking of evidence taken into account?
- Are there any rules regarding expert evidence?
- Are there any guidelines for Counsel to take into account any guidelines such as the LCIA or IBA?
- Are arbitration proceedings confidential?
- Can the evidence and pleadings be kept confidential?

1. The procedural rules shall be fixed by the parties and/or the arbitral tribunal

The answer to these questions and any other issue of procedural or organisational nature is that it is for the parties, failing which the arbitral tribunal, to decide what they deem appropriate.

Article 1464, paragraph 1 and 2 applicable to domestic arbitration provide that: "*Unless otherwise agreed by the parties, the arbitral tribunal shall define the procedure to be followed in the arbitration. It is under no obligation to abide by the rules governing court proceedings. However, the fundamental principles governing court proceedings set forth in Articles 4, 10, Article 11, paragraph 1, Article 12, paragraphs 2 and 3, Articles 13 through 21, 23 and 23-1 shall apply*."

The same principle is in fact applied in international arbitration where, unless the parties have agreed upon specific rules, the arbitral tribunal determines (in consultation with the parties) the procedural rules applicable.

In any event, a few procedural questions are specifically dealt with in the French Code of Civil Procedure: due process, the taking of evidence, confidentiality and the obligation to act diligently and in good faith.

2. Due process

An arbitral tribunal with a seat in France will have to ensure that due process is observed since the award might not otherwise be enforceable.

This requirement states the obvious for every one familiar with international arbitration. It stems from the provisions of Article 1510, which states that: "*Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process.*"

Should this not be the case, the award might be set aside on two grounds (due process, international public policy) that can be found at Article 1520 pursuant to which, "*An award may only be set aside where: (...) (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy*."

3. Evidence

The parties and the arbitral tribunal can freely devise the rules that they consider fit for the arbitration proceedings. They can thus decide that the arbitral tribunal shall apply, or be allowed to make reference to, rules such as the IBA Rules on the Taking of Evidence in International Arbitration (which, as a practical matter, are often used by arbitral tribunals with a seat in France).

As part of the elements introduced by the Decree of May 2011 is the possibility for a party to request the arbitral tribunal, once it is constituted, to summon a third party to appear before the President of the *Tribunal de Grande Instance* for the purpose of obtaining the evidentiary document that the party to the arbitration intends to rely upon.

Article 1469 paragraph 1 (applicable to both domestic and international arbitration) provides as follows: "*If one of the parties to arbitral proceedings intends to rely on an official (acte authentique) or private (acte sous seing privé) deed to which it was not a party, or on evidence held by a third party, it may, upon leave of the arbitral tribunal, have that third party summoned before the President of the Tribunal de Grande Instance for the purpose of obtaining a copy thereof (expédition) or the production of the deed or item of evidence*)."

This is another illustration of the primacy given to arbitral tribunals and of the support that French courts must provide to facilitate the conduct of arbitration.

4. Confidentiality

With respect to domestic arbitration, Article 1464, fourth paragraph provides that: "*Subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential*." This applies to both the parties and the arbitral tribunal. This provision

is not detailed. (Is the existence of the arbitration confidential? Is the award confidential?) and it does not apply to international arbitration. In both types of arbitrations, however, the deliberations of the arbitral tribunal are confidential (Article 1479).

As a result, international arbitration is not confidential as of right under French law.

This does not mean that international arbitration cannot be confidential, but this is an issue that needs to be addressed either before the arbitration is commenced (in the arbitration agreement), or at any point in the course of the proceedings (in the procedural rules discussed at the outset by the parties and the arbitral tribunal, or by means of a specific request made before the arbitral tribunal).

The first place where confidentiality provisions may be found are the rules of arbitration of the institution selected by the parties. However, the rules selected by the parties to govern the arbitration proceedings may contain confidentiality provisions or not. For example, the ICC Rules do not contain confidentiality provisions (other than the confidential character of the work of the International Court of Arbitration); the Swiss Rules contain a detailed provision (article 44). Even if they exist, the confidentiality provisions of the rules might not be as detailed or specific as might be required by the parties.

Parties should therefore consider drafting specific confidentiality provisions in their arbitration clause (both for domestic and international arbitration) in order to cover, when appropriate, the existence of the arbitration and the documents and materials used in the proceedings (written submissions, exhibits, witness statements, expert reports, procedural orders and other communications with the arbitral tribunal, transcripts of hearings …) as well as oral exchanges made during the arbitration proceedings.

If not found in the applicable rules of arbitration of the institution chosen by the parties or in the arbitration clause, such detailed provisions on confidentiality can also be dealt with at the stage of establishing the terms of reference (which might also prove useful to supplement the procedural rules that result from the set of rules applicable to the dispute).

In any event, Parties can also request the arbitral tribunal to rule on certain matters by way of procedural orders to preserve the confidentiality of the proceedings, or of some pieces of information. This is often the case for the confidentiality of trade secrets or know-how that might need to be disclosed in the course of the arbitration proceedings, and that are not the subject of a patent or a confidentiality agreement (although a partial award would seem preferable, since it would be enforceable as an order is not). The ICC rules, Article 22(3), contemplate such a possibility: "*Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information*."

5. The obligation of diligence and good faith

One major innovation, applicable to both domestic and international arbitration, lies in the provisions of the third paragraph of Article 1464 which provide that: "*Both parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings*."

This innovation is in line with recent development in international arbitration in order to tackle with the criticism that arbitration proceedings are exceedingly costly and take too much time.

Arbitral Institutions such as the ICC or the LCIA have recently introduced the same obligation of diligence. (See, ICC Rules 2012, Article 22(1): "*Article 22 Conduct of the Arbitration 1 − The arbitral tribunal and the parties shall make every effort to conduct the*

arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute"; LCIA Rules 2014, Article 14.4 (ii): "*Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: (…) (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute*.")

In sum, it is for the parties and the arbitral tribunal to design the procedural rules, which is usually done at the time the terms of reference are signed or in the first procedural order issued simultaneously by the arbitral tribunal (and any subsequent procedural order issued by the arbitral tribunal to rule upon any such issue).

Arbitrators

Appointment of arbitrators

The constitution of the arbitral tribunal is dealt with in great detail by French law (Articles 1450 to 1461).

- An arbitrator must be a natural person and a legal person can only administer the arbitration. This provision of Article 1450 is not applicable to international arbitration. As noted by a commentator (see Thomas Clay, *Code de l'arbitrage commenté*, Lexis Nexis, 2015, p. 57), this entails that French courts will grant exequatur to an international award with a seat outside of France that is "signed" by an institution, and that an arbitration agreement that would designate a legal person as the arbitrator would be deemed valid (in such a case such legal person would be considered as administering the procedure).
- An arbitral tribunal shall comprise a sole arbitrator or an uneven number of arbitrators (Article 1451).
- Each party is granted the right to nominate an arbitrator (Article 1452).
- The agreement of the parties regarding the appointment of the arbitrator(s) must be followed.

Judicial courts play a specific role in the event of difficulties in connection with the constitution of the arbitral tribunal: Articles 1451, 1452, 1453, 1454, 1455, 1456, 1459 and 1460 refer to the "*judge acting in support of the arbitration*" (the "*juge d'appui*") which is the President of the *Tribunal de Grande Instance* (Article 1459) who has exclusive jurisdiction to finalise the constitution of the arbitral tribunal.

Duty of disclosure: Are the IBA guidelines on conflict of interest taken into account?

Pursuant to the second paragraph of Article 1456, before accepting a mandate, arbitrators must disclose "*any circumstance that may affect his or her independence or impartiality*", and this obligation to be independent and impartial is of a permanent nature, since the arbitrator "*shall disclose any such circumstance that may arise after accepting the mandate*".

Notorious facts or participation in arbitration academic or social events need not be disclosed and the IBA Guidelines on Conflicts of Interests in International Arbitration are frequently referred to.

The scope of such disclosure encompasses objective circumstances (such as a flow of business with a party or a counsel involved in the arbitration) as well as subjective circumstances (for example, friendly relationship) that, in the mind of the parties, can cast

a reasonable doubt as to the arbitrator's independence or impartiality. There appears to be a significant flow of judicial decisions on this topic, that reflects the tendency of parties to challenge awards rather than the lack of impartiality or independence of arbitrators.

Removal and challenge of arbitrators

An arbitrator may only be removed by unanimous consent of the parties (Article 1458) or in the event the parties cannot agree, by the person responsible for administering the arbitration (i.e. institutional arbitration or *ad hoc* arbitration with an appointing authority vested with the power to administer the proceedings) or where there is no such person, by the judge acting in support of the arbitration (Article 1456, final paragraph).

Regarding the challenge of arbitrators, the provisions of Article 1466 might serve as a guardrail. Article 1466 imposes on parties a duty to raise "*in a timely manner*" before the arbitral any irregularity in the conduct of the proceedings that such party is aware of, failing which "*without a legitimate reason*" such party "*shall be deemed to have waived its right to avail itself of such irregularity*". The knowledge of any irregularity, which encompasses any element regarding the constitution of the arbitral tribunal, that is not raised in due course by a party, will prevent such party from challenging the arbitrator, and ultimately from challenging the award on such ground.

Immunity of arbitrators?

French law does not provide for the immunity of the arbitrators which can be held liable (including on criminal grounds) as a result of the performance of their mission in the event of wilful misconduct, gross negligence or denial of justice (see, Thomas Clay, *op. cit*. p.58; Cour de Cassation, 15th January 2014).

Secretary to the arbitral tribunal

It is fairly common that arbitral tribunals with a seat in France are assisted by an administrative secretary. This function is not the subject of specific provisions of the French Decree on arbitration; however, such a person acts under the directives and responsibility of the arbitral tribunal and it is certain that its lack of partiality or independence would taint that of the arbitral tribunal and could give rise to the same consequences as for an arbitrator that did not meet the requirements of Article 1456.

As a practical matter, the presence of a secretary is subject to the agreement of the parties and this person is also required to provide a statement of independence and impartiality. (See, for example, the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the 2012 ICC Rules of Arbitration that contains an entire section devoted to the appointment, duties and remuneration of administrative secretaries, and provides in particular that "*Administrative Secretaries must satisfy the same independence and impartiality requirements as those which apply to arbitrators under the Rules. ICC staff members are not permitted to serve as Administrative Secretaries*.")

Interim relief

What types of interim relief are available to the parties? Can the parties apply to both courts and arbitral tribunals for such interim relief?

As already indicated (see above, 'Arbitration agreement, 1. The principle of *competence-competence*'), Article 1449 expressly provides for the possibility to obtain interim relief from the arbitral tribunal, once constituted, of from judicial courts prior to the constitution of the arbitral tribunal: "*The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for*

measures relating to the taking of evidence or provisional or conservatory measures. Subject to the provisions governing conservatory attachments and judicial security, application shall be made to the President of the Tribunal de Grande Instance or of the Tribunal de Commerce who shall rule on the measures relating to the taking of evidence in accordance with the provisions of Article 1452 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement."

This provision is consistently applied by French courts. (See, for example, Paris Court of Appeals, 29th March 2016: "*However, according to Article 1449 of the Code of Civil Procedure, applicable to international arbitration under Article 1506 1 of the code, the existence of an arbitration agreement does not preclude, in case of emergency, the referral to the national judge so long as the arbitral tribunal is not constituted to obtain an interim measure, such request to be brought before the presiding judge of the Tribunal de Grande Instance or the commercial court*.")

Any kind of interim relief can be obtained from an arbitral tribunal, save for attachments and judicial security for which judicial courts retain exclusive jurisdiction.

These powers are vested in arbitral tribunals by virtue of Article 1468: "*The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order. However, only courts may order conservatory attachments and judicial security. The arbitral tribunal has the power to amend or add to any provisional or conservatory measure that it has granted*."

Anti-suit injunctions

1. What are anti-suit injunctions?

Anti-suit injunctions are orders obtained from a judicial court by a party in order to restrain another party from bringing or continuing an arbitration. The judicial court is requested to protect its own jurisdiction or the jurisdiction of the appropriate forum other than the arbitration that is requested to order a party to refrain from bringing, or to withdraw or suspend an arbitration.

Anti-suit injunctions raise the issue of which national courts and arbitral tribunals have jurisdiction to decide on the validity, scope and effectiveness of an arbitration agreement and in which order (see on this topic, *Anti-Suit Injunctions in International Arbitration*, 2003, IAI Series on International Arbitration N°2, Emmanuel Gaillard Ed., Juris Publishing, Inc.).

2. Can French courts order anti-arbitration injunctions in aid of domestic litigation?

Such injunctions are, in essence, anti-arbitration measures designed to derail an arbitration or resist enforcement of an award.

As such, they are unlikely to be obtained from French courts, unless − when reviewing an award for recognition or enforcement purposes − French courts disagree on the decision of the arbitrators regarding their own jurisdiction and set aside the award. In such an event it is however doubtful that French courts would issue an anti-arbitration injunction. French courts might retain their jurisdiction, in the event that an action is brought before them and they determine that there is no arbitration clause, or that such clause is invalid and that they are the court of competent jurisdiction as a result of applicable rules of conflict.

3. Can French courts order anti-suit injunctions in aid of international arbitration?

In the event that a judicial court is seized of a dispute that is either pending before an arbitral tribunal or that is the subject of an arbitration clause, it will have to decline its jurisdiction by virtue of the negative effect of the principle of *compétence-compétence* (Article 1448).

French arbitration law contains many provisions regarding the role of the "*juge d'appui*", whose function is to act in support of the arbitration process in connection with difficulties in the constitution of the arbitral tribunal but is not defined in the law so as to encompass the equivalent of the anti-suit injunctions. French court would thus not issue pro-arbitration injunctions.

This does not mean that French courts would not give effect to anti-suit injunctions issued by foreign courts.

4. Would French courts give effect to a foreign anti-suit injunction?

There is at least one decision of the French Cour de Cassation giving effect to a foreign anti-suit injunction issued in the context of litigation proceedings (and not arbitration) that can serve as an indication of the rule that would apply should enforcement of an anti-arbitration injunction be sought in France.

In the In Zone Brands International INC decision of 14th October 2009, the Cour de Cassation decided that in its decision of 17th April 2009, the Court of Appeals of Versailles held exactly first, that "*having regard to the jurisdiction clause freely accepted by the parties, no fraud could result from the seizure by the American Company of the courts designated by the jurisdiction clause"; second that "there cannot be denial of justice, since the purpose of the decision of the Georgian judge is precisely to rule on its own jurisdiction and to give effect to the agreement on jurisdiction entered into by the parties"; and finally that "is not contrary to international public policy the 'anti-suit injunction' the sole purpose of which (...) is, as in the present case, to sanction the violation of a pre-existing contractual obligation*".

In sum, the issuance of an anti-suit injunction against a French company does not contravene French international public policy and should therefore be given effect by French courts.

Arbitral award

Making of the award

The award is the decision reached by the majority of the arbitrators, unless the arbitration agreement provides otherwise, and it must be signed by all the arbitrators (Article 1513, applicable to international arbitration).

In order to ensure efficiency and avoid deadlock situations, French law expressly provides that if there is no majority the chairman of the arbitral shall rule alone and that should an arbitrator refuse to sign, the chairman shall make a mention thereof in the award that it shall sign alone (Article 1513, third paragraph). Finally, the same Article 1513 confirms that an award made in such circumstances shall have the same effect as if signed by all arbitrators or made by majority decision.

As to the content of the award, Article 1481 (applicable to both domestic and international arbitration) lists the elements that an award must contain (name and details of the parties and their counsels, names of the arbitrators, date when and place where the award was made). In addition, an award must state "*succinctly*" the respective claims and arguments of the parties and the reasons upon which it is based (Article 1482).

Pursuant to Article 1483 which is not applicable to international arbitration, an award that does not comply with these requirements is void. As a result, French courts have ruled that an international award cannot be set aside on the ground of a lack of motivation, which is not in itself contrary to French international public policy.

Effects of the award

As soon as made, the arbitral award is *res judicata* with respect to the claims adjudicated in that award (Article 1484), and the powers vested in the arbitrators cease with respect to such claims (Article 1485). As a practical matter, in the event of an interim award the powers vested with the arbitrators remain on all claims, and in the case of a partial award their powers remain to adjudicate the remainder of the dispute not decided by such award.

An interesting feature introduced by the Decree of 13th January 2001 is that "*the award may be declared provisionally enforceable*" (Article 1484, second paragraph, applicable to both domestic and international arbitration).

This provision is to be read in conjunction with Article 1496 (domestic arbitration) pursuant to which, unless declared provisionally enforceable, enforcement of the award shall be stayed until the expiry of the time limit for the appeal or action to set aside or, if such action is filed, until it is decided. In sum it is highly advisable in connection with domestic arbitration to require that the award be declared provisionally enforceable in order to expedite enforcement of the award.

Regarding international arbitration, Article 1526 goes further since it expressly provides that "*neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award*". This is perhaps the most important innovation (that is inspired from Swiss law) introduced by the Decree of 13th January 2011 and is a complete upturn of the previous rule.

In the matter of international arbitration, provisional enforcement need not to be requested, it exists as of right.

The only limitation of provisional enforcement might occur when it could "*severely prejudice the rights of one party*" (Article 1526, international arbitration), in which case a stay might be requested from the first president of the Court of Appeals of Paris ruling in expedited proceedings ("*référé*"). The same recourse (although in slightly different terms) is provided for domestic arbitration, when enforcement of the award could "*lead to manifestly excessive consequences*" (Article 1497).

Challenge of the arbitral award

The set of rules to challenge an arbitral award vary for domestic and international arbitration, which is a further demonstration that the determination of the domestic or international character of the arbitration is essential (this was in particular a crucial point in the so-called "Tapie case"). All recourses are centralised before the Court of Appeals of the place where the award was made (domestic arbitration: Article 1494, and international arbitration: Article 1519).

Appeal

An international award cannot be appealed (Article 1518). The principle in domestic arbitration is now that the award cannot be appealed unless the parties have provided otherwise (Article 1489).

It must be noted that an application for revision of the award can be filed in the event of fraud (Article 1502).

Action to set aside

The only recourse against an international award is an action to set aside (Article 1518). The possibility for the parties to waive their right to any recourse against the award in

international arbitration was introduced by the Decree of 13th January 2011 (see, Article 1522).

The five grounds to set aside an award are listed, exhaustively, at Article 1520: "*An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy*." With respect to domestic arbitration, there is a sixth ground set forth at Article 1491 that relates to the lack of reasons upon which the award is based, or when one of the elements detailed above (see above, 'Arbitral award – Making of the award') is missing.

These conditions apply both to the recognition and enforcement of arbitral awards made abroad or in international arbitration. There is thus no review on the merits and it must be noted regarding the international public policy that it is construed very narrowly by French courts.

Both the law and French case law are pro-arbitration and as a result it is very rare that an award is successfully challenged in France.

Enforcement of the arbitral award

In the case of awards rendered outside of France, applications for enforcement are centralised and can only be filed before the *Tribunal de Grande Instance* of Paris which enforces the award by rendering an enforcement ("*exequatur*") order. This is an *ex parte* procedure that requires the filing by the requesting party of an original copy of the award together with evidence of the arbitration agreement, which serves as a basis for the jurisdiction of the arbitral tribunal that made the award (Article 1516) together with a translation in French when such documents are in a foreign language (Article 1515).

The order shall be served to the other party, after which an appeal against the order can be filed before the Paris Court of Appeals (Article 1525) on the same grounds as the ones set forth to set aside an award by Article 1520.

As detailed above (Introduction, 'Some innovations to increase efficiency'), French courts do enforce arbitral awards that are annulled by courts of the seat of the arbitration. This is consistent with the pro-arbitration stance that prevails in France.

To conclude, the arbitration regime provided by French law is more favourable than the one resulting from Article V(1) of the New York Convention of 10th June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which is a possibility contemplated at Article VIII of this convention. Since courts in certain jurisdictions would deny recognition of awards that would have been annulled at the seat of arbitrations, parties willing to secure the enforcement and circulation of their award should not hesitate and opt for Paris as the seat of their (next) arbitration. In so doing they would ensure that their award can hardly be annulled at the seat in France, which will in turn facilitate its recognition elsewhere.

Regarding the New York Convention and its application, UNCITRAL provides very useful and freely accessible tools intended to "*assist judges, arbitrators, practitioners, academics and Government officials to use resources relating to the New York Convention more efficiently*". It has very recently published its Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) in order to "*promote the uniform and effective interpretation and application of the New York Convention with a view to limit the risk that State practice might diverge from its spirit*".

This Guide is supplemented by an online platform, making available case law implementing the New York Convention from multiple common law and civil law jurisdictions (cases are reported in the form of summaries highlighting the interpretation and application of specific provisions of the New York Convention by States, and the full text of the original language decisions is also available), as well as other useful resources relating to the New York Convention. (See: http://newyorkconvention1958.org/.)

Investment arbitration

Investments made by nationals of certain countries on the territory of another foreign host country are the subject of various multinational or bilateral investment treaties (known as "BITs") concluded to protect investments and enhance international commercial relationship.

France is a party to many such BITs as well as international treaties such as the Energy Charter Treaty (which it signed on 17th December 1994, see http://www.energycharter.org/who-we-are/members-observers/countries/france/). France is also one of the Contracting States of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (submitted to States for signature on 18th March 1965 and which entered into force on 14th October 1966), also known as the ICSID Convention. The ICSID Convention established the International Centre for Settlement of Investment Disputes ("ICSID") which is designed to offer institutional and procedural support to tribunals or parties in arbitrations among investors and states.

There is one ICSID arbitration currently pending against France (*Erbil Serter v. French Republic*, ICSID Case No. ARB/13/22) which is the first case ever registered against France before ICSID.

According to (limited) information made publicly available on the ICSID website (see Case Details, available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/13/22), the case relates to ship hull design and is based on the Turkey–France BIT of 2006. ICSID Convention Arbitration Rules apply and French is the language of the arbitration. The Claimant, Mr. Erbil Serter, is of Turkish nationality and the Respondent is the French Republic. The case was registered on 10th September 2013, the arbitrator appointed by the Claimant accepted his appointment on 3rd February 2014, and the arbitrator appointed by the Respondent accepted his appointment on 14th February 2014. This case is currently still pending.

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Admitted to the Paris Bar (1992) Christophe Dugué acts as counsel and also serves as arbitrator in international arbitration cases.

With over two decades of experience in international arbitration in institutional (especially ICC, AFA, CAIP and Swiss Rules) and *ad hoc* (including UNCITRAL) arbitration cases, Christophe Dugué regularly serves as chairman, sole arbitrator or co-arbitrator in ICC, AFA and *ad hoc* international arbitration proceedings (appointments by the parties, by the ICC and by the AFA).

He also acts as counsel and has been involved as lead counsel in cases with parties from Asia, Africa (North Africa, West and South Africa), Europe, North America and the Middle East and has represented clients ranging from individuals and mid-sized companies to Government-owned entities and major international corporations.

He practises both in English and French, under a variety of applicable laws from both civil law and common law jurisdictions.

Cases involved industries such as banking, private equity, chemicals, construction (including FIDIC), defence, systems, electronic components, energy, infrastructures, joint-ventures, mining, M&A transactions, oil & gas and transport infrastructure industries, amongst others.

Christophe Dugué's former experience includes notably 10 years as a Partner at Shearman & Sterling LLP's international arbitration practice group in Paris and also the creation of an international arbitration boutique firm in Paris.

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Introduction

Germany – Arbitration-friendly civil law jurisdiction

The use of arbitration as a dispute-resolution mechanism in Germany has a long-standing tradition. In most areas of business and commerce, institutional and *ad hoc* arbitration is commonly and successfully used.

German arbitration law is part of the German code of civil procedure (*Zivilprozessordnung* ("ZPO")) and is contained in Sections 1025 to 1066[1] thereof.

The ZPO is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("ML"). Therefore, users will find it particularly easy and predictable to apply.

Under the principle of territoriality, the ZPO is applicable to all arbitrations with a place of arbitration in Germany (Section 1025(1)). Further, the ZPO applies to all arbitrations, whether *ad hoc* or institutional. German lawmakers opted for a unified system: the ZPO provides a single set of rules for national and international arbitration. Lastly, unlike the ML (Article 1(1)), the ZPO is not restricted to "commercial" arbitration.

Currently, a working group of the Federal Ministry of Justice is analysing if the ZPO needs to be revised.

Germany is a signatory state of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention or "NYC"). Germany has not declared a commercial or reciprocity reservation (Article I(3) NYC). Pursuant to Section 1061(1), recognition and enforcement of foreign arbitral awards is governed by the NYC. Germany has also ratified, *inter alia*, the European Convention on International Commercial Arbitration of 1961 ("European Convention").

German lawmakers decided to grant the functional competence for arbitration-related matters to the regional higher courts (*Oberlandesgericht* ("OLG") (Section 1062)) (e.g. appointment and challenge of arbitrators; setting aside and enforcement of (foreign) awards and orders for interim measures; declaring arbitration proceedings admissible). This ensures usually consistent, quick and arbitration-friendly decisions. An appeal against orders of the OLG is limited to complaints on a point of law (*Rechtsbeschwerde*) with the German Federal Court of Justice (*Bundesgerichtshof* ("BGH")) (Sections 1065(1), 1062(1) Nos. 2 and 4).

The most well-known arbitration institution in Germany is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit* ("DIS")). The DIS administers national and international arbitration proceedings under the DIS arbitration rules of 1998 ("DIS Rules"). The DIS Rules and model arbitration clause are available in the six official

languages of the United Nations, as well as in German and Turkish. The DIS Rules are currently being revised. Unlike other international arbitration institutions, the DIS has already introduced "Supplementary Rules for Expedited Proceedings" (DIS-*Ergänzende Regeln für beschleunigte Verfahren*) in 2008.

A number of industry-focused arbitration institutions exist in Germany (e.g. German Maritime Arbitration Association (GMAA), *Waren-Verein der Hamburger Börse*, arbitration institutions with stock and commodity exchanges). The Chinese European Arbitration Centre (CEAC) administers international Asia-related arbitration proceedings.

Arbitration agreement

Does the principle of competence-competence apply?

According to the *Kompetenz-Kompetenz* principle, an arbitral tribunal can decide on its own jurisdiction (Section 1040(1) sentence 1). An arbitral tribunal's decision assuming jurisdiction is not binding or final for a court. Any agreement by parties to confer the final and binding decision to an arbitral tribunal is not valid, but in principle, will not invalidate the arbitration agreement as a whole.

Jurisdiction and preliminary rulings of arbitral tribunals

If a party raises objections regarding the jurisdiction of the arbitral tribunal (Section 1040(2)), the arbitral tribunal can assume jurisdiction by way of a preliminary ruling (Section 1040(3)). A preliminary ruling is not an award for the purposes of setting aside proceedings (Section 1059). The ZPO provides a special procedure to have the ruling overturned (Section 1040(3)). The opposing party must file an application with the court within one month after its receipt. Otherwise, the opposing party is precluded from invoking the invalidity of an arbitration agreement in any post-award proceedings. An arbitral tribunal can render an award, although the proceedings under Section 1040(3) are still pending. Reversing its own case law, the BGH recently held that the issuance of an award does not render the application (Section 1040(3)) inadmissible. Further, the three-month deadline for the award debtor to file a setting-aside application against the award will only start to run after the service of the court's decision (Section 1040(3)) denying the jurisdiction of the arbitral tribunal (by way of analogy of Section 1059(3) sentence 2) (BGH, 9.8.2016, NJW 2017, 488).

Does the principle of separability apply?

The arbitration agreement is an agreement independent of the existence, validity or termination of the main contract (Section 1040(1) sentence 2).

What are the substantive mandatory requirements of an arbitration agreement?

According to Section 1029(1), an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The first requirement of a "defined legal relationship" only precludes the validity of arbitration agreements providing that all future disputes between the parties, without any reference to a specific relationship (e.g. a specific contract or framework agreement) will be resolved by arbitration.

The fulfilment of the second requirement often raises problems: the parties' agreement to submit all or certain disputes to arbitration. It is essential that it can be clearly and unambiguously derived from the arbitration agreement that the parties' intention was to exclude the state courts as a dispute resolution forum and to have any disputes resolved

by arbitration. If this requirement is fulfilled, courts enforce arbitration agreements even if the arbitration institution is not unambiguously designated (e.g. KG Berlin, 3.9.2012, SchiedsVZ 2012, 337). Likewise, the parties should clearly use the term *arbitration* and avoid terms such as conciliation, mediation, expert determination, or any other form of alternative dispute resolution. The parties can still agree on multi-tier arbitration agreements.

What are the non-mandatory requirements?

It is highly recommended for parties to agree on non-mandatory issues in the arbitration agreement:

- set of arbitration (institutional or *ad hoc*) rules (e.g. of the DIS, ICC, VIAC, SIAC);
- place of arbitration (e.g. Düsseldorf, Germany);
- number of arbitrators and/or procedure for the constitution of the arbitral tribunal; and
- language of the arbitration.

If the parties wish to apply institutional arbitration rules, it is highly advisable to use the model arbitration clauses of the various arbitration institutions. The latter publish their model clauses on their official websites in various languages.

Emergency arbitrator and fast track rules – opt in or opt out?

Parties need to carefully check whether emergency arbitrator or fast-track rules apply automatically by agreeing on a set of institutional rules ("opt-out system" (e.g. Article 29(6) b) ICC Rules)) or whether they have to explicitly agree to the application of these rules in the arbitration agreement ("opt-in system", e.g. Article 45(1) VIAC Rules).

The parties should also agree on the rules of law governing the dispute in their choice-of-law clause (Section 1051).

(International) mandatory rules and arbitration agreements

Counsel and in-house lawyers need to be particularly considerate of (internationally) mandatory rules when drafting an arbitration agreement and a choice-of-law clause in an agency agreement. The rights of an agent to claim indemnity or compensation – after the principal's termination of an agency agreement – is enshrined in the national laws of the member states of the EU based on Articles 17-19 of Council Directive 86/653/EEC. Articles 17-19 are qualified as internationally mandatory rules, if an agent operates its principal activity and has its seat in the EU (ECJ, Ingmar, C-381/98, EuZW 2001, 50). An arbitration agreement providing for a place of arbitration outside of the EU in tandem with a choice-of-law clause for the governing law of a non-EU country was refused enforcement by a court in Germany (OLG München, 17.5.2006, WM 2006, 1556). The court held that this tandem would pose a "reasonable threat" that an arbitral tribunal (e.g. seated in California) would not apply an agent's mandatory claim for compensation.

In 2016, the BGH overturned the highly disputed decision of the OLG München in *causa* Pechstein (OLG München, 15.1.2015, SchiedsVZ 2015, 40). The BGH held that the arbitration agreement between the ice speed skater Claudia Pechstein and the ISU was valid (BGH, 7.6.2016, SchiedsVZ 2016, 268). It ruled, in particular, that it would not violate (i) the German antitrust law prohibition on abuse of a market dominant position (Section 19(1) GWB (German competition law)), (ii) the fundamental right to free exercise of profession (Article 12(1)GG (German constitution)), or (iii) the right to fair proceedings under Article 6 of the European Convention of Human Rights. Claudia Pechstein has filed a constitutional appeal (*Verfassungsbeschwerde*) against the decision of the BGH with the German Constitutional Court (*Bundesverfassungsgericht*).

Form requirements of an arbitration agreement

Section 1031 requires an arbitration agreement to fulfil the "writing" requirement. Only arbitration agreements between businessmen (Section 14 of the German civil code (*Bürgerliches Gesetzbuch* ("BGB")) not involving consumers, will be addressed herein.

An orally concluded arbitration agreement does not suffice. The writing requirement is fulfilled if the agreement is signed by the parties or if it is contained in an exchange of letters, telefaxes or other means of telecommunication (e.g. emails), which provide a record of the agreement. The list of means of communication in Section 1031(1) is not exhaustive.

Unlike the ML, Section 1031(2) also provides a more lenient writing requirement. An arbitration agreement is deemed to be in writing if it is contained in a document transmitted from one party to the other party. Unless the receiving party raises objections without undue delay, the contents of the document, and thus the arbitration agreement, become part of the contract in accordance with common usage. Thus, an exchange of means of telecommunications containing the arbitration agreement is not required. Section 1031(2) is of high practical importance in business transactions. Often contracts are concluded orally and one party confirms the content of the agreement by a commercial letter of confirmation (*kaufmännisches Bestätigungsschreiben*). If such a letter reflects the result of the negotiations without significant deviations, the recipient will be deemed to be bound by the contract, unless the recipient objects without undue delay.

A contract, complying with the form requirements of subsections 1 or 2 of Section 1031 (signature, exchange of means of communications, failure to raise objections), can also contain a reference to a separate document containing an arbitration agreement. Often arbitration agreements are included in separate standard terms and conditions ("STC"). As long as the reference is such as to make the arbitration agreement part of the contract, the form requirements are fulfilled (Section 1031(3)).

Two questions need to be assessed:

- *First*: Under German law, an arbitration agreement will be validly incorporated into the contract, if the reference is unambiguous and the recipient had the opportunity to review the arbitration agreement (actual review is not required). In recent decisions, courts confirmed that the threshold for a valid incorporation is low. It is sufficient to send the STC containing the arbitration agreement to the other party. It is not necessary to send the institutional rules (referred to in the arbitration agreement) to the other party as long as they are publicly available (e.g. on the website of the arbitration institution) (KG Berlin, 13.06.2016, 20 SchH 1/16).
- *Second*: If German law governs this question, the validity of the STC, and thus of the arbitration agreement itself, is subject to the specific validity requirements set out in Sections 305(1), 307(1), (2) BGB (also applicable between businessmen (310(1) BGB)). An arbitration agreement which fulfils the requirements of a just constitution of an arbitral tribunal and a fair treatment of the parties will be usually considered valid.

Full review of the arbitration agreement and special procedure for admissibility of arbitration proceedings

In case a party initiates court proceedings in violation of an arbitration agreement, the opposing party must invoke the existence of the arbitration agreement prior to the beginning of the oral hearing (Section 1032(1)) (*Schiedseinrede*). Otherwise, it will be deemed that the opposing party has waived its right to arbitrate. The party initiating the court proceedings bears the burden of proof for the invalidity of the arbitration agreement.

Further, the ZPO stipulates a special procedure not mirrored in the ML: a party can file an application with the OLG to determine, in particular, whether the arbitration agreement is valid (Sections 1032(2), 1062(1) No. 2). This application is admissible prior to the constitution of an arbitral tribunal.

Both procedures (Sections 1032(1) and (2)) apply also if the place of arbitration is outside of Germany (Section 1025(2)). In principle, the courts will make a full review of the validity of the arbitration agreement at this pre-arbitration stage. In many other jurisdictions, the courts assess the validity of the arbitration agreement only on a *prima facie* basis at such a stage, and make a full review only in post-award proceedings. The German approach ensures that parties do not spend time and costs on arbitration proceedings, resulting in an arbitral award which will be set aside or refused enforcement due to an invalid arbitration agreement.

What disputes are arbitrable?

Any claim involving an economic interest is arbitrable. Thus, any monetary claims, also involving questions of antitrust law, the use of intellectual property rights ("IPR"), etc. are arbitrable. The term "economic interest" is broadly interpreted. Further, even claims not involving an economic interest are arbitrable, if the parties are entitled to conclude a settlement on the issue in dispute (Section 1030(1)).

Disputes on the existence of a lease of residential accommodation within Germany are not arbitrable (Section 1030(2)). Due to the rising importance of disputes arising out of (patent) licence agreements, it has been recently heavily discussed in the German arbitration community whether the validity of patents is arbitrable (at least with *inter partes* effect between the parties of the arbitration).

What rules exist for joinder/consolidation of third parties?

The ZPO does not provide any rules for joinder and consolidation of third parties. The parties can agree on institutional rules providing for these cases (e.g. Article 7 ICC Rules). If German law applies to this question, a third party might be bound to an arbitration agreement, if rights and obligations arising out of a main contract containing it, have been validly assigned.

Arbitration procedure

How are arbitration proceedings commenced in your jurisdiction?

Pursuant to Section 1044, arbitration proceedings commence on the date on which a request for a dispute is received by the respondent. Many institutional rules, if agreed upon by the parties, deem proceedings to be commenced on the date on which the institution receives the request for arbitration (e.g. Article 4(2) ICC Rules).

The request under Section 1044 has only to state the names, the subject-matter of the dispute and contain a reference to the arbitration agreement. If the parties agree on a set of institution rules, the requirements of a request for arbitration (Article 4(3) ICC Rules) or a statement of claim (Section 6.2 DIS Rules) are much more elaborate than under Section 1044. A claimant has, e.g., to also state the relief sought, nominate an arbitrator and set out the facts giving rise to the claims.

If German substantive law applies to this question, the statute of limitations period is suspended on the date the arbitration proceedings begin (Section 204(1) No. 11 BGB).

Can hearings take place outside of the place of arbitration?

Yes, according to Section 1043(2), unless the parties agree otherwise.

What are the rules on evidence?

Except for mandatory provisions of the ZPO (in particular, the right to be heard, equal treatment of the parties and representation by counsel (Sections 1042(1) and (2))), the parties are free to determine the procedure themselves or by reference to institutional rules (Section 1043(3)). Failing an agreement of the parties, the arbitral tribunal has wide discretion to conduct the arbitration as it considers appropriate (Section 1043(4)).

The applicable rules on evidence will depend, *inter alia*, on the legal background of the arbitrators and parties, the nature of the dispute and the parties' expectations. Arbitral tribunals and parties can therefore tailor-make the procedure. It is good practice, mostly at the beginning of the proceedings, that an arbitral tribunal will issue special procedural rules and a procedural order no.1 after having heard the parties.

Arbitral tribunals lack coercive powers. They cannot compel witnesses or experts to appear. They cannot administer oaths. Further, they cannot order a third party to produce documents. A party, with the approval of the arbitral tribunal, or the arbitral tribunal itself, can request a court to assist in the taking of evidence or to perform other judicial acts (Section 1050).

Taking of evidence in national arbitrations

The continental civil law tradition of Germany and a limited inquisitorial approach will prevail. Written witness statements are the exception. During an evidentiary hearing, an arbitral tribunal will examine witnesses first. Counsel to parties will typically ask additional, in particular, follow-up questions to the witness to test the witness' credibility and the probative value of the statement. An arbitral tribunal may give directions, such as which facts it considers (ir)relevant, and give a preliminary assessment on the merits of the case, unless the parties agree otherwise. Document production between the parties is the exception.

The ZPO provides a framework for arbitral tribunal-appointed experts (Section 1049), subject to the parties' agreement. The arbitral tribunal may appoint one or several experts and order a party to give the expert any relevant information or to produce, or grant access, to any relevant documents (Section 1049(1)). Experts have a continuing obligation to be impartial and independent (Sections 1049(3), 1036). Otherwise, a party can challenge the expert. This challenge procedure is a special feature of the ZPO, not provided for in the ML. The deadline is two weeks after becoming aware of the expert's appointment or after becoming aware of the circumstances giving rise to the challenge (Sections 1049(3), 1037(2)). The arbitral tribunal will decide on the expert's challenge. A party failing to challenge the expert may be precluded from invoking the expert's lack of impartiality or independence in post-award proceedings (Section 1059(2) No. 1(d), Article V(1)(d) NYC). Parties can appoint their own experts.

Taking of evidence in international arbitrations

Written witness statements are commonly used. In particular, if a common-law party is involved, the examination of witnesses will follow the common law tradition (direct, cross- and re-examination). Sometimes also a hybrid system between common and civil traditions will be adopted.

As regards document production, arbitral tribunals use the IBA Rules on the Taking of Evidence (of May 2010) (Article 3) ("IBA Rules") as guidelines. Usually they will clarify in the special procedural rules that they are not bound by them and use Redfern schedules. Subject to the circumstances of the case, German arbitration practitioners apply

the requirements of document production under Article 3 IBA Rules rather strictly (the law applicable to the merits, the burden of proof, and the involvement of a party from a common law jurisdiction often plays a role). This strict approach minimises costs and increases the efficiency and speed of arbitration proceedings.

It is common practice that the parties appoint experts. The IBA Rules (Articles 5 and 6) are often used as guidelines. German arbitration practitioners in international arbitrations also use witness conferencing with experts and witnesses.

What rules are applicable regarding privilege and disclosure?

In civil court proceedings, in principle, discovery or disclosure of documents by an opposing party does not exist. The threshold under the exceptions (e.g. Sections 422, 423, 142) is very high. Accordingly, rules regarding privilege do not exist either in the ZPO. In international arbitrations in Germany, various approaches to determine the applicable law to the question of privilege, and different concepts of privilege in numerous jurisdictions, often arise under the IBA Rules (Article 9(2)(b)). Therefore, German arbitration practitioners are experienced in finding appropriate solutions, ensuring a level playing field between parties from different jurisdictions.

Are arbitration proceedings in your jurisdiction confidential? Can the evidence and pleadings be kept confidential?

The ZPO is silent on whether arbitration proceedings are confidential.

The BGH held that an arbitrator has a confidentiality obligation under his/her arbitrator's contract with the parties (BGH, 5.5.1986, NJW 1986, 3077, 3078), unless the contrary is clearly indicated.

As regards the confidentiality obligations of parties, the legal situation is not clear: If the parties have not explicitly agreed in their contract or in their arbitration agreement on the confidentiality of the arbitration proceedings, it is subject to scholarly debate whether an implied obligation can be derived from either of the contracts.

Therefore, in practice, the parties and the arbitral tribunal often conclude a confidentiality agreement at the outset of the arbitration proceedings (e.g. in the terms of reference of ICC proceedings). The wording of such confidentiality agreement should be broad, so it also encompasses e.g. the parties' pleadings, expert reports and witness statements. Unlike the ICC Rules, Section 43.1 DIS Rules obliges parties, counsel and arbitrators to keep the arbitration confidential.

Experts, witnesses, court reporters etc. are not bound by such confidentiality agreement. Therefore, separate agreements should be concluded with them.

Arbitrators

Appointment of arbitrators

Unless the parties agree otherwise, the number of arbitrators shall be three (Section 1034(1)).

Party autonomy also prevails as regards the procedure of the appointment of the arbitral tribunal (Section 1035(1)). Failing an agreement by the parties, the default rules of the ZPO provide a standard procedure: In case of a three-member tribunal, each party appoints its own arbitrator and the two party-appointed arbitrators shall appoint the chairman. Should a party fail to appoint its own arbitrator and subsequently fail to do so within one month of a request by the other party, the other party may request the court to make the appointment. In case the party-appointed arbitrators fail to agree on the chairman within one month of their

appointment, or in case the parties fail to agree on a sole arbitrator, the court will make the appointment upon request of a party (Section 1035(3)).

The ZPO stipulates a special procedure, not mirrored in the ML, which safeguards, also between businessmen[2], an equal treatment of the parties in the constitution of the arbitral tribunal (Section 1034(2)). This procedure allows a court, upon application of one party, to appoint a substitute arbitrator if the arbitration agreement grants preponderant rights to one party (e.g. only one party has the right to nominate the sole arbitrator or the chairman). The disadvantaged party must make the application within two weeks after becoming aware of the constitution of the arbitral tribunal.

Deviating from the ML (Article 11(1)), the ZPO does not prohibit persons from acting as an arbitrator due to their nationality, unless the parties agree otherwise (e.g. Article 13(5) ICC Rules). Depending on the matter in dispute, engineers, accountants, etc. are nominated as arbitrators, in particular, in national arbitrations. The DIS Rules require that a sole arbitrator or the chairman shall be a lawyer, unless otherwise agreed by the parties (Section 2(2) DIS Rules).

How can arbitrators be challenged in your jurisdiction?

Arbitrators must be impartial and independent (Section 1036). Their duty to disclose circumstances that give rise to justifiable doubts as to their impartiality or independence is ongoing from the time of their appointment (Section 1036(1) sentence 2). Otherwise, they can be challenged (Section 1036(2)).

As regards challenges, a two-tier system applies: First, a party has to file a challenge (a "written statement of the reasons of the challenge") with the arbitral tribunal. The deadline is two weeks after the constitution of the arbitral tribunal or after the challenging party becomes aware of the circumstances enumerated in Section 1036(2) (1037(2) sentence 1). In practice, the challenged arbitrator – even if not obligated to do so by law – often refrains from participating in the tribunal's decision on the challenge.

Second, if the challenge is dismissed, the challenging party may apply to the OLG (within one month) to decide on the challenge (Sections 1037(3) sentence 1, 1062(1) No. 1). Otherwise the challenging party is precluded from invoking in post-award proceedings that the arbitral tribunal was not properly constituted (Section 1059(2) No. 1(d) or Article V(1)(d) NYC) (unless public policy applies). The OLG is not bound by the decision of the arbitral tribunal or a third party (e.g. ICC Court (Article 14 ICC Rules)). The parties cannot validly waive recourse to the courts under Section 1037(3). A complaint on a point of law against a decision of the courts with the BGH is not admissible (Section 1065(1)).

The IBA Guidelines on Conflicts of Interest in International Arbitration of 2014 ("IBA Guidelines") are widely known and used by arbitrators in Germany. Courts tend to consider the principles (red, orange and green lists) laid down in the IBA Guidelines, even if not explicitly referring to them.

How is an arbitrator's mandate terminated?

It is terminated, in particular:

- if an award is issued (the arbitral tribunal becomes *functus officio*);
- if an arbitrator withdraws from his/her office;
- by a court's decision in a challenge procedure to remove the arbitrator (Section 1037);
- by a court's decision to remove the arbitrator, if an arbitrator becomes *de jure* (e.g. legal incapacity) or *de facto* unable to perform his functions (Section 1038(1) sentence 2); or
- if the parties agree to terminate the arbitrator's mandate.

Immunity of arbitrators

Arbitrators are generally immune from liability for damages in their capacity as a decision-maker. They cannot be held liable if they render a decision that is legally incorrect, except for cases of intentional misconduct (Section 44.1 DIS Rules) or criminal offences. They enjoy more or less the same privilege as German state judges (by way of analogy of Section 839(2) BGB).

However, arbitrators are generally liable for breaches of their contract with the parties, in particular, in cases, where they:

- resign without good cause;
- fail to disclose circumstances which may lead to a challenge for lack of impartiality or independence; or
- unduly delay or even refuse to continue with the arbitration proceedings.

In their contract with the arbitrators or by reference to institutional rules, the parties can agree to restrict (e.g. Section 44.2 DIS Rules) or exclude the arbitrator's liability (e.g. Article 40 ICC Rules). The validity of the restriction or exclusion is subject to the applicable law.

Interim relief

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

Under the ZPO, the parties to an arbitration agreement are free to choose whether to seek interim relief with a court or an arbitral tribunal (Sections 1033, 1041). The parties can opt out of seeking interim relief with arbitral tribunals (Section 1041(1)). Whether the parties can also validly waive recourse to the courts is disputed among scholars and courts.

Before or during arbitration proceedings, a party can request a court to order interim relief (Section 1033), even if the place of arbitration is outside of Germany (Section 1025(2)) and if the court assumes international jurisdiction. In practice, German courts can order interim relief, subject to the circumstances and the fulfilment of certain requirements, *ex parte* and within 24 hours.

What types of interim relief are available to parties?

Courts may, for example, grant: (i) a pre-award attachment (Arrest) to secure a monetary claim; (ii) a preliminary injunction (*einstweilige Verfügung*) to secure any other claim; or (iii) a procedure to preserve evidence (*selbstständiges Beweisverfahren*).

Arbitral tribunals have a wider discretion than courts as regards the types of interim reliefs they can order. Contrary to a court, arbitral tribunals can only order interim measures against the parties to the arbitration agreement. Lacking coercive powers, arbitral tribunals cannot enforce interim measures if a party does not voluntarily comply with them. Upon request of a party, a court can enforce them (Section 1041(2)).

If the opposing party can prove that the interim measure – ordered by the court or an arbitral tribunal – was unjustified from the outset, the applicant is liable for damages (Sections 945, 1041(4)) resulting from the enforcement of such a measure.

Arbitration award

Are there any formal requirements for an arbitration award?

An award must:

- be in writing;

- be signed by the sole arbitrator or, in case of a three-member tribunal, by its majority;
- state the reasons upon which the arbitral tribunal has based its decision (unless the parties agree otherwise); and
- state the date of the award and the place of the arbitration (Section 1054).

A copy of the award signed by the arbitrators must be delivered to each party. A specific form of delivery is not required (Section 1054(4)).

Is a time frame stipulated for the arbitration award?

Unless agreed otherwise by the parties, the ZPO does not specify a time frame for rendering the award.

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

An arbitral tribunal has the power to allocate the costs of the arbitration at its discretion, unless the parties agree otherwise (Section 1057). By exercising such discretion, the arbitral tribunal must take into account all circumstances of the case, particularly its outcome. In practice, German arbitration practitioners usually follow the "costs follow the event" rule. Depending on the circumstances of the case, arbitral tribunals may also take into account e.g. "guerrilla tactics", or the outcome of jurisdictional objections or voluminous requests to produce.

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

An arbitral tribunal can grant interest in the award if a party has filed a respective claim. Otherwise, granting interest would qualify as an *ultra petita* ruling and constitute a ground for setting aside or refusing the enforcement of an award (Section 1059(2) No. 1(c) and Article V(1)(c) NYC).

Challenge of the arbitration award

On what grounds can an award be challenged?

According to Section 1059(2) (mirroring Article 34(2) ML), an award may be set aside only if:

1. the applicant shows sufficient cause that:
   (a) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid; or
   (b) the opposing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case; or
   (c) the arbitral tribunal has exceeded its authority; or
   (d) the composition of the arbitral tribunal or the arbitration proceedings was not in accordance with the ZPO or with an admissible agreement of the parties and this presumably affected the award; or
2. the court finds that:
   (a) the subject-matter lacks objective arbitrability under German law; or
   (b) recognition and enforcement of the award would violate public policy.

Section 1059(2) provides an exhaustive list of grounds on the basis of which an award can be set aside. The grounds in No. 1 have to be pleaded by the applicant ("[…] shows sufficient cause […]"). The grounds in No. 2 are considered by the court *ex officio* ("[…] the court finds […]"). A review of the merits by a court is not admissible (prohibition of the *révision au fond*).

The wording of Section 1059(2), "may be set aside", has to be read as "shall be set aside". A court does not have any discretionary powers: it has to set aside an award if a ground exists. An oral hearing is mandatory (Section 1063(1), first alternative).

Deviating from the ML (Article 34(4)), Section 1059(4) provides that a court will set aside the award and remit the case, in appropriate cases, to the arbitral tribunal. Further, Section 1059(5) stipulates that the arbitration agreement becomes operative again once the award has been set aside (except if the arbitration agreement is invalid).

Before arbitration proceedings are initiated, parties cannot validly waive setting-aside proceedings. After the award is issued or once a party becomes aware of a circumstance giving rise to invoke a ground listed in Section 1059(2) No. 1, a waiver to invoke this ground is valid. The grounds of No. 2 of Section 1059(2) (lack of objective arbitrability and violation of public policy) cannot be validly waived.

Is it possible to modify the arbitration award?

An application for the correction, interpretation or an additional award with the arbitral tribunal is admissible within one month after receipt of the award, unless agreed otherwise by the parties (Section 1058(1), (2)).

What are some recent examples regarding successful and unsuccessful attempted challenges of arbitral awards in your courts?

A recent order of the OLG München illustrates the general approach of courts to apply the grounds under Section 1059 in setting aside proceedings restrictively (OLG München, 9.11.2015, SchiedsVZ 2015, 303). The arbitral tribunal had incorrectly applied the applicable law. The OLG confirmed the prohibition of the *révision au fond* in post-award proceedings. It held that an award would only violate *ordre public* (Section 1059(2) No. 2(b)) if the violated provision is not only mandatory, but forms the basis of a functioning public or economic life. Further, the OLG held that the threshold of the violation of a party's right to be heard is high (Section 1059(2) No. 1(b), (d), No. 2(b)): if an arbitral tribunal has given a legal assessment of the merits of the claim, it can deviate from this assessment in the award. The right to be heard is only violated if the arbitral tribunal failed: (i) to inform the parties of the change of legal assessment; and (ii) to grant them the right to comment. The OLG also confirmed that arbitral tribunals do not have to address in the award every legal and factual argument submitted by the parties in a complete and exhaustive manner. Only if the reasons of the award are, in particular, self-contradictory, can an award be set aside for violation of Section 1054(2) (Section 1059(2) No. 1(d)).

Enforcement of the arbitration award

The application in enforcement proceedings is admissible if:

- it is in writing or put on record at the court registry (Section 1063(4)); and
- if the award or a certified copy is annexed to the application (Section 1064(1)). The stricter admissibility requirements under Article IV NYC (e.g. original or duly certified copy of the arbitration agreement; translation of the award into official language of enforcement state) do not apply (Article VII(1) NYC). In practice, the applicant submits a translation of the award, or at least of its operative part.

A foreign award can be refused enforcement based on the reasons of Article V NYC.

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

An OLG has to refuse enforcement of an award which has been validly set aside (Article V(1)

(e) NYC). If the European Convention applies, the application of Article V(1)(e) NYC is limited. Pursuant to Article IX(2) European Convention, a court can refuse enforcement only if the award has been set aside for reasons stated in Article IX(1)(a)-(d) European Convention (being identical to the reasons set out in Article V(1)(a)-(d) NYC). If an award has been set aside, e.g. for violation of public policy or lack of arbitrability at the place of arbitration, Article V(1)(e) NYC cannot be applied by the courts in Germany under the European Convention.

What are the trends of enforcement in your jurisdiction?

The vast majority of foreign awards are enforced in Germany.

Counsel and award debtors have to be aware of the "preclusion" case law in Germany: is an award debtor precluded from invoking grounds under Article V NYC in enforcement proceedings in Germany if he fails to invoke the same grounds in setting aside proceedings within the statutory time limits of the *lex loci arbitri*? The BGH had to decide on this question of preclusion only for the invalidity of arbitration agreements (Article V(1)(a) NYC). It held that an award debtor is not precluded from invoking the invalidity of an arbitration agreement in enforcement proceedings, even if he had not initiated setting-aside proceedings invoking the same ground (BGH, 16.12.2010, NJW 2011, 1290). As regards any grounds other than the invalidity of the arbitration agreement (e.g. violation of right to be heard, *ultra petita* decision, flawed constitution of arbitral tribunal (Article V(1)(b), (c), (d) NYC)), this question of preclusion has not yet been decided by the BGH. Although criticised by scholars and courts, the majority view of the OLGs[3] seems to be in favour of preclusion.

Investment arbitration

Germany is currently a party to more than 130 effective BITs, the ICSID Convention and the ECT.

Public debate in Germany has been fuelled by the ICSID arbitration pending between, *inter alia*, Vattenfall AB, a Swedish power company and Germany since 2012 (ICSID case No. ARB/12/12). Vattenfall AB made investments in a number of nuclear power plants in Germany. The ECT dispute arose from the 2011 amendment to Germany's Atomic Energy Law ("Amendment"). The Amendment stipulated that Germany's nuclear power plants are to be phased out by 2022. Vattenfall AB is claiming damages of more than four billion euros. In October 2016, the arbitral tribunal held a hearing on jurisdiction, merits and quantum[4]. The latest publicly known development of the case is that the arbitral tribunal issued a procedural order concerning production of documents and the procedural calendar.

Further, the BGH made a referral for a preliminary ruling to the ECJ to decide on the compatibility of arbitration clauses in Intra-EU BITs with EU law, in particular Articles 344, 267 and 18 TFEU (BGH, 3.3.2016, SchiedsVZ 2016, 328 (Achmea B.V./Slovak Republic)).

* * *

Endnotes

1. Unless explicitly stated otherwise, any reference to sections are those of the ZPO.
2. As defined in Section 14 BGB.
3. OLGs: Regional higher courts.
4. Except for this hearing – which was made public via streaming on the ICSID website – the proceedings have been largely non-transparent.

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Indonesia

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Introduction

In Indonesia, domestic and international arbitration falls under the Arbitration Law (Law No. 30 of 1999). The Arbitration Law is not based on the UNCITRAL Model Law. Under the Arbitration Law, any award handed down outside the territory of Indonesia (e.g. in Singapore or London) is classified as an international arbitration award. An international arbitral award also includes any award issued by an arbitration institution or *ad hoc* arbitration, which, under Indonesian law, is deemed as an international arbitration award. Any award other than the above is classified as a domestic arbitration award. Most parts of the Arbitration Law concern domestic arbitration. However, the Arbitration Law does provide the procedure and requirements for enforcing an international arbitration award.

Indonesia ratified the New York Convention on 5 August 1981 under Presidential Decree No. 34 of 1981, and the New York Convention has been in force in Indonesia since 5 January 1982. Indonesia acceded to the New York Convention on 7 October 1981. Other than the New York Convention, Indonesia has not signed any other treaty on the recognition and enforcement of arbitration awards.

The main arbitration centre is the Indonesian National Arbitration Board (*Badan Arbitrase Nasional Indonesia*/**BANI**). There are also several special arbitration bodies, which handle disputes in certain areas of law and industry to accommodate the need for special arbitration, among others: the Indonesia Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia*/**BAPMI**) for capital market disputes; the National Syariah Arbitration Board (*Badan Arbitrase Syariah Nasional*/**BASYARNAS**) for Islamic banking matters; and the Indonesian Construction Arbitration and Alternative Dispute Resolution Board *Badan Arbitrase dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia*/BADAPSKI) for construction cases. A few international arbitration bodies have a presence in Indonesia, such as ICC (International Chamber of Commerce) and the Chartered Institute of Arbitrators' chapter.

On 8 September 2016, BANI *Pembaharuan* or Renewed BANI was launched, using a similar name to the existing BANI. BANI *Pembaharuan*, which is located in Sovereign Plaza, has its own code of ethics, rules, procedures, fee structures and list of arbitrators. Further, BANI *Pembaharuan* claimed that the Minister of Law and Human Rights of the Republic of Indonesia has approved its status as a legal entity and has its own articles of association. Given this BANI duality, it is possible that there will be uncertainty when commercial parties wish to enforce their existing agreements by referring disputes to BANI arbitration. However, so far, we have never heard of a dispute being settled or tried by BANI *Pembaharuan*.

Only the Central Jakarta District Court (**CJDC**) handles the enforcement of international arbitration awards. More details are provided below, in "Enforcement of arbitration awards".

Arbitration agreement

Under the Arbitration Law, an arbitration agreement must be drawn up in writing and contain an arbitration clause, or a separate agreement may be entered into after a dispute arises. The arbitration clause should state, among other things, the parties' intention to settle any dispute through arbitration, the arbitration rules, and the seat of arbitration.

An arbitration agreement entered into after a dispute arises must be signed by both parties or drawn up in a notarial deed form. The Arbitration Law requires the arbitration agreement to contain: the matter under dispute; the parties' full names and addresses; the arbitrator's or panel of arbitrators' full names and addresses; the seat of arbitration; the secretary's full name and address; the settlement period; the arbitrators' acceptance; and the parties' commitment to bear the arbitration fees. Without these requirements, an agreement is deemed null and void.

Under the Arbitration Law, the option of arbitration is only available for disputes of a commercial nature and those concerning rights held by the disputing parties under the prevailing laws and regulations. Disputes that cannot be settled amicably under the laws cannot be settled through arbitration.

Under the Arbitration Law, a third party who is not a party to the arbitration agreement is allowed to participate in the arbitration proceedings if it has a relevant interest in the proceedings, the disputing parties agree, and the arbitrator or panel of arbitrators approves. The Arbitration Law recognises the principle of competence under which the district courts do not have jurisdiction to try disputes between parties bound by an arbitration agreement. The principle of separability also applies in Indonesia, under which an arbitration agreement does not become null and void if the main contract expires or becomes void.

Arbitration procedure

Under the Arbitration Law, the arbitration proceedings commence when the claimant serves a written notice of arbitration on the other party and files and registers a written petition for arbitration. The notice of arbitration must provide at least the names and addresses of the parties, a reference to the applicable arbitration clause or agreement, the agreement or matter which is the subject of the dispute, the grounds for the claim and the amount claimed (if any), the method of resolution desired, and the agreement entered into by the parties concerning the number of arbitrators. The petition for arbitration must contain at least the names and addresses of the parties, the facts supporting the petition for arbitration, the issue(s) in dispute, and the amount of relief or other remedy sought.

If the disputing parties do not determine the seat of arbitration, the arbitrator or arbitral tribunal will then determine it. In practice, the arbitration hearings can take place outside of the seat of arbitration, provided that it is agreed by the disputing parties.

When a dispute is referred to arbitration, the parties must abide by the chosen arbitral rules and procedures. Therefore, the rules on evidence under the arbitration procedures agreed to by the disputing parties will apply. Arbitration evidentiary hearings follow the Indonesian Civil Procedure Law, which recognises five kinds of evidence: written evidence; witnesses; indication (conclusions by the arbitrator); confession; and oath.

In principle, the Arbitration Law requires Indonesian language to be used in the arbitration proceedings, unless otherwise agreed by the parties and approved by the arbitrator(s). Arbitration Law allows written evidence to be translated if so required by the arbitrator. For the examination of witnesses and experts, the disputing parties are required to provide their witnesses' written testimony or experts' written statements. If necessary, a hearing can be held to hear their testimony and statements.

The Arbitration Law is silent on the principles of privilege and disclosure. Therefore, they depend on the rules and procedures of the arbitration institution agreed to by the disputing parties and the law of the seat of arbitration. For example, in BANI, the disputing parties must provide written evidence when submitting the petition for arbitration. The written evidence is delivered to the opposing party along with the petition for arbitration by the BANI Secretariat. If the disputing parties present witnesses and experts, they must then provide their written testimony and statements to the opposing party.

The Arbitration Law requires information on the commencement of arbitration proceedings in Indonesia to be kept confidential. Therefore, the pleading documents and evidence must be kept confidential. The arbitration proceedings must be completed at the latest within 180 calendar days of the constitution of the tribunal, and can be extended by the parties' agreement.

Arbitrators

The following are the requirements for an arbitrator:

(a) competent to perform legal acts;

(b) at least 35 years old;

(c) having no family relationship (by blood or marriage) to the third degree with the disputing parties;

(d) having no financial or other interest in the arbitration award; and

(e) having at least 15 years' experience and active mastery in the field.

The appointment of the arbitrator or panel of arbitrators depends on the agreement between the disputing parties. If they fail to agree on the appointment or there is no provision on the appointment of an arbitrator or panel of arbitrators in the arbitration clause or arbitration agreement, they will be appointed by the chairman of the district court with jurisdiction over the respondent's legal domicile. Note that judges, prosecutors, clerks and other court officials cannot be appointed as arbitrators.

The disputing parties can file a demand for recusal on the appointment of an arbitrator to the chairman of the district court with jurisdiction over the respondent's legal domicile. The ground for filing a demand for recusal may be one of the following:

(a) sufficient cause and authentic evidence has been found to suspect that the arbitrator will not perform his/her duties independently or will be biased in rendering the award; or

(b) it is proven that the arbitrator has a family, financial or employment relationship with one of the disputing parties or its representative.

The mandate of the arbitrator or panel of arbitrators may be terminated on the following grounds:

(a) an award has already been rendered with respect to the matter in dispute;

(b) the time limit agreed to under the arbitration agreement (if any) including any extension has expired; or

(c) the disputing parties agree to cancel the appointment of the arbitrator or panel of arbitrators.

Under the Arbitration Law, arbitrators will not be held legally responsible for any action taken during the proceedings to perform their functions unless it is proven they took it in bad faith. If arbitrators fail to render an award within the time limit provided for no valid reason, they may be ordered to pay compensation for costs and losses incurred by the disputing parties because of the delay.

Minutes of hearings will be prepared and drawn up by the secretary for all arbitration proceedings. However, the Arbitration Law is silent on the procedures relating to a secretary to the arbitrator or tribunal. Therefore, it will be subject to the chosen rules and procedures. For example, under BANI Rules and Procedures, tribunal secretaries are appointed for administration purposes, such as submission of pleadings and evidence.

Interim relief

Under the Arbitration Law, the arbitrator or panel of arbitrators may issue a provisional or other interlocutory award at the request of one of the disputing parties. This includes attachment orders (*penetapan sita jaminan/conservatoir beslag*) for the respondent's assets or goods, an order to deposit the goods with a third party, or an order to sell perishable goods (e.g. fruits and vegetables).

Under Indonesian law, an attachment order may be issued to prevent the respondent transferring or disposing of its assets during the proceedings, while a provisional award is essentially an order to the respondent to do or not do something. To enforce a provisional or other interlocutory award, the claimant must comply with the enforcement procedure explained below.

Indonesian law does not, in principle, recognise security for costs, although it may be requested if allowed under the chosen arbitration rules and procedures. Further, if the underlying agreement is governed and to be construed by a foreign law that allows security for costs, the claimant may ask the arbitrator or panel of arbitrators to rule on this matter. Under the Indonesian Civil Procedure Law, Indonesian courts may only enforce court rulings ordering a party to pay a certain amount of money or to vacate premises. This also applies to the enforcement of international arbitration awards in Indonesia.

Arbitration award

The Arbitration Law requires the following to be included in the arbitration award:

(a) a heading containing the words "*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*" (For The Sake Of Justice Based On Belief In Almighty God);

(b) the full names and addresses of the disputing parties;

(c) a brief description of the matter in dispute;

(d) the respective positions of the parties;

(e) the full names and addresses of the arbitrators;

(f) the considerations and conclusions of the arbitrator or panel of arbitrators concerning the dispute as a whole;

(g) the opinion of each arbitrator, if there is any difference of opinion among the members of the panel of arbitrators;

(h) the order of the award;

(i) the place and date of the award; and

(j) the signature(s) of the arbitrator or panel of arbitrators.

In principle, the above requirements apply to domestic arbitration awards. The Arbitration Law is silent on the formal requirements for international arbitration awards. Therefore, the contents of the international arbitration award are subject to the chosen arbitration rules and procedures as well as the law of the seat of arbitration.

The Arbitration Law requires the examination of any dispute to be completed within 180 days of the appointment of the arbitrator of panel of arbitrators but, if required, this can be extended by agreement among the disputing parties. The award must be rendered within 30 days of the closing of the examination of the dispute.

As indicated in "Interim relief" above, Indonesian law also does not recognise any security for costs. Therefore, it depends on the governing law of the underlying agreement between the disputing parties.

In principle, under the Indonesian Civil Code, the non-defaulting party may claim the following compensation from the defaulting party due to a breach of contract:

(a) actual costs and losses suffered and any profit which would have been enjoyed had there been no default (loss of expected profit); or

(b) losses which should have been predicted;

(c) losses directly caused by the default; and

(d) interest as permitted under Indonesian law (in general, 6% *per annum*).

Challenge of the arbitration award

Under the Arbitration Law, a domestic arbitration award that has been registered with the court can be annulled. The request for annulment must be submitted in writing and to the head of the relevant district court within 30 days of the submission and registration date of the award with the Registrar's office of the relevant district court. The following are the only reasons for which a request for annulment may be accepted:

(a) After the award has been rendered, letters or documents submitted are admitted or declared to be false/forged.

(b) After the award has been rendered, important decisive documents, previously concealed by the opponent, are revealed.

(c) The award was rendered based on a fraud committed by either of the disputing parties.

Based on a 2014 Constitutional Court ruling, an application for the annulment can be submitted to the relevant court without any final court ruling evidencing the ground of the request being required.

It is unclear under the Arbitration Law whether an Indonesian district court can annul an international arbitration award. However, the CJDC and the Supreme Court usually dismiss applications for the annulment of international arbitration awards on the ground that Indonesian courts do not have jurisdiction under Article V (1) point (e) of the New York Convention (a competent authority to set aside or suspend the award is the authority in which, or under the law of which, that award was made so that the recognition and enforcement of the award can be refused). As explained above, Indonesia has ratified the New York Convention.

The Arbitration Law is silent on modifications of arbitration awards. However, as explained,

any modification of an award will depend on the arbitration rules and procedures agreed to by the disputing parties. For example, under the BANI rules and procedures, the disputing parties can review the draft award and ask the arbitrator or panel of arbitrators to revise it before they issue the final and correct arbitration award.

Enforcement of the arbitration award

Under the Arbitration Law, the arbitrator or its proxy is required to register a domestic arbitration award with the relevant district court (court with jurisdiction over the losing party's domicile) within 30 calendar days of the issuance of the award. The court's registrar will issue a registration deed. Following the registration, the winning party can enforce the award against the other party according the Indonesian Civil Procedure Law as follows:

(a) file a petition to the relevant district court's chairman asking them to formally summons the respondent to comply with the award (*aanmaning*), and

(b) file an attachment petition to the relevant district court's chairman to seize or attach the respondent's assets followed by their sale at public auction.

In Indonesia, international arbitration awards can be enforced according to the New York Convention. The CJDC is the only court authorised to enforce international arbitration awards. An international arbitration award can be enforced in Indonesia provided that:

(a) the award was rendered by arbitrator(s) in a country which is bound to the Republic of Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of international arbitration awards;

(b) the award is within the scope of commercial law under Indonesian law;

(c) the award does not conflict with public order; and

(d) a writ of execution of the award has been obtained from the Chairman of the CJDC.

For an international arbitration award to be enforced in Indonesia, the arbitrator(s) or its proxy must first register it with the CJDC. For registration, the following documents must be submitted to the court:

(a) the original or an authentic copy of the award and its official Indonesian translation;

(b) the original or an authentic copy of the arbitration agreement or the underlying agreement on which the award is based, as well as its official Indonesian translation; and

(c) a statement from the diplomatic representative of Indonesia in the country where the award was handed down, stating that the country is bound to Indonesia under a bilateral or multilateral treaty on the recognition and execution of international arbitration awards.

If the above requirements are satisfied, the Registrar of the CJDC will issue a deed on the registration of the international arbitration award. Following registration, if the respondent does not voluntarily comply with the international arbitration award, the procedure for enforcing the international arbitration award in Indonesia is the following:

(a) file a petition for a writ of execution (*exequatur*);

(b) file a petition (*aanmaning*) to the CJDC asking the CJDC to summons the respondent to comply with the international arbitration award; and

(c) file an attachment petition to the CJDC to seize or attach the respondent's assets in Indonesia followed by their sale at public auction.

The above procedure is subject to the Indonesian Civil Procedural Law, and the Arbitration Law imposes no specific time limit for enforcing an international arbitration award in Indonesia. Therefore, the whole process often takes a long time, especially if the respondent's assets are not easy to identify or are located in various different places in Indonesia.

The Arbitration Law is silent on the enforcement of an international arbitration award which has been set aside by a court in the seat of arbitration. Since Indonesia has ratified the New York Convention, under Article V (1) of the convention, the chairman of the CJDC may not issue a writ of execution if the international arbitration award has been set aside, and therefore the award cannot be enforced in Indonesia. However, the claimant can file an appeal in the Supreme Court.

In recent years, the number of international arbitration awards registered with the CJDC has increased. However, since the Arbitration Law imposes no specific time limit for enforcing international arbitration awards, many applications for a writ of execution (*exequatur*) remain pending at the CJDC. In practice, it may take 9 (nine) to 12 (twelve) months (as of the registration of the international arbitration award) for the Chairman of the CJDC to issue the writ of execution.

An example of a high-profile case where the CJDC declared the international arbitration award unenforceable was the case of Astro against PT Ayunda Prima Mitra and PT FirstMedia. In this case, the Chairman of the CJDC declared the SIAC's award unenforceable in Indonesia for the following reasons:

(a) the Award ordered PT Ayunda Prima Mitra and PT First Media to cease all court proceedings in Indonesia and prohibited them from submitting any further claims in Indonesia;

(b) the Chairman of the CJDC considered that a ruling intervening in on-going court proceedings in Indonesia violated Indonesia's national sovereignty; and therefore

(c) the Chairman of the CJDC concluded that the SIAC Award violated public policy.

Note that the Indonesian legal system does not acknowledge the principle of binding precedent and therefore, courts are not bound to follow previous judgments.

Investment arbitration

By 2016, Indonesia had signed bilateral investment treaties (**BITs**) with 52 states. Most of the BITs have been in force as of their respective date (ranging from 1972 until 2009). However, in 2015 and 2016, the BITs between Indonesia and several states, such as Italy, Malaysia, The Netherlands, Turkey and Vietnam, were terminated unilaterally.

As a member of South East Asia Nations (**ASEAN**), Indonesia has signed several framework and investment agreements with, among others, India, China, Japan, and the Republic of Korea. Most of these agreements have been in force for a while (since from 2003 until 2010). Moreover, Indonesia has also signed the ASEAN Comprehensive Investment Agreement (in force since 2012) and the OIC (Organisation of Islamic Conferences) Investment Agreement (in force since 1980).

Indonesia also signed the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention**) on 16 February 1968, followed by the issuance of Law No. 5 of 1968 on the Settlement of Investment Disputes between States and Nationals of Other States on 29 June 1968. The ICSID Convention entered into force for Indonesia on 28 October 1968. The Republic of Indonesia has not signed the Energy Charter Treaty.

In recent years, the major investment arbitration case involving Indonesia is *Churchill Mining PLC and Planet Mining Pty Ltd (Claimants) v. the Republic of Indonesia* (ICSID Cases Nos. ARB/12/14 and 12/40). In general, this dispute is related to the revocation of mining business licences of PT Ridlatama Tambang Mineral, PT Ridlatama Trade Power, PT Investama Resource, and PT Investama Nusa Persada by the Kutai Timur Regent. The ICSID tribunal rejected Churchill Mining's and Planet Mining's claims against the Republic of Indonesia because, under the International Law Principle and based on the examination of evidence and experts, it can be concluded that the signatures and stamps of the documents were similar to each other. Therefore, it has been proven that the disputed mining licences were forged. Moreover, it has also been proven that the Claimants did not conduct proper due diligence investigations before conducting foreign investment in Indonesia.

To our knowledge, to date no investment arbitration awards have been registered with the CJDC. However, following the registration of the award, under the Arbitration Law, an international arbitration award (e.g. an investment arbitration award) involving Indonesia may be enforced in Indonesia under a writ of execution issued by the Chief Justice of the Supreme Court.

* * *

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Ireland

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Introduction

"*The realisation, in the words of Lord Simon of Glaisdale…, that litigation, while certainly preferable to personal violence, is not in itself an intrinsically desirable activity, has encouraged the search for other methods of dispute resolution each of which has attracted it adherents and enthusiasts. One of the oldest and best established of these systems is that of arbitration.*"[1]

Legislation and the UNCITRAL Model Law

There has been a good history of arbitration being supported in Ireland. The Arbitration Act, 1954 was passed "*to make further and better provision in respect of arbitrations*" and gave effect to the Geneva Convention of 1927 on the execution of foreign arbitral awards. The Arbitration Act 1980 gave effect to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards and certain provisions of the Washington Convention of 1965 on the settlement of investment disputes. The Arbitration (International Commercial) Act, 1998 adopted the UNCITRAL Model Law for international commercial arbitration.

However, the 1954, 1980 and 1998 Acts have been repealed and the legislation which governs arbitration proceedings in Ireland now is the Arbitration Act 2010 (the "**2010 Act**") which applies to all arbitrations, both domestic and international. The law governing international arbitration is based on the UNCITRAL Model Law and the 2010 Act adopts the UNCITRAL Model Law, as amended on 7 July 2006.

The UNCITRAL Model Law is reproduced in its entirety as a schedule to the Act. Section 6 of the 2010 Act provides that, subject to the provisions of that Act, "*the Model Law shall have the force of law in the State*".

The 2010 Act (and, through it, the UNCITRAL Model Law) applies to all arbitrations commenced in Ireland on or after 8 June 2010. It restates that effect is given to the Geneva Convention and Protocol 1923, the New York Convention 1958 and the Washington Convention 1965.

Courts

There is no special national court for international or domestic arbitrations. Section 9 of the 2010 Act states that the High Court is the relevant court for the purposes of the Act.

Arbitration agreements

In writing

The 2010 Act applies Option 1 of Article 7 of the UNCITRAL Model Law (the "**Model Law**") to the requirements of an arbitration agreement. An arbitration agreement is defined

as "*[a]n agreement ... to submit to arbitration ... disputes which have arisen or which may arise ... in respect of a defined legal relationship whether contractual or not*". The arbitration agreement must be in writing, whether in the form of an arbitration clause in a contract or in the form of a separate agreement. An agreement will be in writing if its content is recorded in any form, notwithstanding that the arbitration agreement or contract may have been concluded orally, by conduct or other means. "*In writing*" includes electronic data interchange, email, telegram, telex or telecopy. It may be in the exchange of the claim and the defence and it may be incorporated by reference.

Disputes excluded from the 2010 Act

Section 30 of the 2010 Act clarifies that the 2010 Act does not apply to:

(i) disputes regarding the terms or conditions of employment or the remuneration of employees;

(ii) arbitrations conducted under Section 70 of the Industrial Relations Act 1946; or

(iii) arbitrations conducted by a property arbitrator appointed under Section 2 of the Property Values (Arbitration and Appeals) Act 1960.

Consumer disputes, where the arbitration clauses are not individually negotiated and where the disputes are worth less than €5,000, are only arbitrable at the election of the consumer. A "*Consumer*" is a person acting outside his trade, business or profession.

Arbitrator's jurisdiction

An arbitrator is permitted to rule on the question of his or her own jurisdiction pursuant to Article 16(1) of the Model Law. This provides that the "*arbitral tribunal may rule on its own jurisdiction*", which includes any questions regarding the existence or validity of the arbitration agreement, thereby granting the arbitrator primary responsibility for deciding whether he or she has jurisdiction to decide the dispute. However, this power is not final as an appeal can be made to the High Court under Article 16(3), and there is no appeal allowable from the High Court's decision. An assertion that the tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence, as per Article 8 of the Model Law.

In *Mayo County Council v Joe Reilly Plant Hire Limited*,[2] the High Court refused an application for a direction pursuant to Article 16(3) of the Model Law, and Order 56 Rule (1) (3) (f) of the Rules of the Superior Courts, that an arbitrator had no jurisdiction to adjudicate upon a claim made by the respondent against the applicant. The dispute arose in respect of the costs of works carried out by the respondent on behalf of the applicant. The contract between the parties contained an arbitration clause, which gave the arbitrator a broad power to hear a dispute of any kind, whether arising during or after the completion of the works or after the determination of the contract. The applicant did not dispute that there was a valid arbitration clause in the contract, but argued that the clause was no longer operative, as the respondent had accepted payment under the contract, and as such, there had been accord and satisfaction.

The Court stated that the fact of accord and satisfaction was not a basis to challenge the arbitrator's jurisdiction (though it may instead constitute a defence to the claim made by the respondent in the arbitration). It was held that in circumstances where the existence of an arbitration clause is not in dispute, the courts will be very slow to interfere with the arbitrator's ruling on his own jurisdiction.

Article 14 of the Model Law provides that if "*an arbitrator becomes de jure or de facto unable to perform his functions, or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or the parties agree upon termination*". The High Court may decide upon the termination of the mandate, but the decision of the High Court is not subject to appeal.

Validity of an arbitration agreement

The courts in this jurisdiction have long been supportive of the arbitral process and there is a line of recent authority which clearly establishes that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration. If there is an arbitration clause and the dispute is within the scope of the arbitration agreement, and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then a stay must be granted (*BAM Building Ltd v UCD Property Development Company Ltd*[3]). However, an element of judicial confusion persisted for a time as to the correct standard to be adopted in deciding whether to uphold an arbitration clause.

In the case of *The Lisheen Mine v Mullock & Sons (Shipbrokers) Ltd*,[4] the Court considered the standard to be applied to this question. Previous cases had suggested quite a low threshold to be met by a party seeking to have proceedings referred to arbitration (*P Elliot & Co Ltd (In Receivership and In Liquidation) v FCC Elliot Construction Ltd*[5]). However, Cregan J held that the issue as to whether a valid arbitration agreement exists should be given "full judicial scrutiny", as opposed to being considered on a mere *prima facie* basis. He felt that the courts were the most appropriate venue in terms of efficiency and cost, given that the determination as to whether an arbitration agreement exists is a question of law.

This position has been followed in the case of *Sterimed Technologies International v Schivo Precision Ltd*.[6] McGovern J held that the onus is on the defendants to establish the existence of the arbitration agreement. If it discharges that burden then the onus shifts to the plaintiffs to show that the arbitration agreement was null and void if the court proceedings are not to be stayed. The High Court stayed proceedings pending the outcome of the arbitration in Charlotte, North Carolina. Similarly, McGovern J stayed proceedings under Article 8(1) of the Model Law in *BAM Building Ltd v UCD Property Development Company Ltd*[7] on the basis that the dispute between the parties was the subject of an arbitration agreement.

Challenge to arbitrator

Article 12 of the Model Law provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality, independence, or if he does not possess the qualifications agreed upon by the parties. The arbitrator's decision in respect of the challenge can itself be challenged by application to the High Court under Article 13 of the Model Law. The decision of the High Court is not subject to appeal.

Arbitration by agreement only

Irish law will only allow an arbitral tribunal to assume jurisdiction over individuals or entities where the parties so agree. Section 16 of the 2010 Act provides that an arbitrator may not direct that different proceedings be consolidated or heard at the same time without the agreement of the parties.

The High and Circuit Courts have power, under Section 32 of the 2010 Act, to adjourn court proceedings otherwise properly before the courts to facilitate arbitration if the relevant court thinks it appropriate to do so, provided the parties consent.

For arbitrations conducted in Ireland under the 2010 Act, Irish law governs the formation, validity and legality of arbitration agreements to the extent set out in that Act.

Arbitration procedure

Commencement of arbitration

Section 74 of the Statute of Limitations 1957 (as amended by the 2010 Act) sets out the manner in which arbitral proceedings are to be commenced. They are deemed to be

commenced on the date on which the parties to an arbitration agreement so provide as being the commencement date or, where no provision has been made by the parties as to the commencement, the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent. Section 74(2) makes provision for when a written communication is deemed to have been received. Article 21 of the Model Law provides that arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The applicable limitation period will depend on the particular cause of action in law which is the subject matter of the dispute. The limitation period for contractual claims where the contract is under hand is six years from the date of the commencement or accrual of the cause of action, and 12 years where the contract is under seal, unless the parties have agreed a different limitation period (which they may do).

Procedural rules

Article 19 of the Model Law provides that the parties are entitled to set their own procedure and, failing agreement on that, it is for the arbitrator to conduct the arbitration in such manner as it considers appropriate. Chapter V of the Model Law sets out provisions regarding the conduct of arbitral proceedings covering such matters as equal treatment, determination of rules of procedure, place of arbitration, commencement, language, statements of claim and defence, hearings and written proceedings, default of a party, experts appointed by the tribunal and court assistance in taking evidence.

The parties will determine the procedure they wish to follow, particularly through the adoption in the arbitration agreement of specific institutional or trade association rules. However, if no rules are chosen and the parties cannot subsequently agree upon how the procedure is to be conducted, the arbitrator can set the procedure, which will generally be done at a procedural meeting between the parties and the tribunal, following which the tribunal will issue an order for directions. This meeting can be conducted in person or remotely, for example, by telephone. Sometimes, the parties can agree all of the procedures and provide an agreed note to the arbitrator. Article 24 of the Model Law provides that, subject to any contrary agreement by the parties, the tribunal shall decide whether to hold oral hearings, or whether the proceedings shall be conducted on the basis of documents and/or materials. If there is any question about conflicting evidence, an oral hearing is preferable so that witnesses can be examined and cross-examined.

Arbitrators are expected to treat both parties equally, with impartiality, and to give each side the opportunity to put forward their case. The maxims "*audi alteram partem*" and "*nemo index in causa sua*" ("*always hear both sides*" and "*no-one should be a judge in his own cause*" respectively) are basic principles of fair procedures which arbitrators should follow. Article 18 of the Model Law sets out that obligation in respect of fair procedures in express terms.

Oath or affirmation

Unless the parties agree otherwise, the tribunal has the power to direct that a party to an arbitration agreement or a witness be examined on oath or affirmation, and the tribunal can administer oaths for that purpose (Section 14 of the 2010 Act). Subject to the agreement of the parties, the tribunal may also: order consolidation of arbitral proceedings or concurrent hearing where the parties agree to the making of such an order (Section 16); award interest (Section 18(2)); order security for costs (Section 19); require specific performance of a contract (save in respect of land) (Section 20); and determine costs (Section 21(3)). The arbitrator is also expected to render a reasoned award in writing.

Privilege of documents

Documents will be exempt from production if they can be said to fall into a recognised category of privilege. The usual types of privilege in this context are legal professional privilege applying to documents prepared in contemplation of legal proceedings ("litigation privilege") and documents prepared for the purpose of giving or obtaining legal advice ("legal advice privilege"). Generally, communications between a party and its lawyers, whether external or in-house, will attract privilege if they are for the dominant purpose of receiving or requesting legal advice or relate to legal proceedings, whether in being or in contemplation. There is a limited exception in respect of in-house lawyers who cannot claim legal professional privilege protection when the company is under investigation by the European Commission in competition proceedings. Without prejudice communications, which are used in the context of trying to reach settlement or narrowing issues in dispute, are exempt from production, subject to limited exceptions. They need not be stated to be "without prejudice" if their purpose is to reach a settlement; also, stating that they are "without prejudice" will not protect them if they are not truly aimed at the purpose of reaching a settlement. In general terms, privilege in documents may be waived by the party who prepared the document or the party for whom it was prepared, and care should be taken by clients and advisors not to waive privilege inadvertently.

Confidentiality

There is no express statutory provision in the 2010 Act that arbitration proceedings are to be confidential or that the parties are subject to an implied duty of confidentiality. However, in practice there is English authority (which is of persuasive effect in the Irish courts) to the effect that the existence and content of arbitration proceedings usually remain confidential. The implied duty of confidentiality was affirmed by the English Court of Appeal in *Ali Shipping Corp v Shipyard Trogir*.[8] This was the first case where confidentiality was considered by the Court of Appeal, which confirmed that a general duty of confidentiality was implied at law. It recognised that the boundaries of this duty had not yet been delineated, and recognised a number of exceptions to the duty, such as consent, court order, or leave of the court. In situations where preservation of the confidentiality of the arbitration is deemed crucial to both parties, it is advisable to explicitly detail the extent of the obligation in the arbitration clause.

Arbitrators

The essence of arbitration as a private means of resolving a dispute is that the parties may choose their arbitrator, and they can decide on whether to have one or more arbitrators. In the absence of agreement on appointment, or a default mechanism, the 2010 Act provides that the number of arbitrators shall be one. Given that agreement upon the identity of the arbitrator can be difficult to reach, especially when a dispute has arisen on some aspect of the substance of the agreement, it is prudent to include a mechanism for the appointment by an agreed nominating professional body, with provision that the parties will be bound by the choice made by such nominating professional body. There is no equivalent to the guides which are commonly used in international arbitration such as *Smit's Roster of International Arbitrators*, although members of the Chartered Institute of Arbitrators have their details displayed on the Institute's website.

If the parties' method for selecting an arbitrator does not produce a result, the High Court will, pursuant to Article 11 of the Model Law, appoint the arbitrator on application to it.

The High Court may intervene in the selection of an arbitrator where the parties cannot

agree upon an arbitrator and have no default mechanism in their agreement for appointment, or where there is a challenge under Article 13 of the Model Law.

Bias and conflicts of interest

The arbitrator should not be biased and this is enshrined in Article 12 of the Model Law, which provides that where a person is approached in connection with appointment as an arbitrator, they are obliged to disclose any circumstances that are likely to give rise to justifiable doubts as to impartiality or independence. The duty to make such disclosure is on-going and an arbitrator is obliged to disclose any such circumstances throughout the proceedings.

Immunity

Section 22 of the 2010 Act provides that an arbitrator "shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions". Such immunity also extends to any agent, employee, advisor or expert appointed by the arbitrator. This followed the old common law position from the case of *Redahan v Minister for Education and Science*[9] that arbitrators enjoy immunity from suit in negligence except in cases of bad faith.

Interim relief

Preliminary relief and interim measures

An arbitrator in Ireland is permitted to award preliminary or interim relief, and need not seek the assistance of the High Court to do so.

Article 17 of the Model Law provides that, unless otherwise agreed by the parties, and upon the application of one of the parties, the arbitrator has the power to order interim measures of protection as may be considered necessary and to make a preliminary order. The arbitrator can order a party to:

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

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

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

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

The arbitrator does not need to seek the assistance of the court to make any of these orders. However, Article 9 of the Model Law, along with Section 10 of the 2010 Act, provide that, before or during arbitral proceedings, a party may itself also request from the High Court an interim measure of protection. However, unless otherwise agreed, the court may not rely on Article 9 of the Model Law to order security for costs or discovery of documents; those are matters to be addressed by the arbitrator.

Anti-suit injunction

There is no Irish case law on anti-suit injunctions in aid of arbitration. It would seem, however, that the position under EU law has recently changed. Anti-suit injunctions were prohibited by the Court of Justice of the European Union in *Paul Turner v Felix Fareed Ismail Grovit [2004] Case No C-159-02* and *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) and Generali Assiarazioni Generali SpA v West Tankers Inc [2009] C-159-07*, on the basis that they were inconsistent with the Brussels Convention and the principle of mutual trust between member courts. In the recent case of *Gazprom OAO v Lithuania*,[10] the Court of Justice of the European Union ruled that an anti-suit injunction issued by an arbitral

tribunal to prevent court proceedings in breach of an arbitral agreement is enforceable in the EU and that such an injunction is not covered by the Brussels I Regulation. It was held that proceedings for the recognition and enforcement of an arbitral anti-suit award are covered by national and international law, such as the New York Convention and not by the Brussels I Regulation. The Court did not overrule its previous position in respect of a court's jurisdiction to grant anti-suit injunctions, but rather it distinguished a court-issued injunction from one granted by an arbitral tribunal. As a result, some commentators have suggested that it is arguable that arbitral tribunals now have greater anti-suit powers than judges in EU Member States' courts. The position adopted in the *West Tankers* case may now be open to question, because in the *Gazprom* case the Advocate General observed that the prohibition on anti-suit injunctions in *West Tankers* may now be untenable due to revisions in the Brussels I Regulation, which came into force in 2015 (Regulation 1215/2012).

Where Irish court proceedings are involved and an arbitration agreement exists, rather than seeking an anti-suit injunction, a party may bring an application under Article 8 of the Model Law effectively to stay any Irish court proceedings. Article 8 of the Model Law provides that "*a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed*" (discussed above).

Security for costs

An order for security for costs can be a significant advantage to a party facing a claim in arbitration, and equally may become an obstacle for a claimant in bringing forward its claim. Pursuant to Section 10(2) of the 2010 Act, the High Court is not allowed to make any order for security for costs, unless the parties agree otherwise; rather an application is to be made to the arbitrator.

Section 19 of the 2010 Act provides that unless agreed otherwise by the parties, the arbitrator may order a party to provide security for the costs of the arbitration. However, qualifications with regard to the basis upon which such security might be ordered by the arbitrator are set out at Section 19(2) of that Act. In particular, the arbitrator may not order security solely because an individual is resident, domiciled or carrying on business outside of Ireland or, in respect of a corporate, it is established, managed or controlled outside of Ireland.

Arbitration award

Making an award

Article 31 of the Model Law provides that the award shall be in writing, be signed by the arbitrator (or, if there is more than one, the majority of the arbitrators) and also set out the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. The award shall also state its date and the place of arbitration. Copies of the award as made are to be delivered to the parties.

If an award also deals with costs, the tribunal must also deal with the requirements set out in Section 21 of the 2010 Act. Usual practice for an arbitrator, in domestic arbitrations, is to obtain payment of any outstanding fees before making the award available to either party. This is usually achieved by writing to both parties to inform them that the award may be taken up upon the discharge of the outstanding fees and expenses. As both parties will usually be jointly and severally liable for the arbitrator's fees and expenses, if they cannot come to an agreement to split the fees as an interim approach, one or other party will typically pay the fees and expenses and then obtain the award. The question of costs

(including who is ultimately liable for the arbitrator's fees and expenses), if not dealt with in the award, will be dealt with subsequently at either a hearing or by submissions or both, leading to an award on costs.

In a situation where the arbitrator delays unduly in making his or her award, it is possible for either party to apply to the High Court pursuant to Section 9(1) of the 2010 Act and Article 14 of the Model Law to terminate the mandate of the arbitrator for failure to render the arbitral award without undue delay.

Remedies

The law applicable to the dispute will dictate the remedies that may be sought in arbitration. Subject to that, an arbitrator may determine and award damages as an Irish court would and may order any of the common law and equitable remedies including specific performance of a contract, save that without the agreement of the parties, it may not award specific performance relating to a contract for the sale of land pursuant to Section 20 of the 2010 Act.

Interest

Section 18(1) of the 2010 Act states that the party to an arbitration agreement may agree on the arbitral tribunal's powers regarding the award of interest. Unless otherwise agreed, Section 18(2) permits the tribunal to award simple or compound interest from the dates agreed, at the rates and with the rests that it considers to be fair and reasonable. It can determine such interest to be payable on all or part of the award in respect of any period up to the date of the award, or on all amounts claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award in respect of any period up to the date of payment.

Fees and costs

Section 21(1) of the 2010 Act provides that, subject to an exception for consumers (Section 21(6) of the 2010 Act regarding unfair terms), the parties may make such provision with regard to the costs of the arbitration as they see fit. The parties may, therefore, agree in advance of any dispute as to how costs will be dealt with (for example, each side will bear its own costs).

If there is no agreement pursuant to Section 21(1), or if the consumer exception applies, the tribunal shall determine, by award, those costs as it sees fit. In making a determination as to costs, the tribunal is obliged to specify the grounds on which it acted, the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each, as well as by whom and to whom they shall be paid. The general principle in respect of costs for domestic arbitrations is that the costs are at the discretion of the arbitrator, who will exercise his/her discretion in the same manner as would a court, which is that costs usually "follow the event", and the loser pays unless there is some reason not to make such an order, such as the existence of an effective *Calderbank Offer* for an amount greater than the amount awarded by the arbitrator, or where the successful party grossly exaggerates its claim.[11]

Funding litigation

Irish law still retains the common law principles of maintenance and champerty, which generally preclude those with no legitimate interest in proceedings taking part in the proceedings or obtaining any benefit therefrom. However, contingency fees are, subject to limits and rules on methods of calculation, permissible under Irish law. Success fees and fee arrangements involving payment contingent on success are permitted.

It is also of note that it has been recently held in *Greenclean Waste Management Limited*

v Leahy (No 2)[12] that After the Event Legal Costs insurance does not fall foul of the civil wrong of champerty and maintenance and is, therefore, legal. After the Event Legal Costs insurance is a type of insurance policy that provides cover for the legal costs incurred in bringing or defending litigation. The policy is purchased after a legal dispute has arisen and typically provides cover for a party's own outlay, and the liability to pay the other party's legal costs in the event that the other party obtains an award of costs against it. The facts of the case required the court to consider the effect such insurance has on an application for security for costs. It was found that the existence of After the Event Legal costs insurance could be taken into account in the course of an application for security for costs. The decision of the High Court was subsequently appealed by the defendant. Although the Court of Appeal allowed the appeal, it was satisfied that such a policy could be taken into account if there was a realistic probability that the policy would cover the costs of the defendant.

Challenge to an arbitration award

Challenges to an award

There is no appeal against an arbitral award under the 2010 Act. The exclusive recourse is an application to a court to set aside the award. However, there are limited grounds upon which such an application may be made. These grounds are set out at Article 34 of the Model Law as follows:

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

(i) the party to the Arbitration Agreement referred to in Article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State;

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

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

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

(b) the court finds that:

(i) the subject matter is not capable of settlement by arbitration under the law of this State; or

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

If satisfied that any of the above grounds are made out, the High Court can set aside the arbitral award. An application to set aside the award may not be made after three months from receipt by the applicant of the award. Alternatively, if there is a request under Article 33 of the Model Law to correct or interpret an award, or to issue an additional award, the applicant has three months from the date on which that request had been disposed of by the tribunal.

The Irish High Court recently, and for the first time, considered the meaning of 'arbitral award' for the purposes of Article 34. In *FBD Insurance Public Limited Company v Samwari Ltd*,[13] it was noted by the Court that 'arbitral award' is not defined by the Model Law, nor is it defined by the 2010 Act. It was held that in order for the Court to have jurisdiction under Article 34 to set aside a decision of an arbitral tribunal, the decision must be one that was made on the merits of the case and it must meet the formal requirements of Article 31. The Court observed that this must include a partial award if it met these criteria, but that procedural rulings and orders made during the course of the arbitration are not amenable to challenge under Article 34.

Under Irish law, a party may no longer:

- state a case to the High Court on a question of law;
- ask the High Court to remit the award to the arbitrator;
- ask the High Court to remove the arbitrator for misconduct;
- ask the High Court to set aside the award for misconduct; or
- seek relief where the arbitrator is not impartial or where the dispute involves a question of fraud.

In summary, recourse for a disappointed party is, broadly speaking, confined to a complaint that:

- the particular party was unable to present its case; or
- the award is in conflict with public policy.

Enforcement of the arbitration award

Enforcement of an award

Ireland ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1981 and no reservations have been entered. The relevant legislation is now the 2010 Act.

Ireland has not signed and/or ratified any regional conventions concerning the recognition and enforcement of arbitral awards.

Approach of the national courts to recognition and enforcement

The Irish courts have shown a supportive approach to the enforcement of arbitral awards. Hussey and Dunne on "*Arbitration Law*" observe that the vast majority of challenges to the award of an arbitrator are rejected, and the strong presumption in favour of upholding an arbitrator's award has been reiterated in a number of cases, including: *Keenan v Shield Insurance*[14] and *Limerick City Council v Uniform Construction Limited*.[15]

Section 23(1) of the 2010 Act provides that an arbitral award shall be enforceable in the State either by action or by leave of the High Court, in the same manner as a judgment or order of that court with the same effect. The 2010 Act expressly excludes any possibility of an appeal to the Supreme Court in relation to the recognition and enforcement of an arbitral award.

In the case of *Yukos Capital Sarl v OAO Tomskneft VNK*,[16] the Irish High Court set aside an *ex parte* order granting the applicant leave to serve arbitration-related proceedings outside the jurisdiction and to dispense with the requirement for personal service of the proceedings. The High Court refused to assume jurisdiction over the respondent on the grounds that it was not appropriate to do so, having regard to the interests of both parties. There were a number of considerations as to why the High Court in that case refused to deal with

an application for enforcement of an arbitral award. The parties, the arbitration, and the performance of the underlying contract had no connection with Ireland. Further, the party against whom enforcement was sought had no assets in Ireland. The High Court decided that there was no benefit to be gained by the applicant where enforcement proceedings were also under way in the French and Singapore courts.

In *Avobone NV v Aurelian Oil and Gas Ltd*,[17] the respondents sought the Irish High Court to decline jurisdiction in an enforcement action for an arbitral award granted by the International Chamber of Commerce in London in the jurisdiction of England and Wales, on the basis that the respondents had no assets within the jurisdiction. The Court referred with approval to the judgment of Kelly J in *Yukos Capital*, where he noted that the presence of assets within the jurisdiction was not a pre-requisite for the granting of leave to serve out of the jurisdiction on an application to enforce an arbitral award.[18] McGovern J applied the "solid practical benefit test" enunciated by Mustill LJ in *Insurance Corporation of Ireland v Strombus International Insurance Co.* [1985] 2 Lloyd's Rep. 138 at 144, and found that the applicants had established that a solid practical benefit would ensue to them if they were to enforce the arbitral award in Ireland, as it could then apply to garnishee this debt from the Irish parent company.

Public policy

The leading Irish case on public policy in the context of enforcement of arbitral awards confirms that the public policy relevant to enforcement actions brought before the Irish courts is the public policy of Ireland, and not that of the seat of the arbitration or where the award has been rendered (*Broström Tankers AB v Factorias Volcano SA*).[19] In that case, which concerned an application to enforce a foreign arbitral award under the New York Convention (implemented by the Arbitration Act 1980, and now the 2010 Act), Kelly J enforced the award despite arguments that it was contrary to Irish public policy. The judge said (quoting from Cheshire and North's Private International Law), "*I am satisfied that I would be justified in refusing enforcement only if there was … some element [of] illegality, or possibility that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public*". Kelly J made it clear that the Irish courts would take a restrictive approach to the concept of public policy in Article 34 of the Model Law, similar to that in other jurisdictions;

> "The case law and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of a narrow scope. It extends only to a breach of the most basic notions of morality and justice. In this regard, I derive considerable assistance from the decision in *Parsons & Whitmore Overseas Co. Inc. v. Société Général de l'Industrie du Papier* 508 F. 2d 969 (2nd Cir, 1974) [a decision of Circuit Judge Joseph Smith]. In the course of his judgment, Judge Smith says this, and I quote: "Perhaps more probative, however, are the inferences to be drawn from the history of the convention as a whole. The general pro-enforcement bias informing the convention and explaining its supersession of the Geneva Convention points towards a narrow reading of the public policy defence. An expansive construction of this defence would vitiate the Convention's basic efforts to remove pre-existing obstacles to enforcement… We conclude, therefore, that the Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."[20]

This decision was mentioned with approval by McGovern J in *FBD Insurance Public Limited Company v Samwari Ltd*.[21]

Investment arbitration

Investor state arbitrations

Ireland signed the Washington (ICSID) Convention in 1966. Ireland ratified the Washington Convention in 1981. Ireland has only ever been a party to one Bilateral Investment Treaty (with the Czech Republic), which was terminated by consent on 1 December 2011.

* * *

Endnotes

1. O'Donnell J in *Galway City Council v Samuel Kingston Construction Limited* [2010] IESC18.
2. [2015] IEHC 544.
3. [2016] IEHC 582 at para 6.
4. [2015] IEHC 50.
5. [2012] IEHC 361.
6. [2017] IEHC 35.
7. [2016] IEHC 582.
8. [1999] 1 WLR (CA (Civ Div)).
9. [2005] 3 I.R. 64.
10. Case C-536/13, 13 May 2015.
11. *Shelley-Morris v Bus Atha Cliath* [2003] 1 I.R. 232.
12. [2014] IEHC 314.
13. [2016] IEHC 32.
14. [1988] I.R. 89.
15. [2007] 1 I.R. 30.
16. [2014] IEHC 115.
17. [2016] IEHC 636.
18. [2014] IEHC 115 at para 112.
19. [2004] IEHC 198.
20. [2004] IEHC 198 at para 28.
21. [2016] IEHC 32 at para 33.

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Italy

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Introduction

The provisions regulating arbitration proceedings in Italy are located in the last chapter of the last book of the Italian Civil Procedure Code ("**CPC**"), specifically in Sections 806 to 840.

In addition, there are several special laws that regulate arbitration in specific sectors, e.g.: (a) Legislative Decree no. 5 of 2003, providing specific rules on arbitration agreements included in companies' bylaws; (b) Legislative Decree no. 50 of 2016, regulating arbitration proceedings in public contracts; and (c) Law no. 262 of 2005, concerning arbitration proceedings in financial markets.

Italy is a signatory party of the New York Convention, with no reservations. Its provisions were transferred into internal law by means of Law no. 62 of 1968.

Further, Italy is also a party to: (a) the European Convention on International Commercial Arbitration signed in Geneva in 1961; (b) the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States signed in Washington in 1965; and (c) the United Nations Convention on Contracts for the International Sale of Goods signed in Vienna in 1980.

The CPC's provisions are applicable to both domestic and international arbitration, except when explicitly provided by the same CPC.

It shall be highlighted that in Italy there are several institutions (mostly Chambers of Commerce) that have established Chambers of Arbitration. Most of them issue their own rules on arbitration.

Section 832 CPC recognises the relevance of such rules, stating that an arbitration agreement can refer to them. In case of contrast between the arbitration agreement and the Chamber of Arbitration's rules, the first shall prevail.

The most important institution is Milan's Chamber of Arbitration, which has issued very effective rules on arbitration which are translated into several languages and very flexible, so that they can be adapted to all kinds of arbitration proceedings.

Arbitration agreement

Pursuant to Sections 807 and 808 CPC, the arbitration agreement shall be in writing and shall determine the boundaries of the controversy that the parties have devolved to arbitrators.

Section 806 of the CPC provides that the parties may refer any disputes to be heard by an arbitration tribunal except for:

- disputes involving inalienable rights; and
- disputes explicitly excluded by the law.

Italian law excludes the referral of employment matters to an arbitration, except when:

- the arbitration is established by the law; or
- provided in the appropriate collective employment agreements or contracts.

Pursuant to Section 817, par. 1 CPC, arbitrators have the exclusive competence to rule on their jurisdiction to award the dispute before them, under the terms of the arbitration agreement. Therefore, the Italian legislative system fully recognises the *Kompetenz-Kompetenz* principle.

Section 817, par. 2 CPC reinforces the above by stating that arbitrators have exclusive competence to rule on their jurisdiction even when the latter is challenged before a Court, and where there are new reasons which appear only at a later stage.

It is important to note that a party who wishes to challenge the Arbitral Tribunal's jurisdiction must raise the question at the time of the first defensive act, i.e. the first defensive brief submitted or at the first hearing, following acceptance of the arbitrators. Failure to do so prevents the party challenging the award at a later stage, claiming that arbitrators did not have the jurisdiction to award the controversy. On the contrary, the appeal is always permitted when the dispute cannot be referred to arbitration on the basis of Section 806 CPC.

The same limitation for appeals applies if, at the time of the first defensive act, a party fails to challenge a counterparty's arguments that do not fall within the boundaries of the arbitration agreement.

Where the tribunal confirms its jurisdiction to decide on a matter and orders the prosecution of the proceedings, the arbitrators can issue a non-final award. The latter can be challenged before the Court of Appeals only along with a final award pursuant to Section 827, par. 2 CPC.

On the contrary, when arbitrators ascertain and declare they do not have the jurisdiction to rule on a dispute, they will issue a ruling in the form of an award.

Further, pursuant to Section 819-*ter* CPC, arbitrators' jurisdiction is not excluded by the fact that the same dispute is currently pending before a Court.

The decision of a Court on its jurisdiction is always appealable before the Supreme Court of Cassation by means of a special petition called '*regolamento di competenza'*. The latter is aimed at securing a decision which will clearly state which is the competent body between the Court or the Arbitral Tribunal to rule on the matter.

Filing of the *regolamento di competenza*'s petition under Section 819-*ter* CPC does not trigger the automatic suspension of the proceedings.

Reflecting the same timing required for raising jurisdictional objections before an arbitral tribunal, a party wishing to challenge the Court's competence to rule on a matter must immediately raise the objection with the statement of defence ("c*omparsa di risposta*"). Failure to raise the objection implies that the Arbitral Tribunal's competence is definitely excluded for that specific controversy.

As noted by several authors, the abovementioned provisions do not provide the means for resolving a dispute in cases where both the Arbitral Tribunal and the Court confirm their competence to do so.

Arbitrators

The party that wishes to start the arbitration proceedings, pursuant to an arbitration agreement that empowers the parties to appoint their own arbitrator, shall serve the other

party(-ies) with a writ containing the invitation to appoint their own arbitrator(s) within 20 days. Failure to meet the deadline empowers the plaintiff to file a petition with the President of the competent Court (where the arbitration has its seat) to appoint one or more arbitrators.

Absent such a determination of the arbitration agreement, the party who wishes to start an arbitration proceedings shall file a petition to the President of the competent Court, who shall appoint the requested number of arbitrators.

The President of the Court can refuse only when the arbitration agreement: (a) manifestly does not exist; or (b) manifestly provides for arbitration proceedings abroad (i.e. when the arbitration proceeding's seat is placed abroad).

In any case, Section 809 CPC requires an odd number of arbitrators.

In addition, the parties can provide for a third entity to appoint the arbitrators. Normally, arbitration agreements vest the power to appoint one or more arbitrators with Chambers of Arbitration, pursuant to their own rules.

Under Italian law, an arbitrator can be challenged for a number of reasons, specifically:

(a) if he/she does not have the qualifications explicitly agreed by the parties;

(b) if he/she, an entity, association, or company where he/she is a director has an interest in the controversy;

(c) if he/she or his/her spouse is: (i) a close relative up to the fourth degree of; or (ii) lives with; or (iii) regularly enjoys a close relationship with one of the parties, an authorised representative of one party or one of the attorneys;

(d) if he/she or his/her spouse has pending proceedings with or a severe hostility with one of the parties, an authorised representative of one party or of one of the attorneys;

(e) if he/she is bound to one of the parties, or to a company controlled by it, or to a subject that controls the party or to a company placed under joint control, by a working relationship of any kind or by other patrimonial or associative relationship capable of reducing his/her independence, or if he/she is a legal guardian of one of the parties; or

(f) if he/she was a consultant, an assistant or the counsel of one of the parties in a previous phase of the dispute or was a witness in it.

The party who appointed an arbitrator can challenge him/her only if the reason that impedes his/her appointment becomes known only at a later stage.

The challenging of an arbitrator does not prevent the prosecution of the arbitration proceedings, unless so ordered by the Arbitral Tribunal. However, if the arbitrator is discharged, the activities carried out by him/her or with his/her cooperation are ineffective.

In addition to the above, Chambers of Arbitration tend also to take into account additional grounds that compromise the independence of arbitrators, e.g. the IBA Guidelines on Conflicts of Interest in International Arbitration.

Under Section 813-*ter* CPC, an arbitrator is personally liable towards the parties when:

(a) fraudulently or with gross negligence, he/she omits or delays his/her activity and for this reason he/she is discharged and replaced, or when he/she unjustifiably renounces his/her office; or

(b) fraudulently or with gross negligence, he/she omits or impedes the issuance of the award within the deadline established by the law.

Arbitration procedure

By the time decided by the Arbitral Tribunal, the parties shall appear at the first hearing. The rules of the arbitration proceedings can be freely decided by the parties. Absent an agreement, the rules (including seat and language) are determined by the Arbitral Tribunal.

Arbitrators are bound by the duty to ensure respect to the due process rules, granting the parties equal and reasonable opportunities to defend themselves.

For what pertains to the evidentiary phase, the parties or the Arbitral Tribunal can delegate specific acts to one or more arbitrators.

Witnesses can be heard also in places different from the seat of arbitration, such as the place where the arbitrator is located, or at the witness's home or office. The Tribunal can also authorise written witness testimony.

If a witness refuses to appear before the Arbitral Tribunal, and the arbitrators deem it appropriate, they can request the President of the Court where the arbitration has its seat to order the witness' appearance.

Further, the Arbitral Tribunal can appoint one or more technical experts (entities can also be appointed) to assist the arbitrators in some specific technical matters.

The arbitrators are also empowered to request a public administrative body to provide written information regarding an act or a document of the latter that the arbitrators deem appropriate to examine.

Interim relief

Section 818 CPC prevents Arbitral Tribunals issuing interim remedies (either provisional or conservative measures), unless otherwise provided by the law.

The applicant shall apply to the competent Court for interim relief in support of arbitration under the general rules of the CPC. As a result, Courts will generally have jurisdiction to grant interim measures.

Section 669-*quinquies* CPC states that when there is an arbitration proceeding ongoing or there is an arbitration agreement in place, the Court to which the party may apply to obtain an interim measure is the one that would have jurisdiction for the merits absent the arbitration agreement.

Under general civil procedural laws, the remedies available on an interim basis are:

(a) judicial seizure, aimed at securing goods whose ownership is being challenged;

(b) cautionary seizure, aimed at securing assets when the alleged creditor fears that the debtor could dispose of them so that the guarantee on the credit might be lost;

(c) reporting of new works or of potential damages in order to avoid damages taking place as a consequence of new work being started or of other goods placing the claimant's property or possessions in danger;

(d) preliminary investigation proceedings, aimed at securing evidence to be later used in a proceeding, when there is the risk that such evidence may be lost; or

(e) in all other cases, the Court can issue any kind of measure it deems most appropriate for reasons of urgency (Section 700 CPC) when:

- the application is likely to be successful on the merits (so-called, *fumus boni iuris*); and
- there is danger in any delay (so-called, *periculum in mora*).

Given the above, Arbitral Tribunals are not vested with the power to issue interim remedies, therefore they do not have the power either to enforce them or to otherwise ensure their effectiveness.

By the contrary, there is only one provision under Italian law, relating to the arbitration of certain company disputes, that empowers arbitrators to issue an interim measure.

Article 35 of Legislative Decree no. 5 of 2003 states that company's articles of association may authorise shareholders to determine, by way of arbitration, the validity of the company's resolutions.

Where an arbitration proceeding is started for such a purpose, article 35, par. 5, (D. Lgs. no. 5 of 2003) empowers the Arbitral Tribunal appointed pursuant to the arbitration agreement to provisionally suspend the enforceability of a company's resolutions while their validity is challenged. The order issued by the Arbitral Tribunal cannot be otherwise challenged.

Commentators generally exclude analogic interpretations of such a provision. Therefore, its scope cannot be extended beyond the strict limits of the Legislative Decree where the piece of law is placed.

From a more general standpoint, the same article provides that until the Arbitral Tribunal is established, the Court which would be competent to determine the controversy absent the arbitration agreement retains the interim general power to suspend the enforceability of the company's resolution.

Arbitration award

Pursuant to Section 820, par. 2 CPC, if the parties have not determined the deadline for the arbitrators to issue the final award, the latter shall be rendered within 240 days from the acceptance of the appointment. Such term can be extended upon the agreement of the parties or, upon the request of one party, by the President of the Tribunal, who shall give the chance to the other parties to rebut.

Section 820, par. 4 CPC states that the term is extended by 180 days, absent a different determination by the parties, in case: (a) preliminary activities are required; (b) the Tribunal appoints an expert; (c) the Tribunal issues a partial or interim award; or (d) one or more arbitrators are replaced.

The Arbitral Tribunal shall decide pursuant to the law, unless the parties declare that the arbitrators shall decide on an equitable basis.

The award is rendered by the Arbitral Tribunal and signed by the arbitrators. The signature of the majority of arbitrators is sufficient only if the award is accompanied by a declaration that all arbitrators participated in the deliberation, but not all of them wanted to or could sign it.

Pursuant to Section 824-*bis* CPC, the award has the exact same effectiveness as a Court's ruling.

Challenge of the arbitration award

Section 829 CPC states that a party can challenge the award only upon the following grounds:

1. if the arbitration agreement is invalid, provided that such an objection was raised in the first submission after the arbitrators' acceptance of the appointment;
2. if the arbitrators were not appointed pursuant to Sections 809-815 and/or Section 832, provided that such an objection was raised during the proceedings;

3. if the award was rendered by a person who could not be appointed as an arbitrator, as set forth under Section 812 CPC;
4. if the award includes provisions that fall beyond the scope of the arbitration agreement, only if such an objection was raised during the arbitration proceedings;
5. if the award does not include the reasoning, the decision, and/or the signature of the arbitrators (within the limits analysed above);
6. if the award was rendered after the expiration of the timeframe provided by the law or by the arbitration agreement, only in case the appealing party – before the deliberation of the award – served the others and the arbitrators a declaration through which he/she intended to take advantage of this ground;
7. if the formalities required by the parties have not been respected, only in case such formalities were provided under express sanction of nullity and the latter was not otherwise healed;
8. if the award contradicts a previous award or a judicial decision between the parties not any longer appealable (i.e. *res judicata*), only if such award or decision was lodged during the arbitration proceedings;
9. if the Arbitral Tribunal failed to comply with the due process' rules;
10. if the award does not decide on the merits of the proceedings when the merits should have been decided;
11. if the award contains contradictory provisions; or
12. if the award has not awarded on some claims and/or objections, pursuant to and within the boundaries of the arbitration agreement.

Notably, a party cannot challenge the award for a reason of nullity if: (i) he/she caused it; (ii) he/she waived it; or (iii) he/she did not immediately raise in the next defensive occasion the objection of a violation of a proceedings' rule.

Generally, the award cannot be challenged on the basis of errors of law, except when such ground is expressly provided in the arbitration agreement or is expressly provided by the law (e.g., in labour law controversies).

Nonetheless, it is always possible to challenge the award if it is in contrast with the public order.

In addition, the award can also be challenged with two other mechanisms: (i) revocation of the award; and (ii) opposition of a third party to the award.

The revocation proceeding is an extraordinary method of challenging the award provided by Section 395 CPC. It can be triggered only when there are serious vices that affect it, namely: fraud of a party; forgery; discovery of unknown documents; or if there is an award affected by a fraud of the arbitrator(s).

In addition, third parties can oppose the award and request it to be declared null if the award endangers their rights and they have not been in a position to take part to the arbitration proceedings. The proceeding is regulated by Section 404 CPC.

Material errors or omissions that do not impact the merits of the decision can be amended using the award-correction proceedings pursuant to Section 826 CPC.

Enforcement of the arbitration award

In accordance with Section 825 CPC, to enforce a domestic award the interested party shall lodge with the law clerk of the Court in the area where the arbitration took place:

(a) the original or a certified copy of the award; and

(b) the document including the arbitration clause.

Once the Court ascertains the formal validity of the award, it will declare the enforceability of the award with a decree. The parties are informed by the law clerk of the lodging of the award.

The most evident difference between the enforcement of domestic and international awards is that Italian arbitral awards already have, from the date of their last signature, the same effect as a ruling of the judicial authority, and it can be appealed notwithstanding the filing with the Court to obtain the enforceability.

The analysis carried out by the Court is merely formal. Indeed, the Court cannot consider the merits of the arbitral award, differently from what happens in relation to international arbitral awards.

An interested party may file an appeal ('*reclamo*') against a decree, denying or upholding enforceability. The parties will be summoned and the Court decides the controversy with an order issued in chambers.

Pursuant to Section 839 CPC, a party that wishes to enforce an international arbitral award in Italy must file a petition with the President of the Court of Appeals for the area in which the counterparty resides. If the counterparty is not located in Italy, the competent Court is the Court of Appeals of Rome.

Along with the petition, and in accordance with article IV of the New York Convention, the petitioner shall lodge:

(a) an original copy of the award;

(b) the document including the arbitration clause; and

(c) the certified Italian translations of these documents.

During this phase of the proceedings, the other party will not be summoned.

Having ascertained that the award is formally valid, the President of the Court of Appeals will declare the enforceability of the international award in a decree with a brief reasoning.

If the President's decree denies enforceability for merely formal reasons (such as there is no Italian translation), the petitioner may file the petition again.

Enforceability of the award will be denied by the President on the merits, if: (i) under Italian law the arbitrators do not have jurisdiction to decide the dispute; or (ii) the award contains provisions contrary to public order.

In relation to disputes excluded under Italian law, in accordance with the second requirement, public order is ascertained in relation to domestic sources of law, such as the Italian Constitution, principles of criminal law and European law.

Commentators have noted that such proceedings should also be admissible in order to obtain enforceability for partial and non-final arbitral awards.

In addition, under article VIII of the Geneva Convention of 1961, an award is admissible even without the reasoning.

In contrast to the above, if the President's decree denies enforceability on the merits or if it upholds the petition and declares the award enforceable, the interested party may file an opposition brief with the Court of Appeals.

The opposition must be filed within 30 days from:

(a) the communication of the decree that denies enforceability; or

(b) the serving of the decree that declares the enforceability.

The proceedings are governed by the provisions of the ordinary proceedings.

Pursuant to Section 840, par. 3 CPC, which almost perfectly mirrors article V of the New York Convention, should the Court of Appeals ascertain that one or more of the following circumstances exist, the enforceability of the award will be denied if:

(a) the parties were under some incapacity;

(b) the arbitration agreement is invalid under the applicable law or, failing any indication thereon, under the law of the country where the award was made;

(c) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;

(d) the unsuccessful party was unable to present its case;

(e) the award falls outside the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Decisions on matters falling within the submission that can be separated from those not within the submission may be recognised and enforced;

(f) an incorrect composition of the arbitral authority;

(g) the arbitral procedure was not in accordance with the arbitration agreement or, where there is no agreement, in accordance with the law of the country where the arbitration took place; or

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

In relation to the final circumstance above, the Court of Appeals has the power to suspend the proceedings pending a judgment on the annulment or suspension requested to the foreign authority that issued the award. Upon the request of the petitioner, the Court can suspend the proceedings and order the counterparty to provide adequate warranties. The provision of warranties is entirely at the discretion of the Court.

In addition to the *ex parte* proceedings mentioned above, the enforceability may be denied if, under Italian law, the dispute cannot be devolved to arbitrators or if the award contains provisions which are contrary to public order.

The statutory limitation for enforcing an award is 10 years.

The final ruling of the Court of Appeals can be appealed to the Supreme Court of Cassation.

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Micael Montinari focuses on litigation; his clients include retail chains, fashion houses and brands, media/digital players. He heads the dispute resolution team (which is ranked by *The Legal 500* and *Chambers & Partners* since respectively 2006 and 2009). His experience includes a broad range of matters, including commercial and business and intellectual property disputes as well as arbitration, often with a significant cross-border element.

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Filippo Frigerio joined Portolano Cavallo in 2015, under the terms of an intern work agreement secured through Bocconi University, becoming later in the year, upon earning his Law degree from the Luigi Bocconi Commercial University, one of the firm's attorneys-at-law.

While completing his university studies, Filippo attended courses at the Law School of the University of Minnesota, Minneapolis, USA, for a period of five months.

Filippo lends his expertise to both Italian and foreign clients in matter of disputes and arbitration on civil and commercial matters, as well as of new technologies, digital media, and Italian and European legislation concerning the protection of personal data. Furthermore, he provides legal assistance to operators in the broad life sciences field.

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Korea

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Introduction

The international arbitration community has witnessed significant changes over the past few years, and South Korea has been no exception. The country has followed the lead set by other arbitration-friendly jurisdictions by consistently updating and refining its national arbitration laws as well as its relevant institutional rules. Such changes have resulted in greater efficiency, flexibility and transparency for parties who choose to resolve their disputes in South Korea. In addition to the facilities of the Korean Commercial Arbitration Board (the "KCAB"), which is the primary Korean arbitration institution, the Seoul International Dispute Resolution Centre (the "SIDRC") was established in 2013 in order to further bolster the country's dispute resolution infrastructure.

South Korea is an extremely arbitration-friendly jurisdiction, and international arbitration is used extensively to resolve disputes between international parties. Indeed, the national arbitration law enjoys a relatively long history compared to many other Asian jurisdictions. The Korean Arbitration Act (the "Arbitration Act") can be traced back to 1966, before it was wholly amended in 1999 in order to adopt the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"). In an effort to create a competitive jurisdiction for the resolution of international disputes, South Korea has consistently worked towards reforming its arbitration laws in order to be in harmony with best practices. Accordingly, the Arbitration Act has been amended several times, including in 2001, 2002, 2010, 2013, and most recently in 2016 (the "2016 Amendments"). The 2016 Amendments to the Arbitration Law, which went into effect on 30 November 2016, reflect an effort to be more consistent with the 2006 amendments to the UNCITRAL Model Law.

In addition to the Arbitration Act, the KCAB has also played a key role in promoting South Korea as a major international dispute resolution hub, and has consistently and laudably refined its institutional rules to be in line with the prevailing best practices of other developed jurisdictions. Like the Arbitration act, and as discussed *infra*, the KCAB's rules were recently amended in 2016 in an effort to offer a more flexible and modern framework for international parties to resolve disputes. This, coupled with the continued growth of international transactions in South Korea, is bolstering the country's reputation as a hub for cross-border arbitration in the region. Further, in addition to its pro-arbitration laws and modern institutional rules, South Korea continues to be recognised as a pro-enforcement jurisdiction in approving and enforcing arbitral awards where the Korean court's refusal to enforce arbitral awards are rare exceptions.

Further, there are no major restrictions on foreign arbitral institutions administering arbitral proceedings under their own arbitration rules in South Korea. Accordingly, in addition to

the KCAB, which is the only national arbitration institution in South Korea, a variety of other foreign arbitration institutions also operate in the country, including the Singapore International Arbitration Centre (SIAC), the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre (HKIAC), as well as the International Chamber of Commerce (ICC). Generally speaking, South Korean laws afford parties great autonomy and flexibility to agree on their own procedures for international arbitrations, discussed further *infra*.

The aim of this article is to both provide a general framework for practitioners unfamiliar with South Korea's international arbitration regime, as well as highlight recent amendments to relevant domestic laws and institutional rules which impact international arbitration. Further, this article will highlight key areas where such arbitration laws and institutional rules conform with, or diverge from, model rules from other jurisdictions with which practitioners may be more familiar.

Arbitration agreement

Under the Arbitration Act, an arbitration agreement is valid if the agreement is contained in a document, signed in writing by the parties, and exchanged by means of letters, telex, telegrams, fax, or other means of communication. Significantly, the recent 2016 Amendments to the Arbitration Act ease the writing requirement and allow it to be met if "recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or other means" (Article 8.3.1). Further, the 2016 Amendments also expressly recognise arbitration agreements that are evidenced by electronic communications (Article 8.3.2).

The 2016 Amendments also substantially broaden the scope of what types of disputes are arbitrable in South Korea. Whereas under the pre-2016 law, arbitration was defined as a "dispute in private law", the definition has now been revised to include "any property dispute and non-property dispute which may be resolved by the parties' reconciliation" (Article 3.1). Accordingly, this expanded scope of arbitrable disputes may now cover public law-related issues, including those stemming from property rights as well as non-property rights.

Regarding the scope of what types of disputes are governed by the law, the Arbitration Act differs from the UNCITRAL Model Law. Whereas the UNCITRAL Model Law applies to "international commercial arbitration" (UNCITRAL Model Law Article 1.1), the Arbitration Act applies to both international and domestic arbitrations (Article 2). Further, the Arbitration Act is no longer limited to only commercial disputes. As discussed *supra*, the 2016 Amendments have broadened the scope of disputes from those in "private law" to "any property dispute and non-property dispute which may be resolved by the parties' reconciliation" (Article 3.1).

Principle of *kompetenz-kompetenz*

The Arbitration Act has adopted the principle of *kompetenz-kompetenz*, and authorises the arbitral tribunal to rule on issues pertaining to its own jurisdiction, including on objections made by a party concerning the existence or validity of the underlying arbitration agreement (Article 17.1). An objection by a party that the tribunal has exceeded the scope of its authority may be ruled on by the tribunal as either a preliminary question or in an arbitral award on the merits (Article 17.5). If the tribunal makes a decision on its jurisdiction as a preliminary question, the party who objects to the decision may file a petition with the court to examine the jurisdiction of the arbitral tribunal within 30 days after the date the party is notified of the decision (Article 17.6). Accordingly, under the revised Arbitration Act,

courts can review the issue of jurisdiction even if the arbitral tribunal finds that it lacks such jurisdiction. Importantly, where the court is asked to examine the jurisdiction of the arbitral tribunal, "no appeal shall be filed against the review of the authority which is conducted by [the court]" (Article 17.8).

Principle of separability

Under the Arbitration Act, an arbitration clause forming a part of a contract must "be treated as an agreement independent of the other clauses of the contract" (Article 17.1). Any amendment, termination, nullification or rescission of the underlying contract will not affect the validity of the arbitration agreement, therefore, unless it is also directly related to the arbitration clause itself.

Effect of arbitration clauses

Under the Arbitration Act, if a party breaches an arbitration agreement by commencing litigation in court, the court must dismiss the action if the defendant so requests no later than at the first oral submission on the first hearing on the merits, unless the arbitration agreement is null and void, inoperative or incapable of being performed (Article 9). In relation to an optional clause, the Korean Supreme Court has held that an optional arbitration clause that offers the option of either litigation or arbitration, is unenforceable, unless one party to the agreement initiated arbitration proceedings with no objections from the other party (Supreme Court Decision 2003Da318, 22 August 2003).

Arbitration procedure

Arbitration procedure under the Arbitration Act

The Arbitration Act allows the parties to agree on the specifics of the arbitral proceedings (Article 20.1), including, among others, determining the place of arbitration (Article 21.1), the language of the arbitration (Article 23.1) as well as procedural aspects of the arbitration (Article 24, 25, 26 and 27). Generally, unless otherwise agreed by the parties, the arbitral proceedings are commenced on the date when a request for the dispute to be referred to arbitration is received by the respondent. (Article 22.1)

The 2016 Amendments added much-needed flexibility and efficiency to the arbitral regime in South Korea with regard to evidence collection issues. Under the new law, the scope of an arbitrator's role has expanded significantly, as arbitrators may now "*ex officio* or at the request of the parties, request a court to examine evidence or may request a court to cooperate in examining evidence" (Article 28.1). It should be noted that the UNCITRAL Model Law does not have an analogous provision authorising domestic courts to *examine* evidence, but only allows courts to assist in the *taking* of evidence. The UNCITRAL Model Law states in relevant part, "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence [and] the court may execute the request within its competence and according to its rules on taking evidence" (Article 27). Accordingly, the Arbitration Act allows greater flexibility for the arbitral tribunal to use the domestic court system to assist in the arbitral process with regards to evidentiary issues. Further, if an arbitral tribunal requests a court to examine evidence, it "may specify, in writing, the matters to be entered in the report on the examination of evidence and other matters necessary for the examination of evidence" (Article 28.2).

Arbitration procedure under the KCAB's International Arbitration Rules

It should be noted that the KCAB's arbitration rules, particularly its International Arbitration Rules (the "KCAB International Arbitration Rules") are highly regarded in South Korea and

are frequently used in international disputes. The KCAB International Arbitration Rules have been significantly amended, most recently in 2016, to be in line with current best practices of other major regional institutions, including SIAC, LCIA, and the ICC. The 2016 revisions came into effect on 1 June 2016, and apply to arbitration proceedings commenced after 1 June 2016, where one of the parties is not Korean or the venue of the arbitration is designated outside the Republic of Korea, unless the parties explicitly agree otherwise.

Among the features of the new rules are provisions relating to third party joinder, emergency arbitration procedures, provisions relating to fairness in the appointment of arbitrators, as well as provisions related to conservatory and interim measures.

Under the newly-minted KCAB International Arbitration Rules, joinder of additional parties is allowed if all parties and the additional party agree in writing, or if the additional party is a party to the same arbitration agreement (Article 21). This rule is similar to third party joinder rules in SIAC, HKIAC, LICA and the ICC. On top of that, the KCAB International Arbitration Rules now expressly provide for the consolidation of claims where there is a dispute arising from multiple contracts. The KCAB Secretariat may allow the submission of claims arising out of multiple contracts within a single Request for Arbitration, which would result in a single arbitration, provided that: (i) the Secretariat is satisfied that all of the contracts provide for arbitration under the KCAB rules; (ii) the arbitration agreements are compatible; and (iii) the claims arise out of the same transaction or series of transactions. This notable revision will likely prove a useful tool for disputes arising in certain industries – for example, construction – where often multiple contracts underlie the dispute (Article 22).

Further, the KCAB International Arbitration Rules allow for consolidation of claims between the same parties (Article 23), and broaden the scope of application of expedited procedures by increasing the claim threshold for such procedures to KRW 500,000,000 (approximately US$ 437,825) from KRW 200,000,000 (approximately US$ 175,128) (Article 43). This increased amount presumably reflects the desire to allow more disputes to be dealt with on an expedited basis, and will likely increase the efficiency of arbitrations whose claims fall within this range.

Significantly, the KCAB International Arbitration Rules also extend the deadline for the award for such expedited arbitrations. Previously under the 2011 version of the rules, absent a decision from the secretariat to the contrary, the arbitral tribunal was required to render its award within three months from the date of its constitution (Article 43.1). Now, however, the deadline has been extended to six months, thereby providing adequate time for arbitrators who may be ruling on more complex or higher-value claims (Article 48). Similarly, the KCAB International Arbitration Rules have decreased the previous threshold for the resolution of disputes on a documentary basis alone; whereas the previous rules provided that documentary proceedings would be initiated for claims not exceeding KRW 20,000,000 (approximately US$ 17,454), the amount has now been raised to KRW 50,000,000 (approximately US$ 43,636) (Article 47).

Article 28 of the KCAB International Arbitration Rules gives greater autonomy to the tribunal and secretariat, and requires that parties submit translations of submitted documents, evidences or other written exhibits, if requested by either the secretariat or the tribunal. This provision brings the KCAB in conformity with other well-known arbitral institutions, and is analogous to provisions found in SIAC, HKIAC and LCIA. Such provisions will likely increase the efficiency of case management for international disputes administered by the KCAB, and further highlight South Korea as a growing hub for international arbitrations.

Arbitrators

Arbitrator appointment and challenges under the Arbitration Act

The Arbitration Act allows parties to determine the number of arbitrators (Article 11.1), as well as choose the procedure for appointing the tribunal (Article 12.2). Further, there is no restriction on the nationality of an arbitrator under the Arbitration Act, and the law stipulates that "[n]o person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties" (Article 12.1). Additionally, should the parties fail to select their arbitrator(s), the Arbitration Act includes a default procedure to such selection (Article 12.4).

Once asked to be an arbitrator, a candidate must "without delay disclose any circumstance likely to give rise to justifiable doubts as to his impartiality or independence" (Article 13.1), and reasonable doubt about such impartiality and independence of an arbitrator may be grounds for the challenging of an arbitral award (Article 36.2(1)(d)).

Once appointed, an arbitrator may be challenged on two grounds under the Arbitration Act. A challenge may arise if circumstances exist that give rise to justifiable doubt about the arbitrator's impartiality or independence (Article 13.1), or if the arbitrator does not possess the qualifications agreed by the parties (Article 13.2). Regardless of the grounds for initiating such a challenge, a party may only challenge an arbitrator that is appointed or in whose appointment it participated for reasons it became aware of after the appointment (Article 13.2).

Under the Arbitration Act, the parties are free to agree on a procedure for challenging an arbitrator (Article 14.1). In the event the parties do not agree on a procedure, the tribunal will decide the challenge, and the challenging party must send a written request to the tribunal stating its reasons for the challenge within 15 days of becoming aware of the composition of the tribunal, or after becoming aware of the existence of any circumstances that constitute grounds for the challenge (Article 14.2).

In the event an arbitral tribunal denies a challenge, the challenging party may request the domestic court for judicial review of the decision within 30 days of receiving notice of the decision (Article 14.3). While the domestic court reviews the arbitrator challenge, the arbitral tribunal may continue (or commence, as the case may be) the proceedings and render an arbitral award (Article 14.3). However, in the event that the court approves the challenge, then the arbitral award so issued will be deemed invalid and the parties cannot appeal the decision of the court (Article 14.4).

Arbitrator appointment and challenges under the KCAB International Arbitration Rules

Regarding appointment of arbitrators under the KCAB International Arbitration Rules, the recent 2016 revisions ushered in one important change to the previous institutional rules. Under the current KCAB International Arbitration Rules, "the nomination of any arbitrator by the parties or of the third arbitrator by the other arbitrators shall be deemed appointed upon confirmation by the Secretariat" (Article 13.1), and "if the Secretariat determines, in its discretion, that a nomination is clearly inappropriate, the Secretariat may refuse to confirm the nomination after giving the parties and the arbitrator(s) an opportunity to comment" (Article 13.3). This amendment gives substantial power to the Secretariat to ensure that principles of fairness, independence and impartiality are respected during the constitution of the arbitral tribunal.

Regarding the challenging of an arbitrator, the KCAB International Arbitration Rules largely mirror the Arbitration Act. Under Article 14.1 of the KCAB International Arbitration Rules,

"A party may challenge an arbitrator if circumstances give rise to justifiable doubts as to the arbitrator's impartiality or independence [and a] party that nominates an arbitrator may challenge such arbitrator only for reasons of which the party becomes aware after the nomination." Similar to the Arbitration Act, a challenge for lack of impartiality or independence requires a written statement to the Secretariat of the KCAB specifying the facts and circumstances on which the challenge is based (Article 14.2). Additionally, a challenge shall only be considered valid if it is made within 15 days of either the date of receipt of the confirmation, if the parties nominated the arbitrator (or the date of receipt of the appointment if the Secretariat, not the parties, appointed the arbitrator), or 15 days from the date on which the party making the challenge became aware of the facts and circumstances giving rise to such a challenge (Article 14.3).

Interim relief

The 2016 Amendments significantly changed the scope of interim relief under the Arbitration Act in order to reflect Article 17 of the UNCITRAL Model Law. Previously, the arbitral tribunal could, at the request of a party, "order a party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute", (previous Article 18.1 of the Arbitration Act). However, under the 2016 Amendments, the arbitral tribunal may now order a party to take interim measures for protection that may be considered necessary to: 1) maintain or restore the *status quo* pending the determination of the dispute; 2) 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; 3) provide a means of preserving assets out of which a subsequent award may be satisfied; or 4) preserve evidence that may be relevant and material to the resolution of the dispute (Article 18).

Similarly, the 2016 Amendments provide greater flexibility to parties seeking interim relief by allowing an arbitral tribunal to issue an interim measure not just in the form of a "decision" but also in the form of an arbitral award. Previously, an interim measure had to be given as a "decision" and, because only "awards" could be recognised and enforced in the Korean courts, such "decisions" could not be recognised by local courts. The current law, however, explicitly allows for the Korean courts to recognise interim measures issued by the tribunal.

It is important to note that, regarding preliminary orders, there is a clear divergence between the Arbitration Act and the UNCITRAL Model Law. While the UNCITRAL Model Law envisions a preliminary order regime (Chapter IV, Section 2, Articles, 17B, 17C, 17D, 17E, 17F, 17G), the Arbitration Act does not contain any express provision for such *ex-parte* preliminary orders.

As the 2016 Amendments were only recently implemented beginning on 30 November 2016, it may be too early to tell how often and to what extent such interim relief measures will be used. However, in the context of international commercial arbitration, it is easy to imagine that a party would employ such measures within an arbitration context instead of seeking certain forms of injunctive relief in the Korean courts.

Arbitration award

Formal requirements for an arbitral award

As a basic principle, an arbitral award must be made in writing and signed by the arbitrator (Article 32.1), and the arbitral award must state the reasons upon which its decision is based

(Article 32.2). Further, the arbitral award shall state the date and place of arbitration, and the award shall be deemed to have been made on that date and at that place (Article 32.3). Once the authentic copy of the arbitral award is so made, the award must be delivered to each party, provided that the arbitral tribunal may deliver the original copy of the award to the competent court, along with a document certifying delivery upon the request of the parties (Article 32.4).

Allocation of costs and interest

Under the current Arbitration Act, unless otherwise agreed by the parties, the arbitral tribunal may "determine the allocation of costs of arbitration incurred in the arbitral proceeding, considering all circumstances of the relevant arbitration case" (Article 34.2), and may also "order either party to pay past due interest, if it finds it appropriate in making an arbitral award, considering all circumstances of the relevant arbitration case" (Article 34.3). Accordingly, the arbitral tribunal has significant discretion to award costs and determine past due interest under the Arbitration Act.

Further, as a practical matter, parties to an arbitration with a South Korean seat generally are entitled to recover legal fees and costs, and typically such fees are awarded to the prevailing party. The so-called "loser pays" principle, also known as the "costs follow the event" principle, is widely followed in South Korea.

Challenge of the arbitration award

Arbitral awards cannot be appealed before the courts under the Arbitration Act, and Korean law does not recognise a right to appeal of an arbitral award. The only way for a party to challenge an award, therefore, is to apply to annul the award on certain limited grounds which closely mirror those of the UNCITRAL Model Law. If a party wishes to apply to annul an award, such an application must be made within three months from the date on which the applicant received a duly authenticated copy of the award (Article 36.3), and before a final and conclusive decision for the recognition or execution of the award is rendered by a court (Article 36.4).

Enforcement of the arbitration award

In general, South Korea is a very favourable jurisdiction for the enforcement of arbitration awards. The country acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") in 1974, making both the reciprocity and commercial reservations. Accordingly, a foreign arbitration award will be considered a New York Convention award under the Arbitration Act if it was rendered in a country that is also a party to the convention in respect of a commercial dispute (as determined by Korean law). Generally speaking, South Korean courts have been largely in favour of enforcing arbitration agreements.

The 2016 Amendments to the Arbitration Act provide a more efficient and expeditious mechanism for the enforcement of arbitral awards. Previously, in order to approve/enforce an arbitral award in South Korea, a party had to obtain a court judgment, which typically required formal in-court hearing[s]. However, the 2016 Amendments have changed the enforcement process in a subtle yet very significant way. Instead of requiring a court "judgment", now a party only requires a court "decision", greatly expediting the enforcement process, in theory. Accordingly, under the current rules, a party could presumably ask a court to recognise the enforcement of an arbitral award without necessarily conducting a formal hearing.

The practical effects of these amendments are yet to be seen, given that they came into force very recently; however, it is expected that they will significantly expedite the enforcement process.

Investment arbitration

South Korea has actively sought to foster a positive investment environment for foreign investment. Over the past several years, the government has created a host of agencies, laws and regulations in order to attract and assist foreign investment into the country. Specifically designated foreign-investment zones, free economic zones and free trade zones have been carefully created by the government, with various tax incentives offered to foreign investors. Similarly, there has been a steady liberalisation of the regulatory ceilings on foreign investments in various industries/markets, further spurring interest in investment in South Korea.

Such foreign investment is backed up by a robust treaty regime which, generally speaking, affords investors broad protections. South Korea enjoys an extensive bilateral investment treaty ("BIT") programme, with 87 BITs currently in force. In addition to these BITs, Korea has also entered into 20 free trade agreements ("FTA"). The majority of these FTAs generally include provisions for the protection of investments between contracting states, and may be considered broader instruments compared to BITs, which also provide certain protection for investors. Korea is also an observer of the Energy Charter Treaty.

Domestic laws relevant to foreign investment

South Korea has promulgated a series of domestic legislation that specifically applies to foreign investors. The Foreign Investment Promotion Act ("FIPA") was first enacted in 1998 in an effort to encourage foreign direct investment following the 1997 Asian financial crisis. FIPA accomplishes this goal by enacting measures to provide protection for foreign investments, supporting a foreign investment stimulation plan, outlining foreign investment procedures, and creating tax abatement and exemption incentives for foreign investments. FIPA functions as the foundational law for foreign investment in the country, and it also has various subordinate statutes, including the Enforcement Decree of FIPA, the Enforcement Rule of FIPA and the Regulations on Foreign Investment and Technology Introduction.

Investor-state arbitrations

There have not been extensive numbers of investor-state disputes against the Korean government. In 1984, Colt Industries Operating Corporation filed an ICSID arbitration against the Korean government; however, this arbitration was eventually settled by the parties. Indeed, since 2012, there have only been three investment arbitration cases against Korea. The first was an arbitration brought by the private equity fund Lone Star (ICSID Case No. ARB/12/37) in which a private equity fund alleged that the treatment of the company's investment violated the terms of the BIT between South Korea and Belgium/Luxembourg. The second was an arbitration regarding tax treatment of an investment made by subsidiaries of the International Petroleum Investment Company under the South Korea-Netherlands BIT. And the third arbitration was under the UNCITRAL rules, by Iranian investors pursuant to the South Korea-Iran BIT.

It should be noted that there are two investment arbitration cases where Korean companies, as Claimant, initiated proceedings against foreign governments. The first was *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/12/25), registered on 4 November 2014, and *Samsung Engineering Co., Ltd. v. Sultanate of Oman* (ICSID Case No. ARB/15/30), registered on 20 July 2015.

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Kosovo

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Introduction

Kosovo gained its independence on 17 February 2008 and has been officially recognised by 113 UN Member States, including 23 out of 28 European Union countries. The government of Kosovo continuously seeks further diplomatic recognition and membership of international organisations. Kosovo is in the process of European integration. In April 2016, the Stabilisation and Association Agreement entered into force, which represents the first comprehensive contractual relationship between Kosovo and the EU.

In September 2008, the Law on Arbitration of Kosovo (No. 02/L-75) (**Law on Arbitration**), which is based on the UNCITRAL Model Law, came into effect. It satisfies the formal and substantive requirements of a modern arbitration law. The Law on Arbitration regulates domestic and international arbitration and sets forth the procedures for enforcing domestic (Article 38) and foreign (Article 39) arbitral awards. The Law on Foreign Investment (Law No. 04/L-220), enacted in 2014, further favours the use of arbitration in international relationships. With the adoption of international standards, Kosovo has the necessary framework to promote itself as an arbitration-friendly jurisdiction.

Since 2011, arbitration services have been available within the Kosovo Chamber of Commerce at the Kosovo Permanent Tribunal of Arbitration and within the American Chamber of Commerce in Kosovo (**AmCham**) at the Alternative Dispute Resolution Center. In June 2011, the Chamber of Commerce introduced the Kosovo Arbitration Rules (**Kosovo Arbitration Rules**), based on the UNCITRAL Arbitration Rules (as revised in 2010). The Kosovo Arbitration Rules are also applied by the Alternative Dispute Resolution Center at AmCham.

Due to divergent positions on its statehood, the Republic of Kosovo is not yet eligible to become a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**). Nonetheless, Kosovo's courts recognise foreign arbitral awards (Law on Arbitration Article 39.1). The documents to be filed before the Kosovo courts when applying for the recognition and enforcement of an international award (Law on Arbitration Article 39.3) are similar to those to be filed under the corresponding provision of the New York Convention (Article IV). In addition, the Law on Arbitration substantially reflects the grounds for refusal of recognition and enforcement under Article V of the New York Convention (Law on Arbitration, Arts. 39.4–39.5). Furthermore – again, in spite of Kosovo not being a contracting state to the New York Convention – the Foreign Investment Law expressly stipulates that international arbitral awards "shall be enforceable in accordance with the New York Convention, regardless as to whether or not that convention is otherwise

binding on Kosovo" (Foreign Investment Law, Article 16.4). There are therefore express provisions for international awards to be recognised and enforced in accordance with the New York Convention in Kosovo.

Arbitration agreement

An arbitration agreement can either be signed as a separate agreement attached to the main contract, or may be included as an arbitration clause within the contract. In either case, the consent of the parties to arbitrate disputes must be in writing and clearly state the parties' intention to settle contractual disputes through arbitration. The Law on Arbitration states that the conclusion of an arbitration agreement by letter, telegraph, fax, email or any other electronic form is considered to fulfil the requirement of a written form. For consumer contracts, the agreement is only deemed to be validly concluded when all parties personally sign the document containing the arbitration clause, including via electronic signature (Article 6).

Under Article 5 of the Law on Arbitration, all disputes are arbitrable as long as the relief sought has a "civil-judicial and economic-judicial" character. All other disputes are not arbitrable.

The Law on Arbitration accepts the *competence-competence* doctrine (Article 14, Law on Arbitration). This principle vests an arbitral tribunal with the right to decide whether it has jurisdiction over the dispute presented before it, and whether the arbitration agreement is valid. The *competence-competence* principle is also provided under Article 24 of the Kosovo Arbitration Rules.

The validity of an arbitration agreement may not be challenged on the grounds of invalidity of the underlying contract. The separability principle is set forth in Article 14.1 of the Law on Arbitration, which provides that an arbitral tribunal should decide on the validity of an arbitration agreement and that "*for that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the terms of the contract*".

Arbitration procedure

Under Article 18 of the Law on Arbitration, unless otherwise agreed by the parties, the arbitration proceedings commence on the date the Respondent receives the Request for Arbitration. The Respondent is deemed to have received the Request for Arbitration on the day that it is delivered physically to it or deemed to have been received if it is delivered at its habitual residence, place of business or mailing address of the addressee (Law on Arbitration, Article 4).

The Law on Arbitration follows the Model Law's guarantees of two fundamental arbitration principles: equal treatment of the parties; and the opportunity to present one's case (Article 16.1). The parties to an arbitration are free to determine the procedural rules applicable to the dispute. The Law on Arbitration provides that in the absence of an agreement by the parties on the procedural rules, the arbitral tribunal shall determine the applicable rules.

The hearing of the case does not necessarily have to take place at the place of arbitration. The place of arbitration is agreed upon by the parties or, in the absence of an agreement, is established by the arbitral tribunal, taking into consideration the circumstances of the case and the convenience of the parties and the arbitral tribunal. Unless otherwise agreed, the arbitration proceedings are not public (Law on Arbitration, Article 21.1), and the arbitrator and other participants must keep all information confidential.

The parties may agree the language of the proceedings, failing which this is determined by the arbitral tribunal. The language applies to all written and oral submissions. The arbitral tribunal may order prompt translation of all relevant documents into the language or languages to which the parties have agreed (Law on Arbitration, Article 19). Similar provisions are included in Article 19 of the Kosovo Arbitration Rules.

The Law on Arbitration stipulates that each party shall have the burden of proving the facts relied upon to support its claim or defence. The arbitral tribunal has the discretion to decide what evidence is relevant and admissible, and to exclude evidence it deems irrelevant (Article 23.2). Courts may assist the arbitral tribunal or a party (with the approval of the arbitral tribunal) in the taking of evidence, or to perform judicial acts which the arbitral tribunal is not authorised to carry out (Law on Arbitration, Article 28).

The arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period as the arbitral tribunal deems appropriate (Law on Arbitration, Article 23.4).

Evidence of witnesses may be presented in the form of testimonies or written statements signed by a witness, provided that the witness is made available at the hearing, if their examination is requested. The details of each witness (name, address, etc.) shall be communicated to the other party at least 15 days before the hearing (Law on Arbitration, Article 24).

Apart from witness testimonies and evidence presented by the parties, the arbitral tribunal may appoint one or more experts to produce a written report on specific issues to be determined by the arbitral tribunal. The arbitral tribunal may ask the parties to provide to the expert all documents that the expert might need in order to prepare an expert opinion. After the delivery of a written expert report, the parties and/or the arbitral tribunal (where necessary) may request that the expert appear at a hearing to be cross-examined. "At this hearing", the parties have the right to submit their own expert reports (Law on Arbitration, Article 25).

Arbitrators

Under the Law on Arbitration, the parties are free to determine the number of arbitrators (provided that the panel is composed of an uneven number of arbitrators) and to choose any selection method for appointing the arbitrator or arbitrators. In the event of no consensus on the selection method or number of arbitrators[1], the arbitral tribunal shall consist of a panel of three arbitrators. The Law on Arbitration follows the Model Law's default rules and provides that each party shall appoint one arbitrator, and these two arbitrators shall appoint the chair. If any appointments are not made within the required time period (30 days), the Kosovo courts will, upon request of one of the parties, make a default appointment (Law on Arbitration, Article 9.4).

Article 5 of the Kosovo Arbitration Rules regulates the issue in a slightly different manner. It provides that "*if the parties have not previously agreed, the appointing authority shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances*".

The Law on Arbitration does not establish any restrictions regarding the citizenship of arbitrators. It establishes the general requirements for arbitrators, i.e. an arbitrator shall be impartial and independent of the parties. The arbitrator does not have to be a qualified lawyer. The parties may, however, require an arbitrator to have certain skills or qualifications.

Before accepting an appointment, a prospective arbitrator must disclose any circumstances that might raise justifiable doubts regarding the arbitrators' impartiality or independence. Even after the appointment, an arbitrator is obliged to disclose any such circumstances as soon as they arise (Law on Arbitration, Article 10.1).

Non-disclosure of the abovementioned circumstances may give rise to a challenge of an arbitrator by the parties. Arbitrators may be challenged only if there are circumstances that give rise to justifiable doubts as to the arbitrators' impartiality or independence, or if the arbitrator does not have the qualifications required by the parties (Law on Arbitration, Article 10.2).

Article 11 of the Law on Arbitration allows the parties to freely designate the procedure for challenging arbitrators. Absent such agreement, Article 11.2 provides that "*the party which intends to challenge an arbitrator shall within fifteen days after the appointment of an arbitrator, or after circumstances listed in article 10, par.2, became known to that party, send notice of its challenge to the other party and the other members of the tribunal*". In case the other party does not agree to the resignation of the respective arbitrator, or the arbitrator under challenge does not resign, the tribunal shall decide on the challenge. If the challenge is not successful, a dissatisfied party may initiate court proceedings within 15 days of receipt of the rejection decision, in order to have the question of an arbitrator's challenge decided by the state court. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render an award (Law on Arbitration, Article 11.4). Similar provisions are contained in the Kosovo Arbitration Rules (Arts. 12-14).

Furthermore, the arbitrator's mandate terminates if the arbitrator becomes *de jure* or *de facto* unable to perform his or her function or, for other reasons, fails to act without undue delay. In such a case, if the arbitrator does not resign or if the parties do not agree on the termination of the arbitrator's mandate, the law allows the state court to render the final decision. The court can make that decision upon the request of any party or member of the tribunal. No appeal is allowed against a court's decision on this matter (Law on Arbitration, Article 12).

The Arbitration Law does not contain any provisions concerning the liability of arbitrators. Article 16 of the Kosovo Arbitration Rules provides that, save for intentional wrongdoing, the parties waive to the fullest extent permitted under the applicable law any claim against the arbitrators, the appointing authority, the Permanent Tribunal and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

Interim relief

Regardless of the wording of the arbitration agreement or the commencement of arbitration proceedings, according to the Law on Arbitration, each party is entitled to request interim measures from state courts and the state court is further empowered to grant the requested measure if the party proves that it may suffer immediate or irreparable damage or loss if such a measure is not taken (Article 8).

Article 15.1 of the Law on Arbitration provides that an arbitral tribunal may issue interim measures if requested by a party. The arbitral tribunal has to be provided with credible evidence that, in the event such a preliminary order is not issued, the party requesting it will suffer immediate or irreparable injury, loss or damage. The arbitral tribunal may order any interim measure against the other party that it deems appropriate and may order any party to provide "appropriate security". A court may order the enforcement of an interim measure issued by an arbitral tribunal unless a party has already requested a court to enforce

an interim measure on the same matter (Law on Arbitration, Arts. 8 and 15.2).

The Law on Arbitration does not provide an exhaustive list of admissible types of interim measures that may be granted by the arbitral tribunal. More detailed provisions are to be found, however, in the Kosovo Arbitration Rules under the section on Interim Measures (Article 27).

If a preliminary order issued by an arbitral tribunal proves to be unjustified, the party in whose favour the interim measure was issued is obliged to compensate the party against which the order was issued and enforced. The arbitral tribunal also has the power to decide on the justification of the preliminary order and matters related to the compensation of damages referred to above (Law on Arbitration, Article 15.3).

Arbitration award

An arbitration award is final and may not be appealed against. The Law on Arbitration does not provide for any specific timeframe within which the arbitration award shall be rendered. With regard to the decision-making, form and correction of an award, the Law on Arbitration largely follows the Model Law standards. The award must be in writing, shall include the reasons on which it is based unless the parties have agreed otherwise, signed by the majority of arbitrators, provided that the award states the reasons for the absence of a signature, and shall contain the place and date on which the award was rendered. The Law on Arbitration does not address the issue of dissenting opinions, namely whether the arbitral tribunal is to issue the dissenting opinion of an arbitrator.

The Law on Arbitration contains provisions on settlement of disputes. According to Article 32, the parties may settle their dispute at any time during the proceedings, as long as the award has not been rendered. In such a case, the parties are to inform the arbitral tribunal about the settlement and may request to convert their settlement agreement into an award, unless the settlement is in violation of public policy (*ordre public*). The law ensures that the resulting award has the same force and effect as any other arbitral award on the merits of the case.

In its award, the arbitral tribunal shall determine the costs of the arbitration and, unless the parties have otherwise agreed, decide which parties are to bear these costs, and in what proportion. Pursuant to Article 34.1 of the Law on Arbitration, the costs of the arbitration include the fees of the arbitral tribunal, the arbitrator's costs, counsel's fees, and expenses and representatives of the parties (claimed during the proceedings and to the extent that the arbitral tribunal finds them reasonable), travel and other witness expenses (as approved by the arbitral tribunal), and fees and expenses of the court when acting as the appointing authority of arbitrators. Unless otherwise agreed by the parties, costs are borne by the unsuccessful party (Law on Arbitration, Article 34.3). The Law on Arbitration does not contain any provisions on whether the parties are entitled to recover interest.

Challenge of the arbitration award

Vesting the parties with an unlimited right to appeal an award would take away one of the main advantages of arbitration – its ability to deliver fast and cost-effective dispute resolution. Consistent with this interest, the law provides only limited grounds for the annulment of an award.

An award may be annulled if the contesting party resisting proves that (Law on Arbitration, Article 36.2):

(a) a party to the arbitration agreement did not have the capacity to act;

(b) the arbitration agreement is not valid under the law determined as applicable by the parties or the arbitral tribunal or, in the absence of such determination, under the law applicable in Kosovo;

(c) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(d) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the provisions of [the Law on Arbitration] or a valid arbitration agreement, under the condition that such defect had an impact on the arbitral award; or

if the court finds that:

(a) arbitration is prohibited by law; or

(b) the enforcement of the award leads to a result which is in conflict with public policy.

The timeframe for requesting a court to set aside an arbitral award can be stipulated by the parties in their arbitration agreement. In the absence of an agreement on this issue, the request for setting aside shall be brought within ninety (90) days from the day on which the Claimant in the annulment proceedings receives the award. Once the request is submitted, the court may, where appropriate, set aside the award and resubmit the case to the arbitral tribunal to resume the arbitral proceedings or to take such other action as, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside. According to Article 37 of the Law on Arbitration, the decisions of the court shall have the form of a court order. Prior to the issuance of a court order regarding the challenge of an award, the court shall hear all parties.

Enforcement of the arbitration award

The Law on Arbitration sets forth the legal requirements for the enforcement and recognition of domestic and foreign arbitral awards in Kosovo. Its Article 38.1 provides that "*an arbitral award made by an arbitral tribunal in Kosovo shall be enforced when declared enforceable by the Court*". A request to declare an arbitral award enforceable shall be accompanied by the arbitral award or a certified copy thereof (Law on Arbitration, Article 38.2). However, a request shall be rejected if the court determines that one or more grounds for setting aside an award are satisfied (Law on Arbitration, Article 38.1).

Arbitral awards rendered outside Kosovo are subject to recognition and enforcement. In order to have an arbitral award enforced, the requesting party shall file with the Basic Court, Economic Department in Pristina an application, accompanied by the authenticated original award or a certified copy thereof and an original arbitration agreement or its duly certified copies. When the arbitral award or arbitration agreement is written in a foreign language, the party shall supply a duly certified translation of the abovementioned documents into an official language of Kosovo (Albanian or Serbian).

Grounds for refusing the enforcement and recognition of an award

Although the Law on Arbitration does not expressly refer to the New York Convention, the provisions dealing with recognition and enforcement (Law on Arbitration, Article 39)

mirror the correlating provisions under Article V of the New York Convention. Similar to the New York Convention, refusal of recognition or enforcement may be raised by a party or by the court.

A party may raise the following grounds for refusal (Law on Arbitration, Article 39.4):

(a) lack of capacity of the parties to conclude an arbitration agreement;

(b) invalidity of the arbitration agreement under the applicable law;

(c) lack of a fair opportunity to be heard during arbitral proceedings;

(d) the award deals with matters not covered by the submission to arbitration;

(e) the composition of the arbitral tribunal or the conduct of the arbitral proceedings was not in accordance with the applicable law;[2] or

(f) the final award has not yet become binding on the parties, or has been set aside or suspended by a competent authority.

Recognition and enforcement of an award "may" be refused by a court based on any one or more of the above grounds.

Recognition and enforcement of an award, however, "shall" be refused by a court if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kosovo, or the recognition or enforcement of the award would be contrary to the public policy (*ordre public*) of Kosovo (Law on Arbitration, Article 39.5).

Investment arbitration

In 2009, Kosovo joined the International Center for Dispute Resolution. The government has signed investment agreements providing for investor-state arbitration with Albania, Austria, Belgium, Luxembourg, Macedonia, Turkey and the United Arab Emirates.

Placing economic growth as its first priority, Kosovo has undertaken numerous economic and legal reforms in order to make the country more attractive to foreign investors. In 2011, the government took substantive steps to open Kosovo to foreign investment through the enactment of the Public Private Partnership (PPP) Law, which is harmonised with European Council regulations and EU *Acquis Communitaire*.

The Law on Foreign Investment, enacted in 2014, incorporates international standards on investment protection, including fair and equitable treatment, full and constant protection, security and the transfer of rights.

In the absence of an agreement on the settlement of disputes between a foreign investor and the state, the Law on Foreign Investment allows foreign investors to require that investment disputes are settled through domestic or international arbitration with the procedural rules as chosen by the foreign investor. The Foreign Investment Law stipulates that investors may utilise the following alternative dispute resolution mechanisms:

(a) the ICSID Convention, if both the foreign investor's country of citizenship and Kosovo are parties to the said Convention at the time of the request for arbitration;

(b) the ICSID Additional Facility Rules, if the jurisdictional requirements for personal immunities per Article 25 of the ICSID Convention are not fulfilled at the time of the request for arbitration;

(c) the United Nations Commission on International Trade Law (UNCITRAL) Rules. In this case, the appointing authority referred to therein will be the Secretary General of ICSID; or

(d) the International Chamber of Commerce Rules.

Pursuant to Article 2 of the Law on Foreign Investments, the minimum capital amount that has to be contributed by a foreign investor, directly or indirectly, to a business organisation established in Kosovo in order to be considered as a foreign investment organisation, is 10%.

Currently, with *Axos Capital Ltd. v. Republic of Kosovo,* Kosovo faces its first investment claim (ICSID Case No. ARB/15/22). The case concerns the privatisation of Kosovo's telecom company, PTK. In 2013, Axos, as a part of the consortium, won a tender to buy 75% of PTK's shares. At the end of 2013, however, the government of Kosovo terminated the transaction. As the claim is based on Germany's bilateral investment treaty with Yugoslavia, it might provide some clarity as to whether investors may invoke any of Serbia's investment protection agreements signed prior to Kosovo's declaration of independence.

* * *

Endnotes

1. The consensus should be reached within 15 days after the receipt of the notice of arbitration by the Respondent (Law on Arbitration, Article 9.3).
2. Article 39.4(d) of the Law on Arbitration omits the wording of Article V(1)(d) of the New York Convention that "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place" (emphasis added), being "a distinction which is of no material significance." (A. Gojani, *Recognition and Enforcement of Kosovo made Arbitral Awards in New York Convention Countries: A Comparative Study*", Journal of Alternative Dispute Resolution in Kosovo, Vol. 2, June 2016, p. 72.)

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Lithuania

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Introduction

The Law on Commercial Arbitration was introduced in 1996. A new version was adopted in 2012. Since the adoption of the essential legislation, arbitration started gaining popularity.

Lithuanian courts make no distinction between *international commercial arbitration* and *local commercial arbitration*. At the same time, Lithuanian courts tend to follow international pro-arbitration trends, thereby allowing business to benefit from a truly liberal approach to arbitration which is developing in international commercial arbitration.

Lithuanian arbitration regulation is predictable and based on UNCITRAL Model Law. In 2012, the Law on Commercial Arbitration of the Republic of Lithuania (the LCA), which is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), was amended to match the changes adopted by the General Assembly in 2006.

The LCA explicitly states that it shall be interpreted and its definitions shall be subsidiarily governed by the UNCITRAL Model Law. Therefore Lithuanian courts in their case law often refer to the UNCITRAL Model Law, stating that "*logical, systematic and functional relationships*" between the LCA and UNCITRAL Model Law, and historical background of adoption of the LCA, allow it to be interpreted by subsidiary application of UNCITRAL Model Law (*"Sativa Grou" OÜ v. "Galinta ir partneriai" UAB, 2014*).

Moreover, Lithuania has ratified the ICSID Convention, the Energy Charter Treaty and the Convention on Conciliation and Arbitration within the Commission on Security and Cooperation in Europe of 1992.

Lithuania has been a member of the New York Convention since 1996. Local courts strictly adhere to this international treaty. Lithuania has made a reciprocity reservation by allowing recognition and enforcement of an arbitral award in the territory of Lithuania, if such arbitral award was made in a state which is a party to the New York Convention.

There is a strong willingness in Lithuania to create an attractive forum for business to resolve its disputes outside the courtroom. It stimulates legislators and courts to take a liberal, enforcement-oriented approach to arbitration, based on internationally accepted standards and principles of commercial arbitration.

Arbitration agreement

Arbitration agreements may be concluded by tacit understanding or in writing, regarding existing or future disputes.

The Supreme Court of Lithuania confirmed that arbitration is generally recognised as an alternative method of dispute resolution equal to legal proceedings organised in the

national courts (*L.B. v. State Property Fund*, 2014). This alternative jurisdiction is rooted in parties' free will and agreement to transfer the specific dispute to arbitration.

An arbitration agreement is considered valid if the parties sign a document which includes an arbitration clause, or else exchange documents (including electronic documents) which confirm that they agree on arbitration, or the parties exchange claim and response in which both parties confirm that they agree on arbitration, or if there are other circumstances which prove that parties agree on arbitration.

Agreement to arbitrate the dispute not only gives the parties the right to refer to arbitration, but also waives their right to refer the dispute to any state court. According to the Supreme Court of Lithuania, the principle of *pacta sunt servanda* applies to the arbitration agreement (*L.B. v. State Property Fund, 2014*). Therefore the validity and capability of execution of the arbitration agreement shall be established separately from the main agreement. The doctrine of arbitration agreement separability that was established in the case law of Lithuanian courts long ago (ex. *"Marketing Service" v. "Nemunas" AB, 2001*), is constantly applied in practice today.

The LCA provides for application of the *competence-competence* principle in Lithuania, meaning that if the arbitral tribunal is constituted, it is the only competent body to decide on the validity of the arbitration agreement. According to the LCA, courts are allowed to declare the arbitration agreement null and void before the dispute is referred to arbitration. Once the arbitration proceedings are initiated, Lithuanian courts strictly follow the doctrine of *competence-competence* and refuse to accept claims related to the validity of the arbitration agreement, or shall not consider the claim related to that matter if such claim was already admitted (*"Tarptautinė statybos korporacija", UAB v. ALSTOM Power Sweden Aktienbolag AB, 2012*).

According to Article 12 of the LCA, all disputes may be settled by arbitration except disputes arising from constitutional, family and administrative matters; also disputes connected with patents, trademarks and service marks may not be submitted to arbitration. Disputes arising out of employment or consumer contracts may be referred to arbitration only if the arbitration agreement is concluded after the dispute arises.

Moreover, after recent amendments the LCA provides that initiating bankruptcy proceedings against a party to the arbitration agreement shall have no impact on the arbitration proceedings or the validity of the arbitration agreement.

Disregarding the general pro-arbitration approach, the Supreme Court of Lithuania has in several cases concluded that disputes arising out of the investigation of a legal person's activities, and disputes regarding procurement contract price changes, cannot be referred to arbitration. The Supreme Court of Lithuania has explained that the doctrine of *numerus clausus* applies to disputes that cannot be referred to arbitration, and such disputes have to be provided by law (*"WTE Wassertechnik GmbH" and "Požeminiai darbai" AB v. Environmental Projects Management Agency under the Ministry of Environment of the Republic of Lithuania and "Kauno vandenys" AB, 2011*).

However, this does not mean that the list of non-arbitrable disputes has to be provided in the LCA and cannot be mentioned in other laws of the Republic of Lithuania. At the same time, the Supreme Court of Lithuania tends to evaluate each case individually and, in cases of purely commercial dispute, tends to allow arbitration even in cases arising out of procurement contracts. The good news is that the list of non-arbitrable disputes still remains very short and sustainable.

In 2012, the Supreme Court of Lithuania referred to the European Court of Justice a question for a preliminary ruling on whether the courts may refuse to recognise an arbitral anti-suit injunction on the ground that it would restrict its *"right to determine itself whether it has jurisdiction to hear the case under the rules on jurisdiction in the Brussels I Regulation"*.

In May 2015 (C-536/13) the Grand Chamber of the ECJ provided an answer to the Supreme Court of Lithuania. The ECJ had already ruled in the earlier case of *Gasser v. MISAT* (C-116/02) and even more clearly in *Turner v. Grovit* (C-159/02) that anti-suit injunctions between the state courts of different Member States are incompatible with European law and thus inadmissible. ECJ reconfirmed its case lase developed in *Allianz and Generali v. West Tankers* (C-185/07) and justified the finding of incompatibility with European law by referring to a general principle that every court seized itself determines whether it has jurisdiction to resolve the dispute before. The ECJ ruled that Regulation No 44/2001 was intended to prevent only conflicts of jurisdiction between courts of the EU Member States and not conflicts between a court and an arbitral tribunal, and the "Brussels I" Regulation expressly excludes arbitration from the scope of that regulation.

Arbitration procedure

The arbitral procedure is started on the day the secretariat of the VCAA receives the claim or the request for arbitration in compliance with the requirements of the VCCA, unless it has been agreed otherwise between the parties.

Hearing of the case can take place outside the seat of arbitration and there are no limiting provisions either in the LCA or VCCA rules. Moreover, parties are free to use any language of arbitration, although it should be noted that the VCCA administers arbitration only in English, Russian and Lithuanian.

The general rule is that the parties to arbitration are free to agree on arbitration procedure. In the absence of party agreement, the LCA gives the tribunal the power to conduct the arbitration in the manner it considers appropriate. The tribunal's discretion is only limited by general principles requiring fair treatment, equal procedural rights, autonomy, economy and cooperation. The LCA provides that the arbitral tribunal, in deciding cases, should apply the principles of *ex aequo et bono* or *amiable compositeur* only if the parties have expressly authorised it to do so.

The LCA provides that arbitral proceedings are confidential. Furthermore, VCCA rules provide that, unless the parties agree otherwise, an arbitral tribunal should hear a case in closed proceedings. However, it should be emphasised that if the award is challenged, the review procedures in national courts shall not be confidential. The court, upon the request of the interested party, may declare the case 'material non-public' to protect confidential information and commercial secrets.

Moreover, on 1 July 2017 recent amendments of the LCA come into power. The said amendments shall ensure more confidentiality for arbitration proceedings even when the state courts are involved. The state courts shall ensure confidentiality and restricted assets (even to the finished cases); if the state court is involved in assistance for taking evidence, imposition of injunction measures or challenging arbitration award, the said cases shall be considered as confidential by default.

There are no specific provisions on disclosure or discovery in arbitration within the LCA or VCCA rules. However, arbitrators and the parties are guided by the general rule that the arbitral tribunal may order any of the parties to submit relevant evidence. Also the IBA Rules on Taking Evidence in International Arbitration are not obligatory under VCCA rules

or the LCA. However, arbitrators and the parties often refer to these rules. It has to be admitted that the continental approach to the taking of evidence, rather than what applies in common law countries, is adopted in Lithuania. Thus, production orders are limited to specific identifiable documents.

Courts may assist the arbitral tribunal or a party in taking evidence. The arbitrators and parties are allowed to participate in the procedure of taking evidence in court by giving explanations, asking questions or exercising other rights necessary for the collection of evidence.

The rules of VCCA allow the arbitral tribunal to order expertise to determine certain circumstances, or in cases where issues pertaining to the applicable foreign law have to be clarified. There are no more special regulations regarding expert evidence, however IBA Rules on the Taking of Evidence in International Arbitration are commonly applied in practice.

Arbitrators

Any natural person with full legal capacity may be appointed as an arbitrator, irrespective of his or her nationality, unless otherwise agreed by the parties. The parties are free to agree on a procedure for appointing arbitrators.

According to Article 14 of the LCA, if there is no prior agreement and if the arbitration consists of three arbitrators, each party selects one arbitrator, and the two of them appoint the third one. If the arbitration has a sole arbitrator, and if the parties cannot agree on the appointment, an arbitrator is appointed by the head of the permanent arbitral institution upon the request of any of the parties. The same rule also applies if one party does not appoint an arbitrator (or two arbitrators do not appoint the third one) within 20 days from the date the respective party had to appoint an arbitrator.

The courts have very limited powers to intervene in the appointment of arbitrators. Basically the law provides only one case where the court may intervene in the selection of arbitrators, and only in *ad hoc* proceedings.

The court may intervene in the selection of arbitrators in case of *ad hoc* proceedings, provided that a party fails to appoint an arbitrator, or in case two arbitrators appointed by the parties fail to appoint the chairman of the tribunal; an arbitrator/chairman of the tribunal is then appointed by Vilnius regional court within 20 days from the date the respective party had to appoint an arbitrator.

Article 14 of the LCA does not establish any specific restrictions on acting as an arbitrator. Anyone who has full legal capacity may serve as an arbitrator in Lithuania.

The law establishes general requirements for arbitrators, i.e. an arbitrator shall be impartial, independent and competent.

Arbitrators may be challenged only if there are circumstances that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties. The IBA Guidelines on Conflicts of Interest in International Arbitration are not mandatory under VCCA rules and the LCA. However, arbitrators and the VCCA secretariat frequently address these guidelines. The procedure of verification of independence and impartiality is diligently managed by the secretariat of VCCA, and the secretariat reviews the arbitrator's declaration in detail. It must be emphasised that not a single award has been set aside for this reason in Lithuania.

In the current landmark case by the Court of Appeal of Lithuania, the court formed case law requiring the highest standard of independence for arbitrators, and applied IBA Guidelines on Conflicts of Interest in International Arbitration. In the abovementioned case, regarding

the recognition and enforcement of the interim measures award made by *ad hoc* arbitration tribunal in Estonia, the Court of Appeal of Lithuania emphasised that, despite a party's right to freely choose the arbitrator on its side, the arbitrator has to be impartial and independent. After evaluating relations between the claimant and arbitrator appointed on the claimant's side, the nature of the relationship, its duration and the time passed after, the Court of Appeal of Lithuania established that it qualified for the Non-Waivable Red List of the IBA Guidelines on Conflicts of Interest in International Arbitration. Thus, the Court of Appeal of Lithuania stated that the third arbitrator appointed, who was unlawfully appointed on the side of the party to the proceeding, shall also be considered to have been appointed unlawfully. Having this in mind, the Court of Appeal of Lithuania refused to recognise and enforce the award on interim measures made by an *ad hoc* arbitration tribunal in Estonia, on the grounds of Article V (1) (d) and Article V (2) (b) of the New York Convention.

Lithuanian courts also have powers in *ad hoc* arbitration. If a party fails to appoint an arbitrator, the Vilnius County Court of the Republic of Lithuania shall appoint an arbitrator. The same procedure shall be involved if the parties fail to nominate a solo arbitrator. The involvement of Vilnius County Court ensures the fast and transparent nomination of arbitrators in both cases, as the judge usually issues the ruling in less than 20 days after the deadline for the abovementioned actions passes.

Under the rules of the VCCA, except for cases where such disclaimer is not allowed under the applicable law, neither arbitrators, the VCCA, the chair, nor the secretariat or employees of the VCCA are liable to any persons for any actions or mistakes in arbitration proceedings.

Moreover, the current case law of the Supreme Court of Lithuania (1 September 2016, case No. e3K-3-387-421/2016) establishes that the independence requirements might be applicable not only upon arbitrators but also the arbitration institution itself. This case law is especially relavant, while dealing with newly found arbitration institutions.

The arbitrator's mandate terminates when the arbitrator resigns or the parties agree upon the removal of the arbitrator from office. Under VCCA rules, the arbitrator is obliged to resign from office in case an arbitrator becomes *de jure* or *de facto* unable to perform the arbitrator's functions or delays performing these functions without any valid reason.

Interim relief

The arbitral tribunal may, at the request of a party and upon informing other parties, rule on interim measures, which have the aim of ensuring that a party's request or relief will be enforced or that the evidence of the case will be preserved. However, the parties may agree otherwise and not to grant the tribunal such rights.

The LCA grants the parties to the arbitration proceedings a right to request the following interim measures: 1) prohibition of engagement by the party in certain transactions or taking of certain actions; 2) obligation of the party to keep safe assets related to arbitral proceedings, provide a monetary deposit or a bank or insurance guarantee; and 3) obligation of the party to preserve evidence that may be significant in arbitral proceedings.

For such interim measures to be enforced a party has to prove that: 1) claims are likely to be founded (however, the determination of such likelihood does not affect the power of the arbitral tribunal to subsequently give a different arbitral award or order in arbitral proceedings); 2) the failure to take the measures can substantially preclude the enforcement of the arbitral award or render it impossible; and 3) interim measures are cost-effective and proportionate to the goal sought.

An emergency arbitrator, who can order urgent interim measures, may be appointed under Article 35 of VCCA rules. An order made by an emergency arbitrator can be modified later by the arbitral tribunal.

Under Article 27 of the LCA a party is entitled to request Vilnius Regional Court to take interim measures or require evidence before the commencement of arbitral proceedings or the constitution of an arbitral tribunal. At the same time the refusal of the court to take interim measures or preserve evidence does not preclude a party from requesting an arbitral tribunal to apply interim measures or preserve evidence during arbitral proceedings.

Courts may assist the arbitral tribunal or a party in taking evidence. Evidence is collected at court, *mutatis mutandis* applying the provisions of the Code of Civil Procedure of the Republic of Lithuania (e.g. the appropriate court may be instructed to carry out certain procedural actions (question parties, third parties and witnesses, inspect location, etc.)).

Arbitration award

The major formal requirement for an arbitral award is that it must be made in writing and signed by arbitrators or an arbitrator. An award of the arbitral tribunal must be in writing and signed by a majority of the arbitrators, with the other arbitrators indicating their reasons for not signing.

In cases where the arbitrator or arbitrators disagree with the majority, they shall have the right to state their dissenting opinion in writing, which shall be enclosed with the arbitral award.

The LCA does not provide any specific timeframe within which the arbitration award shall be rendered. Part 6 of Article 8 of the LCA establishes a general principle that arbitral proceedings shall conform to the principles of autonomy of the parties, competition, cost-efficiency, cooperation and rapidity. Therefore, some permanent arbitration institutions in their arbitration rules establish more detailed regulation. The arbitral award must state the reasons upon which it is based, unless the parties have agreed otherwise.

For example, VCCA rules provide that a final arbitration award shall be made as soon as possible after the main hearing, but not later than 30 days following the last main hearing. In exceptional cases the Arbitration Rules of VCCA allow the chair of VCCA to extend at his/her own discretion the term for making an award for another period of up to 30 days, or longer provided the parties consent thereto. Before signing any arbitral award, the arbitral tribunal is obliged to submit it in draft form to VCCA (the secretariat) which, in no more than 10 days, shall assess the compliance of the arbitral award with the requirements of form (in this case, the legitimacy and validity of the award is not assessed).

Costs are usually awarded from the losing party upon advance request from the winning party, unless otherwise agreed in the arbitration agreement. Although the award of interest is allowed and interest is usually awarded together with the claimed amounts, it is important to emphasise that, according to the case law of Lithuanian courts, awarding punitive interest is contrary to the public order of the Republic of Lithuania and therefore is prohibited.

Challenge of the arbitration award

It has already been mentioned above that Lithuanian judges are pro-arbitration and very conservative in dealing with award-challenging issues. I venture to suggest that the situation in Lithuania is the best in the region. The Lithuanian courts system has established that all award challenges go directly to the Court of Appeal of Lithuania, and this ensures that the limited number of senior judges having academic degrees are involved in the procedure of review of the awards.

Depending on the workload of the Court of Appeals of Lithuania, the procedure of challenge of the arbitration award may take three to six months. The ruling of the Court of Appeals is subject to appeal to the Supreme Court of Lithuania.

Coherent and consistent case law of the Lithuanian courts confirms that the appeal of arbitration awards in the Republic of Lithuania is not possible. When a court receives a claim regarding a matter subject to an arbitration agreement, the court shall refuse to accept the claim (*"Valbis" UAB v. "Schenker" UAB, 2011*). Moreover, you can be almost 100% sure that the court will refuse to review the arbitral award on the issues of proper evaluation of factual background and application of laws (*Ballsbridge Advisory Ltd v. M. Ž., O. B. and V. S., 2014*).

Of course, the law provides traditional grounds for challenging arbitral awards. It is possible to challenge an award on strict grounds established by law. Part 3 of Article 50 of the LCA allows the Court of Appeal of Lithuania to set aside an arbitral award where the appellant party provides evidence that:

1. one party to an arbitration agreement, according to applicable laws, was legally incapable or the arbitration agreement is not valid according to laws applicable according to the agreement of the parties, or in the absence of an agreement of the parties on law governing the arbitration agreement according to the laws of the state in which the arbitral award was made;
2. the party in respect of which the arbitral award is intended to be invoked has not been duly notified of the appointment of an arbitrator or arbitral proceedings or has not been otherwise enabled to give his explanations;
3. the arbitral award has been made in relation to a dispute or part thereof which has not been submitted to arbitration. Where part of the dispute which has been submitted to arbitration may be distinguished, the part of the arbitral award that resolves matters submitted to arbitration may be recognised and enforced;
4. the composition of an arbitral tribunal or arbitral proceedings does not conform to the agreement of the parties and/or the imperative provisions of this Law;
5. the dispute may not be submitted to arbitration according to the laws of the Republic of Lithuania; or
6. the arbitral award is in conflict with the public policy of the Republic of Lithuania.

One of the most recent successful challenges of arbitral decisions was made in the case *"Giraitės vandenys" UAB v. "Grundolita" UAB, 2014*. In this case, the Court of Appeals of Lithuania held invalid a partial award made by the arbitral tribunal of the permanent arbitration institution, Vilnius international and national commercial arbitration court. In a partial award, the arbitral tribunal ruled on its competence to hear the dispute. The dispute arose from the fact that the parties to the arbitration clause had not agreed directly which permanent arbitration institution or *ad hoc* arbitration was entitled to resolve the dispute. The Court of Appeals of Lithuania, after analysing the arbitral clause from the agreement, decided that the intentions of the parties were to resolve any dispute in the International Court of Arbitration of the International Chamber of Commerce. Thus, the Court of Appeals of Lithuania declared null and void a partial decision of Vilnius international and national commercial arbitration court regarding its competence to hear a dispute.

Nor should you be worried about the courts' interpretation of public policy in challenging awards. Lithuanian courts have already ruled a number of times that public policy is to be understood as international public policy, the fundamental principles of due process

and mandatory rules of substantive law embedding generally accepted principles of law (*"Farmak" AB v. "Baltijos farmacijos centras" UAB, 2013*).

Award-challenging proceedings do not freeze enforcement proceedings. However, after accepting an application to set aside an arbitral award, the Court of Appeals of Lithuania may suspend the enforcement of the award at the request of a party.

Enforcement of the arbitration award

Lithuanian courts recognise the presumption of validity of an arbitration decision established both in UNCITRAL Model Law, as well as in the New York Convention.

According to the LCA, the party willing to recognise and enforce the arbitration award shall provide to the Court of Appeal of Lithuania an application, accompanied by the original copy of an arbitral award requested to be recognised and enforced, and of an original arbitration agreement or its duly certified copies. When the arbitral award or arbitration agreement is made in a foreign language, the applying party shall supply a duly certified translation of the abovementioned documents in the Lithuanian language.

The LCA does not provide any specific grounds for refusal to recognise or enforce the arbitral award, and refers to the provisions of the New York Convention. Thus, it shall refuse to recognise or enforce foreign arbitral awards only under the grounds of Article V of the New York Convention.

Lithuanian courts strictly follow international practice in the application of Part 1 and Part 2 of Article V of the New York Convention, refusing to consider the grounds stipulated in Part 1 of Article V of the Convention unless a party makes a request to consider one or several grounds to refuse recognition and enforcement of the foreign arbitral award. Part 1 of the Article V of the New York Convention is applied by Lithuanian courts *ex officio*.

Requests concerning recognition of foreign arbitral awards are heard by the Court of Appeals of Lithuania and written proceedings are applied. Rulings of the Court of Appeals of Lithuania on recognition and enforcement of a foreign arbitral award may be appealed to the Supreme Court of Lithuania within one month. Thus the same system as in the case of challenging of arbitral awards applies in this case. Involvement of the highest-tier courts ensures very modern, consistent and pro-arbitration case law in Lithuania.

Investment arbitration

Lithuania signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID, 1965). It came into force in Lithuania on 5 August 1992. Lithuania is a party to the Energy Charter Treaty (which entered into force in Lithuania on 13 December 1998). Moreover, Lithuania is a party to more than 50 Bilateral Investment Treaties (BITs) or other multi-party investment treaties.

The Supreme Court has developed theory that the defence of state immunity should be allowed only in disputes governed by public law; while in disputes governed by private law, such defence should not be allowed.

Most Lithuanian BITs provide a right of recourse to ICSID. Most of the treaties also allow investors to pursue an arbitration claim through an *ad hoc* tribunal applying the rules contained within the Washington Convention, an *ad hoc* tribunal constituted in accordance with the UNCITRAL rules; and/or any other tribunal acting in accordance with any other arbitration rules may be mutually agreed by the parties. Numerous BITs refer to the use of a commercial arbitral institution, i.e. ICC arbitration in Paris or SCC Stockholm arbitration.

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Macedonia

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Introduction

The demand for a transparent, time-efficient and cost-effective forum for dispute resolution has grown stronger with the steady increase of foreign investments in South-Eastern Europe. This has resulted in legislation being passed in Macedonia that allows parties to custom-tailor their arbitration proceedings using internationally recognised standards and instruments.

To bring Macedonian arbitration law in line with international standards, the commission for drafting the 2006 Law on International Arbitration (**LICA**) decided to adopt the original text and structure of the 1985 UNCITRAL Model Law (**1985 ML**) to the greatest extent possible. LICA applies exclusively to international commercial arbitration where the place of arbitration is in Macedonia. The legal framework under which domestic entities can bring their disputes to arbitration is provided for in Chapter 30 of the Law on Civil Procedure (**LCP**).

The main arbitration institution in Macedonia – the Permanent Court of Arbitration – was established in 1993 within the Economic Chamber (the **Court**). The Court has authority to administer both domestic and international disputes. In 2011, consistent with its intention to modernise, the Court altered its structure with the adoption of the new Rulebook of the Court (the **Rulebook**). These changes led to immediate results, especially with regard to the shortening of the proceedings.

A major revision of LICA and the Rulebook is set to be published by the end of 2017. It has not yet been disclosed by the working group whether the revision will result in an arbitration law applicable both to international and domestic arbitration. In any case, the revision will incorporate the 2006 amendments of the ML.

Macedonia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**). Macedonia, as then part of Yugoslavia, had acceded to the New York Convention on 26 February 1982. In September 2009, the Macedonian government notified the UN Secretary General of its decision to withdraw the reciprocity reservation; no other reservations have been made. Macedonia is also a party to the 1961 European Convention on International Commercial Arbitration and the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID**).

Arbitration agreement

The agreement to arbitrate under LICA can be concluded in the form of a contractual clause in a contract or as a separate contract. Regardless of the choice, the will of the parties to have their dispute finally resolved through arbitration has to be expressed in writing. The

written form requirement is fulfilled if the clause is contained in (i) a document signed by the parties, or (ii) an exchange of letters, telex, telegrams or other means of communication which will provide a record of the agreement. Any defect of the written form requirement is cured by an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. Any reference to a contract, including reference to general terms and conditions, which contains an arbitration clause, constitutes an arbitration agreement, but only if the written form is met and the reference is such as to make that clause part of the contract (Art. 7 LICA).

In addition to the writing requirement, an arbitration agreement has to refer to a defined legal relationship, whether contractual or not (Art. 2.6 LICA). Naturally, such a relationship can only be established on the assumption that the prerequisites for subjective arbitrability are met, i.e. the parties to the agreement to arbitrate had legal capacity to enter into such a contract.

With regard to objective arbitrability, LICA stipulates that any dispute for which an exclusive jurisdiction of a court in Macedonia is not provided can be submitted to arbitration. With this, and in line with the Model Law, the term "commercial" is given a wide interpretation to cover all relationships of a commercial nature. If a claim is filed with a court for the same dispute and between the same parties, the court shall reject the claim, unless it finds that the arbitration agreement is null and void, or incapable of being performed.

The principle of competence-competence is incorporated under Art. 16 LICA. The arbitral tribunal may rule on its own jurisdiction, and rule thereby on any objections with respect to the existence and validity of the arbitration agreement. The principle of separability is also recognised, providing that an arbitration clause which is part of a main contract will be treated as an agreement independent of the other terms of the contract. LICA does not deviate from the original text of the 1985 ML with regard to these principles and further provides that the decision of the arbitral tribunal that the contract is null and void does not entail *ispo jure* the invalidity of the arbitration clause.

Arbitration procedure

The arbitration proceedings, unless otherwise agreed by the parties, commence on the date on which the request for the dispute to be referred to arbitration is received by the respondent (Art. 21 LICA). LICA further provides for the possibility for the parties, or the arbitral tribunal, to state the facts supporting the claim, the points of issue and the relief or remedy sought within a determined period of time.

The Rulebook provides a detailed list on the information that has to be contained in the statement of claim, such as a detailed description of the parties, the arbitration agreement, the statement of facts and the request for relief, the name(s) of the arbitrators, determination of the value of the dispute, and all the evidence that is considered to be relevant (Art. 42 Rulebook).

The place of arbitration, if not otherwise chosen by the parties, shall be Skopje. The arbitral tribunal may, if such decision is considered appropriate, meet at another place.

The parties are free to determine the rules of the procedure. In the absence of such agreement, the arbitral tribunal will conduct the procedure in such manner as it deems appropriate (Art. 19 LICA).

Further, the parties are free to agree on the procedure for taking of evidence. Therefore, the parties may also agree on the IBA Rules on the Taking of Evidence. In the absence

of any such agreement, the arbitral tribunal has wide discretion regarding the conduct of the evidentiary proceedings, subject to the mandatory provision of the law such as equal treatment of the parties, the right to be heard, public policy, etc. This discretion entitles the arbitral tribunal to determine the admissibility, relevance and weight of any evidence. Although there are no special provisions in LICA regarding the hearing of witnesses, both written statements and oral hearings, including cross-examinations, are possible.

The arbitral tribunal is authorised to request the parties to disclose certain documents. If the party does not comply with a request of the arbitral tribunal, the arbitral tribunal can request assistance from the competent court in Macedonia (Art. 27 LICA).

The arbitral tribunal may also appoint experts. Furthermore, the tribunal may request from the parties to provide the expert with all relevant information or to produce or provide access to any relevant documents, goods or other property for his/her inspection. If a party and an expert (either appointed by one of the parties or the arbitral tribunal) disagree on the relevance of the requested information and documents, the opposing party can request a decision in relation to the issue. Upon submission of the expert report, the parties can request the expert to attend an oral hearing to be cross-examined on the findings of his/her expert report (Art. 52 Rulebook).

Subject to any agreement to the contrary, the arbitral tribunal can decide to hold an oral hearing or to conduct the proceedings without a hearing, solely based on the documents and other materials. In case of an oral hearing, the parties must be given advance notice. All statements, documents and other information submitted to the arbitral tribunal by one of the parties must also be delivered to the other party in due time.

LICA provides for confidential proceedings, such that unless otherwise agreed by the parties, the arbitration procedure is not open to the public.

Arbitrators

Consistent with the 1985 ML, LICA allows the parties to determine the number of arbitrators and does not require an odd number of arbitrators to be selected. If the parties cannot reach an agreement, then as a default rule the arbitral tribunal will consist of three arbitrators (Art. 10 LICA). Parties are free to agree on a procedure for the appointment of the arbitrators. Failing such agreement, each party will appoint one arbitrator, and the two arbitrators thus designated will appoint the President of the arbitral tribunal.

The Rulebook provides for a slightly narrowed choice and gives the parties the right to decide whether the dispute shall be settled by a sole arbitrator or an arbitral tribunal composed of three arbitrators. Subject to any provision to the contrary, the Rulebook specifies the threshold of €30,000 in dispute as the upper limit, above which an arbitral tribunal of three arbitrators will be appointed. In this case, each party will appoint one arbitrator and the President of the Court will appoint the President of the arbitral tribunal (Art. 28 Rulebook).

The President of the arbitral tribunal is always chosen from the list of arbitrators provided by the Court. Such limitation is not set for the parties – they are free to nominate an arbitrator not enrolled in the list (Art. 30 Rulebook).

Generally, any natural person having full legal capacity can be appointed as an arbitrator. This implies that an arbitrator does not have to be a qualified lawyer, although the parties can agree on certain (professional) qualifications required for being appointed as an arbitrator.

Prior to his/her appointment, any arbitrator must disclose any circumstances which might raise doubts as to her/his impartiality or independence. The challenge of an arbitrator on the basis of his/her impartiality has to indicate any potential link to the parties, direct or indirect financial income or potential possession of confidential information in relation to the dispute, or any other information that might affect the impartiality of the arbitrator. In case the respective arbitrator does not resign, or the other party does not agree to the exemption, the decision regarding the exemption will be made by the arbitral tribunal, respectively, by the President of the Court. The right to challenge is also given to the party who nominated the arbitrator, but only for reasons that were not disclosed at the time of the appointment and discovered thereafter (Art. 35 Rulebook).

The mandate of the arbitrator will be terminated if, due to legal or factual reasons he/she becomes unable to perform his/her function, or for other reasons fails to perform without undue delay, the respective arbitrator resigns, or the parties agree on the termination. If the parties cannot agree on the termination of the arbitrator's mandate, each party may request the President of the Court to decide on the termination of the mandate of the arbitrator (Art. 37 Rulebook).

In case of termination of the mandate, a substitute arbitrator will be appointed under the same requirements that were applicable for the appointment of the arbitrator being replaced. In case an arbitrator has been replaced, unless otherwise agreed by the parties, the hearing has to be repeated. The repetition of the hearing is mandatory in case the procedure was conducted by a sole arbitrator (Art. 39 Rulebook).

Interim relief

The arbitral tribunal may, at the request of a party, order interim measures against the other party which the arbitral tribunal considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may also request the party to provide appropriate security in connection with the interim measure (Art. 17 LICA).

Under Macedonian arbitration law, it is possible to apply both to domestic courts and to the arbitral tribunal for the issuance of an interim measure either before or during the arbitral proceedings. However, considering the arbitral tribunal's lack of enforcement powers, in case the party does not comply with the interim measure ordered by the arbitral tribunal, the party upon whose proposal the measure was issued may address the competent court for legal assistance. Taking into consideration that there are no special courts for arbitration matters in Macedonia, legal assistance, if such is required, is provided by the Basic Courts (Art. 17(2) LICA; Art. 56(2) Rulebook).

Both the LICA (in relation to international arbitration) and the LCP (in relation to domestic arbitration) provide that the Court shall immediately reject any claim that is filed before the Basic Court for the same dispute and between the same parties for which an arbitration agreement has been concluded. Accordingly, anti-arbitration injunctions are not stipulated under Macedonian law.

Arbitration award

The arbitration award shall be in writing, and shall be signed by the sole arbitrator, the arbitrators, or respectively by the majority of the arbitrators. In the latter case, the arbitral award has to state the reason for any omitted signatures. If majority cannot be reached, the chairing arbitrator shall have a deciding vote.

The award shall state the reasons upon which it is based, unless the parties agreed otherwise. The award shall state the date on which it was made and the place of arbitration. The award shall be deemed to have been rendered on that day and at that place (Art. 31 LICA).

Neither LICA nor the Rulebook prescribe a time limit for the rendering of the award. The Arbitration statistics for the year 2015 show that the average timeframe in which the proceedings are finalised, including the rendering of the arbitral award, was from four to 12 months.

A copy of the signed award is to be delivered to each party. Within 30 days of receipt of the award, a party can request the arbitral tribunal to correct any errors in computation, any typographical errors or errors of a similar nature in the award, or the arbitral tribunal can be requested to provide an additional interpretation of a specific part of the award. In case the request is considered to be justified, the arbitral tribunal will provide the correction or the interpretation. The interpretation shall be considered to be part of the original award (Art. 33 LICA).

In addition, each party can request an additional award to be rendered with regard to issues that the arbitral tribunal failed to address in the original award. The additional award has to be rendered within 60 days of receipt of the request, provided that the same was justified (Art. 33 LICA).

The arbitral tribunal shall allocate the costs of the proceedings, taking into account the outcome of the dispute. If the claim was successful only in part, the tribunal shall allocate the costs on a *pro-rata* basis. The parties may, however, depart from this general rule, and allow for the tribunal to allocate the costs in a manner it deems fit (Art. 7 Rules on Costs).

Challenge of the arbitration award

A claim for annulment shall be filed with the competent Basic Court, and must be based on at least one of the limited grounds for setting aside the award:

- a party in the procedure was incapable of concluding the arbitration agreement or to be a party to the arbitration agreement;
- a valid arbitration agreement does not exist under the applicable law to the agreement;
- the party has not been duly informed about the appointment of the arbitrators or the initiation of the arbitration proceedings or was otherwise unable to present its case;
- the arbitral award deals with a dispute not covered by the arbitral agreement, or contains decisions on issues beyond the scope of the arbitration agreement. If the default concerns only a part of the award that can be separated, only that part of the arbitral award shall be set aside;
- the composition of the arbitral tribunal or the arbitration procedure were not in accordance with the arbitration agreement, unless such agreement was in conflict with a provision of LICA from which the parties cannot derogate;
- the subject matter of the dispute cannot be settled by way of arbitration; or
- the arbitral award is in conflict with the public policy.

The claim for annulment can be filed within three months from the day of receipt of the award. LICA provides the possibility for the Court to postpone the commencement of the procedure for annulment and to provide the arbitral tribunal with additional time to correct the defects that could lead to the setting-aside of the award. However, so far there is no recorded case in which an arbitral award has been annulled in Macedonia.

Enforcement of the arbitration award

An arbitral award (in conformity with the provisions of LICA) has the effect of a final judgment and can be enforced.

Any award enacted outside of the Republic of Macedonia is considered a foreign arbitral award, and will thus be recognised and enforced in accordance with the New York Convention.

The procedure for recognition of a foreign arbitral award is conducted before the Basic Court where the opposing party has its seat of business. The procedure is initiated with an application for recognition of a foreign arbitral award. In accordance with the formal requirements of the New York Convention, the application shall be filed with originals, or certified copies of the arbitration award and the arbitration agreement.

Investment arbitration

There are 38 bilateral investment treaties in force in Macedonia, with an additional two in process of ratification. Macedonia is a party to the ICSID Convention. The Convention provides for arbitration in case of a dispute between the state and a foreign investor.

To date, Macedonia has been involved in four investor-state disputes:

- In 2007, the Greek company Hellenic Petroleum brought proceedings against the Republic of Macedonia before the International Chamber of Commerce (ICC), and succeeded on the grounds of violation of a contract for the sale of the oil refinery OKTA.
- In 2009, the electricity provider EVN AG brought proceedings against the Republic of Macedonia under the ICSID Rules of Arbitration. In 2011 upon the request of both parties, the arbitral tribunal issued an award on agreed terms pursuant to Rule 43(2) of the ICSID Rules of Arbitration, incorporating the settlement reached by the parties.
- In addition, in 2009 the Swiss confectionary affiliate Swisslion brought proceedings against the Republic of Macedonia before ICSID. In its decision of July 2012, the arbitral tribunal decided that the Republic of Macedonia breached its obligations under public international law by failing to accord fair and equitable treatment to the Claimant's investment. However, all other claims of the Claimant were dismissed and the Respondent was ordered to pay €350,000.00 of the Claimant's legal costs and expenses.
- In 2015, Guardian Fiduciary Trust, Ltd. brought proceedings against Macedonia before ICSID. The arbitral tribunal dismissed the Claimant's claim due to lack of jurisdiction, and ordered the Claimant to pay the costs of the proceedings.

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Malaysia

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Introduction

The Malaysian Arbitration Act 1952 ("**the 1952 Act**") was incorporated in one of Malaysia's states, Sarawak, as early as 18 June 1952, and this act was subsequently incorporated in other states of Malaysia on 1 November 1972. Meanwhile, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("**the 1985 Act**") was enacted to give effect to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, passed at New York on 10 June 1958 ("**the New York Convention**").

The 1952 Act and the 1985 Act formed the earliest legislative framework in Malaysia for laws relating to arbitration. In 2005, both these acts were replaced by the Arbitration Act 2005 ("**the Act**") which, amongst others, sought to reform the law relating to domestic arbitration, provide for international arbitration, and the recognition and enforcement of awards. It seeks to promote international consistency of arbitral regimes based on the model law adopted by the United Nations Commission on International Trade Law on 21 June 1985.

The Act came into force on 15 March 2006, is modelled on the UNCITRAL Model Law 1985 on International Commercial Arbitration 1985 and is similar to the New Zealand Arbitration Act 1969.[1] It applies to both domestic and international arbitrations conducted in Malaysia and varies only with regard to certain aspects of the Act such as enforcement. The 1952 Act is still applicable but only in relation to arbitral proceedings commenced before 15 March 2006.[2]

With effect from year 2006, the Act is the principal source of law and regulation relating to international and domestic arbitration. Section 30(1) of the Act allows parties to a domestic arbitration to determine the substantive law applicable and in the absence of agreement, the substantive laws of Malaysia shall apply.

An international arbitration is defined in the Act as an arbitration where one of the parties to the arbitration agreement, the seat of arbitration, the subject matter of the dispute or a substantial portion of the commercial obligations of the parties lie in a state outside Malaysia. An international arbitration could also arise where parties expressly agree that the arbitration relates to more than one state. On the other hand, a domestic arbitration is defined as any arbitration that is not an international arbitration.

In relation to international arbitration, the arbitral tribunal shall determine the dispute according to the laws agreed upon by the parties as applicable to the substance of the dispute, failing which the dispute shall be decided based on the law determined by the rules on the conflict of law based on Section 30(4) of the Act.

In year 2011, the Arbitration (Amendment) Bill 2010[3] was passed to promote and encourage arbitration. Among others, the amendments passed in this bill limit court intervention and to discourage the use of inherent powers, and that no reference on a question of law is allowed unless the question of law substantially affects the rights of one or more of the parties. After the amendment, the grounds allowed under Section 10 of the Act for the court to refuse an application to stay a court proceeding for the existence of an arbitration agreement has also been reduced to just one ground, i.e. that if the arbitration agreement is null and void, inoperative or incapable of being performed.

Malaysia is a signatory to the New York Convention starting from 5 November 1985. Therefore, an arbitral award from Malaysia is enforceable in more than 148 countries which are contracting states to the New York Convention.[4] As for foreign awards where seats of arbitration are from these 148 countries, Section 38 of the Act allows such foreign awards to be recognised and enforced in Malaysia, including an award made in international arbitration with a seat in Malaysia.

Apart from the New York Convention, Malaysia is also a signatory to the Comprehensive Investment Treaty between members of the Association of Southeast Asia Nations[5] (ASEAN), as well as a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention).[6]

The main arbitral institution in Malaysia that both carries out the administration function and provides a venue for commercial arbitrations is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) established in 1978.[7]

The KLRCA maintains its own rules of arbitration, which are the KLRCA Rules. The KLRCA Rules adopt the UNCITRAL Arbitration Rules as revised in 2010, with modifications. The KLRCA has also developed other rules, amongst others, the KLRCA i-Arbitration Rules and the KLRCA Fast Track Arbitration Rules, to cater for the growing demands of the global business community. The KLRCA i-Arbitration Rules regulate arbitration of disputes arising from commercial transactions premised on Islamic principles, whereas the KLRCA Fast Track Arbitration Rules are designed for parties who wish to obtain an award in the fastest way with minimal costs.[8]

Apart from the KLRCA, arbitrations are also administered by a number of other professional institutions such as the Association of Architects of Malaysia and the Institute of Engineers Malaysia for disputes arising from the standard forms of contract provided by these institutions.

Arbitration agreement

Section 9 of the Act provides a statutory definition and form of an arbitration agreement. An "arbitration agreement" is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Provided that it is in writing, an arbitration agreement may:

(a) be an arbitration clause in an agreement signed by both parties;

(b) be in the form of a separate agreement signed by both parties;

(c) be an exchange of communication which provides a record of the agreement;

(d) arise from pleadings exchanged between parties where the existence of an arbitration agreement is alleged by one party and is not denied by the other; or

(e) be a reference in an agreement to a document containing an arbitration clause.

The Federal Court of Malaysia, in the case of ***Ajwa For Food Industries Co (Migop), Egypt v. Pacific Inter-Link Sdn Bhd,***[9] had referred and relied on two English cases of *Baker v. Yorkshire Fire and Life Assurance Company* [1892] 1 QB 144, where it was held that it is not necessary in all cases for the written agreement referring the matter to arbitration to be signed by both parties; and *Morgan v. (W) Harrison Ltd* [1907] 2 Ch 137 at p.104, where the court held that an arbitration agreement may be deduced from correspondence between the parties.

Another example is the case of ***Sebor (Sarawak) Marketing & Services Sdn Bhd v. SA Shee (Sarawak) Sdn Bhd,***[10] where the Malaysian Court held that written agreement for arbitration can be deduced from the minutes recording the agreement and the written acceptance by the arbitrator of his appointment.

Clearly for an arbitration agreement to come under the purview of Malaysian laws, it may come in various forms, and could even exist in exchange of correspondence, as long as the intention of the parties could be shown to be bound by such agreement.

Most civil disputes (as opposed to criminal matters) are arbitrable in Malaysia under the Act, so long as the parties have agreed to submit to arbitration under an arbitration agreement. Under Section 4 of the Act, there is no requirement that the dispute be commercial in nature or arise out of a contractual relationship. However, an arbitration agreement which is contrary to public policy will not be arbitrable, in which case the public policy must be considered in a Malaysian context.

Being consistent with the principle of privity of contract, an arbitration agreement does not bind a non-party or strangers to the agreement. Despite so, a party to an arbitration agreement is able to assign its rights under the agreement to a third party, by which the third party who then becomes the assignee is bound.

In line with the modern arbitral practice, the doctrine of severability/separability and the concept of *Kompetenz-Kompetenz* is well recognised under Section 18 of the Act, which provides power for an arbitral tribunal to rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement. This is consistent with Article 16 of Model Law.

Meanwhile, Section 18(2) of the Act provides that an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement, and a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.

Therefore, it is very clear from the Act that an arbitration clause can still be considered valid even if the rest of the contract in which it is included is determined to be invalid and the arbitral tribunal is empowered under Section 18(1) of the Act to make such ruling.

Given that an arbitration agreement is a contract, the grounds on which a contract can be avoided are equally applicable to a party to an arbitration agreement who intends to challenge the said arbitration agreement.

Under the Malaysian Contracts Act 1950, a contract may be avoided where it is entered without free consent, for example, when it is entered by coercion, undue influence, fraud, misrepresentation or mistake. Thus, when any of these is proven, such an arbitration agreement would become void.

Rights to arbitrate disputes failing within a valid arbitration agreement can be waived by both parties by initiating proceedings in court and taking steps in such proceedings. However, if a party initiates a court proceeding and the other party objects to the same on

the ground that there is a valid arbitration agreement, the latter party may apply to stay the court proceeding and refer the disputes to arbitration, and Section 10(1) of the Act provides that it is compulsory for the court to stay the court proceeding in the presence of a valid arbitration agreement. This shows the pro-arbitration stance intended by the parliament under the Act.

Arbitration procedure

Unless parties otherwise agree in their arbitration agreement, arbitral proceedings commence on the date on which a request is issued by one party to the other for the dispute to be referred to arbitration. Pursuant to Section 23 of the Act, the request is to be in writing. Other than this, there are no formal requirements under the Act for making the request. Some institutional rules, if adopted by the parties, may require specific matters to be stated in the request for arbitration.

An example of this is Rule 2 of the KLRCA Arbitration Rules, requiring the submission of a copy of the notice of arbitration to the director of the KLRCA, together with a copy of the arbitration agreement, confirmation of service of the notice of arbitration on all other parties, and payment of a registration fee.

Parties are also free to reach consensus on the procedures of the arbitration pursuant to Section 21 of the Act. In the absence of such agreement, the Act allows the appointed arbitrator to make directions for the rules and procedures to be followed. In international arbitration, it is not uncommon for parties to adopt memorial-style directions to be adopted, with parties following the sequence of submitting their pleadings, witness statements, documents and experts' reports.

On the issues of evidence law for arbitration, the Malaysian Evidence Act 1950, which sets out strict rules of evidence, is inapplicable to arbitration proceedings.[11] In practice, some evidential requirements are agreed by parties in which rules of evidence in common law are applied.

While the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules on Evidence) are not incorporated into the Act, it is not uncommon for experienced arbitrators in Malaysia, when dealing with domestic and international arbitrations, to take guidance from and include the IBA Rules in their procedural orders.

Under the Act, there is no specific requirement or prohibition of expert evidence. As such, whether or not evidence of experts is to be taken is dependent on the nature of the dispute, and thus the necessity of expert evidence. In accordance with Section 28 of the Act, the arbitral tribunal may appoint an expert to assist it, unless otherwise agreed by the parties.

In certain jurisdictions, the duty of confidentiality of arbitral proceedings and information is codified into their legislation, e.g. Section 14A and 14B of the New Zealand Arbitration Act 1996. There is no such similar provision under the Act, but it is common practice for parties to expressly have a confidentiality clause in their arbitration agreement so that all matters relating to the arbitral proceedings shall be treated as and kept confidential.

Rule 15 of the KLRCA Arbitration Rules does provide that the arbitral tribunal, the parties, all experts, all witnesses and the KLRCA shall keep confidential all matters relating to the arbitral proceedings including any award, except for the purposes of enforcement or challenge of an award, or to adhere to any legal duty to disclose.

Exceptions to the general rule of confidentiality are that when parties subsequently agree

to the contrary to waive the confidentiality requirement, or where a court makes an order granting permission to disregard the confidentiality obligation. Confidentiality is also not available with respect to documents in the public domain.

Each document filed in the courts and read out in open court is a public document. As such, the confidentiality of the arbitral proceedings may be lost in the event that the award is challenged and the arbitration documents are produced in the High Court. For comparison, Sections 22 and 23 of the Singaporean International Arbitration Act provide on application of the parties, that court proceedings under this Act may be heard otherwise than in open court and that parties may apply to restrict publication of information in this proceeding. However, there is no such corresponding provision under the Act.

There is no relevant statutory governing provision in respect of matters to which the duty of confidentiality extends, as to whether it covers the existence of the arbitration, pleadings, documents produced, the hearing and/or the award; it depends on any confidentiality agreement entered into by the parties.

Arbitrators

The Act promotes parties' autonomy, according to which parties are free to determine the number of arbitrators of their own volition. In the absence of agreement, the Act provides that there shall be three arbitrators in an international arbitration, and one arbitrator in a domestic arbitration (Section 12).

Section 13 of the Act further provides that parties have freedom to determine the procedure for appointing the arbitrator or the presiding arbitrator. Otherwise, the Act provides procedures on the same, which generally cover three circumstances which may possibly arise, i.e. (i) if there is no agreement between the parties on the appointment procedure in their arbitration agreement, (ii) if there is disagreement between the parties, or (iii) if they refuse to exercise the right to appoint a member of the arbitral tribunal. In any of these situations, parties may request the Director of KLRCA to appoint the arbitrator, who must do so within 30 days, failing which the parties may apply to the High Court for such appointment.

An arbitrator owes a statutory duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence under Section 14(1) of the Act. The circumstances which can raise an issue as to impartiality, among others, are that the arbitrator is engaged in a personal, business or professional relationship with one party to a dispute, or that he has an interest in the outcome of the dispute.

As such, the issue as to the impartiality or independence of an arbitrator is one of the grounds to challenge an arbitrator. To bring such a challenge, parties must be able to show justifiable doubts as to the impartiality or independence of the arbitrator.

Apart from this, an arbitrator may be challenged if he does not possess the necessary qualifications agreed to by the parties, as provided under Section 14(3) of the Act.

In practice, the application of the IBA Guidelines on Conflicts of Interest, which require all arbitrators to be free of bias, has been pervasive in Malaysia. There are specific declaration forms given by both Pertubuhan Arkitek Malaysia (PAM), which is the Malaysian Institute of Architects, and the KLRCA which must be signed by every arbitrator before confirmation of their appointment. In Malaysia, experienced arbitrators who deal with domestic and international arbitrations are well aware of the said guidelines.

Interim relief

The Act confers power on the arbitral tribunal to order interim relief respecting the subject matter of the dispute, and the order is only addressable to the parties to the arbitration agreement. This power is enshrined in the Act under Section 19: "[U]nless otherwise agreed by the parties, a party may apply to the arbitral tribunal for any of the following orders: (a) security for costs; (b) discovery of documents and interrogatories; (c) giving of evidence by affidavit; and (d) the preservation, interim custody or sale of any property which is the subject matter of the dispute." Section 19(2) also provides that the arbitral tribunal may require any party to provide appropriate security in connection with the measures that are ordered. In the absence of parties' agreement or adoption of rules of arbitration in the arbitration agreement in relation to the procedures for applying interim reliefs, it is at the discretion of the arbitral tribunal to determine such procedures. The arbitral tribunal will apply the common law tests when determining whether or not to grant a particular interim relief that is sought by the parties, and the interim measure will be granted in the form of an interim award which attracts the application of provisions (Section 38 and 39) under the Act relating to the recognition and enforcement of an award.

Pursuant to Section 11 of the Act, a party may apply to the High Court for any interim measure before or during arbitral proceedings for similar interim relief and in addition, amongst others, appointment of a receiver and security for the amount in dispute. Parties cannot contract the statutory right to seek interim reliefs from the High Court under Section 11 of the Act out of their arbitration agreement.

Despite that the High Court may grant interim reliefs in support of arbitrations in an international arbitration regardless of whether the seat of arbitration is in Malaysia, the High Court should be mindful of Sections 8 and 10 of the Act which set a limitation on court intervention. Section 8 expressly provides that "no court shall intervene in matters governed by this Act, except where so provided in this Act". Meanwhile, the use of the word "shall" in Section 10 renders it mandatory for the court to grant a stay of court proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed.

An arbitrator has the power equivalent to that of a judge in court after the constitution of the arbitral tribunal. However, parties should first make an application to the arbitral tribunal unless such an interim order is to bind third parties or is to be enforced effectively where it cannot be done by the interim order made by the arbitrator.[12]

The parliament's intention of this is demonstrated in Section 11(2) of the Act, which provides that "[W]here a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application." This corresponds to the rationale that the arbitrator is in a better position to make an expeditious and informed decision on the interim relief sought, given that the arbitrator has already had all facts and possibly documents presented before him in the pending arbitration. In cases of *ex parte* and urgent applications, parties should be allowed to apply to the courts for such interim relief, as such similar application to the arbitrator may prevent the necessary element of surprise, or result in delay.

It is a matter of discretion whether or not an arbitral tribunal is to make an award for security for costs. It may depend on whether there is evidence of a real risk that the respondent would not be able to recover the costs incurred from the claimant, and the likely effect of awarding such security for costs on stifling a genuine claim of the party against whom the security is sought.

Arbitration award

The requirements for an arbitration award are provided under Section 33 of the Act which provides that an award shall be made in writing and be signed by the arbitrator(s). In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall be sufficient, provided that the reason for any omitted signature is stated (Section 33(2)).

Additionally, an award shall state the reasons upon which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms. An award shall also state its date and the seat of arbitration. Unless otherwise agreed by the parties, an award has to be a reasoned award whereby it should set out the facts, the explanation of the arbitral tribunal's findings, and how the arbitral tribunal reached its conclusion. This is to enable the parties to comprehend the award and understand why certain points were decisive.

Nothing in the Act requires the award to be rendered within a specific time frame. Section 46 of the Act gives the High Court power to grant an extension to any limitation of time in the arbitration agreement for an award be issued. This intervention by the court can, nonetheless, be excluded by the agreement of the parties. Under Rule 11 of the KLRCA Arbitration Rules, the default period for rendering of final award is limited to three months from the date of final submissions, extendable by consent of parties and consultation of the Director of the KLRCA.

Rule 11 of the KLRCA Fast Track Arbitration Rules (revised 2013) even provides that for a document-only arbitration, the arbitral tribunal shall publish the final award no later than 90 days from the commencement of the arbitration. With regard to an arbitration with a substantive oral hearing, the arbitral tribunal shall publish the final award expeditiously and no later than 160 days from the commencement of the arbitration, extendable by agreement.

As for costs, in the absence of agreement, Section 44 of the Act vests in arbitral tribunals the discretion to award costs. The principles for awarding costs are derived from the common law, and the arbitral tribunal may refer to existing Malaysian case laws and the relevant provision in the Rules of Court 2012, where appropriate. The general rule is that costs follow the event, wherein the unsuccessful party will bear the costs. In any event, if parties wish not to follow the general rule, they should state the reasons for doing so. Articles 40 to 42 of the UNICTRAL Rules, adopted in the KLRCA rules, provide jurisdiction on determination and allocation of costs.

In practice, the arbitral tribunal may take into account, amongst others, the following factors in considering the quantum of cost to be awarded:[13]

- the complexity of the matter;
- the requirement of skill, specialised knowledge and responsibility, and the expenditure of time and labour, by the solicitor or counsel;
- the value of the subject matter in dispute; and
- whether there are other solicitors or counsel who get paid for the work done, and so the amount of work required has been reduced.

Unless otherwise agreed by the parties, Section 33(6) of the Act provides that the arbitral tribunal may award interest on any sum of money ordered and determine the rate of interest, where the tribunal is allowed to make reference to the interest rates that may be awarded by the Malaysian courts. However, there is no provision in the Act that expressly allows pre-award interest to be awarded, hence leaving this issue open to argument. In such instance, parties may make an express agreement to grant jurisdiction to the arbitral tribunal to award pre-award interest.

Challenge of the arbitration award

An arbitral award is final and binding against the parties to an arbitration agreement and those parties cannot appeal the award under the Act.[14] However, where the seat of the arbitration is in Malaysia, the parties may apply to have the award set aside by the High Court. It appears that such right to set aside the award cannot be excluded by the parties.

An application to set aside an award must be made within three months of receipt of the award under Section 37 of the Act. Parties may apply to set aside an award based on the grounds and circumstances set out in Section 37 which include but are not limited to the following:

- the award is in conflict with the public policy of Malaysia;
- the making of the award was induced or affected by fraud or corruption; or
- a breach of the rules of justice occurred.

Nonetheless, an application to set aside an award does not automatically stay the enforcement of the award, and parties have to make an application to stay such enforcement.

Despite not having a right to appeal, parties may refer questions of law arising out of an award to the High Court, which fundamentally affect the rights of one or more of the parties, for a decision under Section 42 of the Act. In determining a question of law, the High Court has the power to affirm, vary, set aside or remit the award to the arbitral tribunal for reconsideration of the relevant question/issue.

However, it is to be noted that parties may waive such rights to appeal to the High Court, as evidenced in rule 1(b)(ii) of the KLRCA Rules, which says that where the seat of arbitration is Malaysia, Section 41, Section 42, Section 43 and Section 46 of the Malaysian Arbitration Act 2005 (Amended 2011) shall not apply.

Section 35 of the Act provides for correction and interpretation of an award or additional award. In any event, if the arbitral tribunal considers the request made to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request, and such interpretation shall form the award. Also, the arbitral tribunal may correct any error of the type referred to in part (a) abovementioned on its own initiative within 30 days of the date of the award.

In furtherance to that, unless otherwise agreed by the parties, a party may, within 30 days of receipt of the award and upon notice to the other party, request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. Should the arbitral tribunal consider the request justified, it shall make the additional award within 60 days from receipt of such request.

In any event, the arbitral may extend the period of time within which it shall make a correction, interpretation or an additional award, when it thinks necessary.

Enforcement of the arbitration award

Generally, an arbitration award is enforceable by making an application under Section 38 of the Act to recognise such award. As mentioned earlier, a foreign arbitration award can be enforced in Malaysia, subject to and in accordance with Section 38 of the Act.

To enforce an arbitration award, registration of the award as a judgment of the High Court is required. An application for enforcement is made *ex parte* and is usually ordered as of right, whereupon the arbitration agreement and a duly certified copy of the award (with a translation into English if it is neither in the national language nor the English language) are produced. The order for registration of the award is to be served on the respondent, who

has 14 days to make an application to set aside the registration. Pending the disposal of the application to set aside the registration, the enforcement of the award will be stayed.

Registration or enforcement of an award may be refused based on the grounds set out in Section 39 of the Act. None of the grounds concern the merits of the arbitration award. This simply shows that the Malaysia courts, when determining whether an award ought to be registered, will not sit on appeal over the correctness of the award. However, if the merits of the award may be challenged under the laws of the country which issued the award and on which basis the award is set aside; such an award is not capable of registration in Malaysia.

Recent authorities in Malaysia have suggested that the Malaysian courts are maintaining friendly attitudes towards arbitration and are therefore more inclined to recognising and enforcing arbitration awards. This is demonstrated in a Federal Court decision in ***Government of India v. Cairn Energy India Pty Ltd & Anor***.[15]

Investment arbitration

Malaysia is a signatory to a number of bilateral investment treaties. Thus far, Malaysia has entered into 71 bilateral investment treaties (BITs), starting with its first BIT signed with the Netherlands on 15 June 1971,[16] and last BIT signed with Syrian Arab Republic on 7 January 2009.[17]

* * *

Endnotes

1. Sundra Rajoo, WSW Davidson, "The Arbitration Act 2005", *Introduction,* Sweet & Maxwell Asia, 2007 (page 2).
2. Section 51(2) of the Act.
3. The Malaysian Parliament's website at http://www.parlimen.gov.my/files/billindex/pdf/2010/DR422010E.pdf.
4. New York Convention Arbitration's website at http://www.newyorkconvention.org/countries.
5. Nuclear Threat Initiative's website at http://www.nti.org/learn/treaties-and-regimes/association-southeast-asian-nations asean/.
6. International Centre for Settlement of Investment Disputes's website at https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.
7. The Kuala Lumpur Regional Centre's wesbite at https://klrca.org/.
8. The Kuala Lumpur Regional Centre's wesbite at https://klrca.org/Arbitration-Fast-Track-Arbitration.
9. [2013] 7 CLJ 18.
10. [2000] 1 LNS 15; [2000] 6 MLJ 1 at 7.
11. Section 2 of the Malaysian Evidence Act 1950.
12. *Lady Muriel (Owners) v Transorient Shipping Ltd (The Lady Muriel)* [1995] 2 HKC 320.
13. Order 59 Rule 16 of the Rules of Court 2012.
14. Section 36 of the Act.
15. [2011] 6 MLJ 441.
16. The United Nations Conference on Trade and Development's website at http://investmentpolicyhub.unctad.org/IIA/CountryBits/127.
17. *Ibid*.

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Nigeria

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Introduction

The main arbitration law of Nigeria is the Arbitration and Conciliation Act 1988 (ACA) (Cap A18 Laws of the Federation of Nigeria 2004). ACA is largely based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, with minimal differences. Nigeria is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and ACA domesticated Nigeria's treaty obligations arising under the New York Convention. Nigeria is a party to some Regional Conventions concerning the recognition and enforcement of arbitral awards. See, for instance, the Economic Community of West African States (ECOWAS) Energy Protocol. Article 26 thereof provides for the settlement of disputes between a contracting state and an investor by the International Centre for Settlement of Investment Disputes (ICSID), if the investor's country and that of the contracting party are both parties to the ICSID Convention or a sole arbitrator or *ad hoc* arbitration tribunal established under the United Nations Commission on International Trade Law (UNCITRAL) Rules, or an arbitral proceeding under the Organisation for the Harmonisation of Trade Laws in Africa (OHADA). There is also the Treaty of ECOWAS (1993 revised Treaty). Article 16 thereof establishes an Arbitration Tribunal whose powers, status, composition and procedure were to be set out in a subsequent protocol.

In 1989, the Regional Centre for International Commercial Arbitration Lagos (RCICAL) was established in Lagos, Nigeria under the auspices of the Asian African Legal Consultative Organisation (AALCO) as a non-profit, independent, international arbitral institution to provide, amongst other things, a neutral forum for dispute resolution in international commercial transactions. Its establishment is also geared towards encouraging settlement of disputes arising from international trade and commerce and investments within the region where the contract was performed. The continued operation of the RCICAL in Nigeria was ratified by a treaty executed in April 1999 between Nigeria and the AALCO. The legal framework for the existence of the RCICAL in Nigeria is embodied in the Regional Act No. 39 of 1999. The RCICAL has an autonomous international character and enjoys diplomatic privileges and immunities under international law for the unfettered conduct of its functions. See the Diplomatic Immunities and Privileges (Regional Centre for International Commercial Arbitration) Order 2001. RCICAL renders assistance in the enforcement of awards made under its Rules. See Rules 35.6 and 35.8 of RCICAL Rules.

There is no different arbitration law for international arbitration as ACA governs both domestic and international arbitration. There are myriad arbitral institutions in Nigeria including but not limited to the Lagos Court of Arbitration, the Regional Centre for International Commercial Arbitration and the Lagos Multi-Door Courthouse. Foreign

arbitral institutions also have branches in Nigeria such as the International Chamber of Commerce Nigeria and the Chartered Institute of Arbitrators, UK (Nigeria Branch). Each of these institutions have their respective rules governing arbitration and parties may elect that arbitrations be subject to the rules of the institutions rather than the rules attached to ACA. There are no special courts for international arbitration, but for a foreign arbitral award to enforced or for an application to set aside an arbitral award, an application must be made either to the Federal High Court or to the High Court of the State.

Arbitration agreement

The basic legal requirement of an arbitration agreement under this law is that an arbitration agreement must be in writing or must be contained in a written document signed by the parties. Section 1 of ACA provides that every arbitration agreement shall be in writing and contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement, or in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another. Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract. This provision presupposes that arbitration must be consensual and indicates that an arbitration agreement may either be an express clause in a contract whereby parties agree to refer future disputes to arbitration, or in a separate document (Submission Agreement), whereby parties agree to submit their existing dispute to arbitration. An arbitration agreement may also be inferred from written correspondence or pleadings exchanged between parties.

However, there are situations of non-consensual or compulsory arbitration, as depicted in statutes and consumer standard form contracts. For instance, under the Pension Reform Act, the regulator National Pension Commission, PENCOM, can refer any dispute to arbitration. Also, under the National Investment Promotion Act, any foreign investor who registers under the Act is automatically entitled to bring a treaty arbitration under the ICSID system. Arbitration provisions contained in such statutes are deemed to be binding on any person to whom they apply.

The following additional legal requirements for a valid arbitration agreement can be distilled from the provisions of ACA:

5.1 The arbitration agreement must be in respect of a dispute capable of settlement by arbitration under the laws of Nigeria. See section 48(b)(i) and 52(b)(i) ACA.

5.2 The parties to the arbitration agreement must have legal capacity under the law applicable to them. See section 48(a)(i) and section 52(2)(a)(i) ACA.

The arbitration agreement must be valid under the law to which the parties have subjected it or under the laws of Nigeria. In other words, the agreement must be operative, capable of being performed and enforceable against the parties. See sections 48(a)(ii) and 52(a)(ii) ACA.

ACA does not stipulate any particular subject matter that may not be referred to arbitration. The question of whether or not a dispute is arbitrable is therefore left for interpretation by the courts. In ***Ogunwale v. Syrian Arab Republic*** *(2002) 9 NWLR (Part 771) 127,* the Court of Appeal held that the test for determining whether a dispute is referable to arbitration is that the dispute or difference must necessarily arise from the clause contained in the agreement. However, not all disputes are necessarily arbitrable. Only disputes

arising from commercial transactions are referable to arbitration (see section 57(1) of ACA on the definition of arbitration and commercial disputes). Disputes not falling within the category of commercial disputes (e.g. domestic disputes), would not be arbitrable under ACA, though they may be referable to customary arbitration. Such disputes as competition or anti-trust disputes with elements of criminality and nullification of patent rights are generally not arbitrable, although there are some exceptions. In ***Federal Inland Revenue Service v. Nigerian National Petroleum Corporation & 2 Ors. - Suit No. FHC/CS/774/2011,*** a case involving the Federal Inland Revenue Service (FIRS), NNPC, Shell Petroleum and other international oil companies (IOCs) operating in Nigeria, a Federal High Court in Abuja voided an arbitral award under a Joint Operating Agreement between the government and the IOCs on the ground that the subject matter of the arbitration (interpretation, application and administration of the Petroleum Profit Tax Act, the Deep Offshore Act, Education Tax Act and Company Income Tax Act) was not arbitrable, but was a function solely to be carried out by Federal Inland Revenue Service. However, the Court of Appeal in ***Statoil (Nig) Ltd v. Nigerian National Petroleum Corporation (2013) 14 NWLR (Pt. 1373) 1*** effectively overturned the decision of the Federal High Court. The Court of Appeal essentially held that jurisdiction of an arbitral tribunal is premised on the agreement of the parties and that parties are to be bound by their agreement, implying that, albeit the dispute may be related to taxation matters, if the parties agree to refer it to arbitration, then the arbitral tribunal has jurisdiction.

Also, some matters are generally more suitable for litigation than arbitration. For instance, applications for immediate enforcement of rights or preservation of *res,* e.g. the enforcement of fundamental human rights, application for *Anton Pillar, Mareva* and other injunctions, are less suitable for arbitration than litigation. In addition, since an arbitrator has no statutory power of joinder under ACA, multi-party proceedings may be less suitable for arbitration under ACA, unless the arbitration agreement makes specific provision for it. It is hoped that ACA may be revised to address multiparty provisions, as other arbitral institutions like the International Chamber of Commerce (ICC) and UNCITRAL Rules have done.

Section 40(3) of the Lagos Arbitration Law provides that a party may, by application and with the consent of the parties, be joined to arbitral proceedings, but ACA does not contain such provision. It follows that whilst Federal law does not allow joinder of non-parties, conceptually such a joinder is possible under the Lagos Arbitration Law. At present, no jurisprudence has developed on this point. In contemporary practice and with the spate of increase in multi-party (and multi-contract) arbitrations, parties who were not parties to the original arbitration agreement are made to submit to the jurisdiction of an arbitral tribunal. For instance, in ***FGN v. CTTL*** (Unreported Suit No. FHC/L/CS/421/2009), the Federal High Court refused to set aside an ICC award against the Federal Government of Nigeria, a non-signatory and its state agency which signed the arbitral agreement, on the basis that though FGN was not a party to the agreement, it had given presumed consent by its conduct and involvement with the execution and implementation of the contract.

ACA cloaks the arbitral tribunal with power to rule on its own jurisdiction – the competence-competence rule. There is no specific provision in ACA that an arbitration is separable from the substantive contract. However, there is copious jurisprudence that an arbitration agreement is severable and separate from the substantive contract and therefore survives novation, unenforceability, termination or otherwise of the substantive contract, such as ***NNPC v Klifco (Nig) Ltd (2011) 10 NWLR (Pt. 1255) 209***.

Arbitration procedure

Arbitral proceedings are commenced by the issuance or communication of a Notice of Arbitration by the Claimant to the Respondent in the prescribed format in Article 3 of the Rules attached to the ACA. A 30-day notice period is stipulated.

Technically, evidential hearings can take place outside the seat of arbitration, although the law of the seat of arbitration would apply. Parties are at liberty to elect to have the hearings in a place other than the seat of arbitration. However, in practice and owing to administrative convenience in terms of access to the national courts for the enforcement of orders or interim preservatory orders, parties tend to have hearings in the same jurisdiction as the place where the hearing is held.

ACA and the Arbitration Rules contain minimal procedural provisions on rules of evidence. (See section 20 ACA and Articles 24-29 of the Rules.) In Nigeria, the substantive law of evidence in legal proceedings is the Evidence Act 2011. This Act repealed the old Evidence Act (Cap E.14 Laws of the Federation of Nigeria 2004) which provided in section 1(2)(a) that the Evidence Act is not strictly applicable to arbitral proceedings. The 2011 Evidence Act does not expressly exclude arbitral proceedings from its application, but the preamble "*...A New Evidence Act which shall apply to all judicial proceedings in or before courts in Nigeria; and for related matters"* implies that the Act does not strictly apply to arbitration. However, the general rules of evidence, like fair hearing, natural justice, equal treatment of parties and full opportunity of parties to present their case, rule against hearsay evidence, etc., are applicable to arbitral proceedings by virtue of the provisions of ACA and case law. With the agreement of parties, an arbitral tribunal may adopt any other rules of evidence which it considers appropriate. Tribunals in Nigeria sometimes adopt the International Bar Association (IBA) Rules of Taking Evidence.

By section 20(6) of ACA, which provides that "no person can be compelled under any writ of subpoena to produce any document which he could not be compelled to produce on the trial of an action", it appears that the general rules on privileged documents will apply in arbitration. Generally, privileged communications include: any document or communication made between a legal practitioner (whether external or in house counsel) and his client in the course of his engagement (see ***Abubakar v. Chuks*** *(2007) 18 NWLR (Part 1066) SC 386);* documents or agreements made without prejudice between parties in the course of negotiations; and documents which, by consent and agreement of parties, have been agreed not to be used in proceedings. Documents or communications made in furtherance of an illegal purpose or showing that a crime or fraud has been committed are not privileged. Parties may agree that a document which is ordinarily privileged, should be tendered in evidence. In such cases, privilege is deemed to have been waived. Privilege is also deemed to be waived where a party calls his counsel (external or in house) as a witness and questions are put to the Counsel on privileged matters.

Article 24(3) of the Arbitration Rules provides that the tribunal may, at any time during the arbitral proceedings, require the parties to produce documents, exhibits, or other evidence within such a period of time as the arbitral tribunal shall determine. Section 20(6) of ACA provides that any party to an arbitral proceeding may issue a writ of subpoena *ad testificandum* or subpoena *duces tecum,* i.e. for the purpose of compelling attendance of a witness to give oral testimony or to produce documents. By these provisions, an arbitral tribunal has the authority to order the disclosure of documents (including third party disclosure). This power is, however, limited by the *proviso* in section 20(6) of ACA to the extent that no person can be compelled under any writ of subpoena to produce any

document which he could not be compelled to produce on the trial of an action.

By virtue of section 23(1) of ACA, a court is able to intervene to compel the disclosure of documents. Section 23(1) provides that the court or judge may order that a writ of subpoena *ad testificandum* or of subpoena *duces tecum*, shall issue to compel the attendance before any tribunal of a witness wherever he may be within Nigeria. Thus where, under section 20(6) of ACA or Article 24(3) of the Arbitration Rules, any person refuses to produce documents requested by a party or by the tribunal, the court can compel the disclosure or production of documents.

There is no ACA provision on confidentiality. While Article 25 (4) of the rules attached to ACA provides that hearings shall be held in camera, this only means that proceedings shall be conducted by the arbitral tribunal, the registrar, the parties alone, their counsel and representatives and any other person allowed by the parties to be present, to the exclusion of the general public. The provision does not impose an obligation not to disclose the proceedings to third parties. In practice, however, parties tend to keep proceedings confidential because the substantive contract usually contains a confidentiality clause by which the parties are bound. There are no rules mandating counsel to consider the London Court of International Arbitration (LCIA) Guidelines or IBA Guidelines, but parties may elect to abide by them. There are no provisions on the evidence of expert witnesses.

Arbitrators

Under ACA, parties have autonomy to appoint arbitrators of their choice. This autonomy is, however, limited to the extent that the arbitrators so-appointed must be independent and impartial and must make a declaration or disclosure of any circumstances that may affect their independence or impartiality. Also, the parties' choice of arbitrators must be in accordance with the arbitration agreement itself. For instance, the chosen arbitrator(s) must have the experience or professional qualification stipulated in the arbitration agreement, in order to have a properly composed tribunal and, consequently, a valid award.

Under ACA, parties are free to agree on the method of appointment of arbitrators, but where they do not stipulate the method, or the method chosen by them fails, the arbitrator(s) will be appointed by the court. Section 7 of ACA prescribes a default procedure. It provides that the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator. Where no procedure is specified, in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, but if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement.

In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement made within 30 days of such disagreement. Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under the procedure, or the parties or two arbitrators are unable to reach agreement as required under the procedure or a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment. A decision of the court under subsections (2) and (3) of section 7 shall not be subject to appeal.

See the case of ***Ogunwale v. Syrian Arab Republic*** *(2002) 9 NWLR (Part 771) 127,* where the court held that by virtue of section 7(4) of the Arbitration and Conciliation Act, a decision of the High Court relating to the appointment of an arbitrator shall not be subject to appeal. However, it is only a decision strictly within sections 7(2)(a) and (b) and section 7(3)(a), (b) and (c) of the Act that shall not be subject to appeal. The court further held that sections 7(4) and 34 of the Arbitration and Conciliation Act cannot override the right of appeal conferred on a party by section 241(1) of the 1999 Constitution, as such right of appeal has constitutional backing.

It is a fundamental requirement under ACA that an arbitrator must be independent and impartial. The arbitrator has a duty to ensure and maintain his independence and impartiality and to disclose any circumstances which may affect his independence and impartiality. This duty endures throughout the arbitration proceedings, covering all parties until the final award. A breach of it may constitute misconduct for which an award may be set aside. Even a party-appointed arbitrator is bound by this duty to be and to remain independent and impartial. The requirement of independence and impartiality of an arbitrator is emphasised by section 9 of ACA and the section provides for the challenge of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Generally, the concept of impartiality presupposes that an arbitrator must not be biased in favour of one of the parties or as regards the issues in dispute. Independence and neutrality presupposes that the arbitrator has no such relationship or derives no such benefits from any of the parties as would oblige him to act in favour of that party. From the wordings of section 8 of ACA, the arbitrator's duty to maintain his independence and impartiality or his duty of disclosure is a mandatory provision from which the parties cannot derogate. Article 12 of the 2008 Arbitration Rules of the Regional Centre for International Commercial Arbitration Lagos contains similar provisions on the independence and impartiality of an arbitral tribunal. Article 12.2 thereof emphatically provides that no arbitrator shall act in the arbitration as an advocate of any party and no arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute.

ACA does not provide for arbitrator immunity, but the Lagos Arbitration Law 2009 provides for arbitrator immunity. Section 18 of the Lagos Law provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of the arbitrator's functions as arbitrator, unless the act or omission is determined to have been in bad faith. This provision applies to an employee or agent of an arbitrator as it applies to the arbitrator, but it does not affect any liability incurred by an arbitrator by reason of resignation. Article 45 of the Regional Centre Rules provides for absolute immunity on the Regional Centre staff, director, arbitrators and experts for any act or omission in connection with any arbitration conducted under the Rules.

Arbitral secretaries are now being frequently used in arbitrations to limit direct interface between the arbitral tribunal and the parties with their counsel and for greater administrative convenience. Many arbitral institutions now encourage presiding or sole arbitrators to select arbitral secretaries from qualified arbitration practitioners in their database. There are no rules governing arbitral secretaries but they would be bound by the same standards governing the arbitrators. All arbitrators are bound by the rules of professional conduct promulgated to regulate standards of service and professionalism in the respective arbitral institutions to which they belong. For instance, the Chartered Institute of Arbitrators, UK has its Code of Professional and Ethical Conduct for Members. In a similar manner, the Lagos Multi-Door Courthouse has its Code of Ethics for Arbitrators.

Interim relief

Under ACA, an arbitral tribunal has the power to order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, and to require any party to provide appropriate security in connection with any measure taken. (See section 13 of ACA.) There is no restriction on the type of interim reliefs which the tribunal can grant; however, it is suggested here that in awarding interim reliefs, the tribunal should be careful to act within the scope of its jurisdiction, as determined from the arbitration agreement and the law applicable to the contract.

Although section 13 of ACA confers on the tribunal the power to grant interim reliefs without recourse to court, it is doubtful if the tribunal can enforce compliance with its interim orders since the tribunal has no coercive powers. The Lagos Arbitration Law 2009 puts it more clearly by providing in section 29(1) that an interim measure issued by an arbitral tribunal shall be binding, unless otherwise provided by the arbitral tribunal, recognised and enforced upon application to the High Court by a party, irrespective of the jurisdiction or territory in which it was issued, subject to the provisions of subsections (2) and (3) of this section. Article 29 of the Regional Centre Rules also gives the tribunal power to grant interim measures; it provides that such interim measures may be made in the form of an interim award.

ACA does not expressly give the courts the power to grant interim relief in respect of arbitral proceedings. However, the courts are entitled by the Rules of Court and under their inherent jurisdiction to grant interim orders in any matter where there is a situation of urgency and this power of court can be inferred from Article 26(3) of the Arbitration Rules. Thus, once a party can show that there is a situation of urgency which will cause irreparable harm if not remedied by an interim order of the court, the court is entitled to grant the order. (See ***Afribank v. Haco*** *supra.)* See also ***Maevis v. FAAN*** (Unreported Suit No. FHC/L/CS/1155/2010).

In the recent case, ***Nigerian Agip Exploration Ltd v. Nigerian National Petroleum Corporation and Oando Oil*** (***NAEL v. NNPC***, unreported CA/A/628/2011), (February 25 2014), the court emphasised that urgency is a condition for the granting of an interim injunction, stating that such injunctions are "granted in cases of extreme urgency so as to preserve the *'res'* pending the determination of the motion on notice".

The Lagos Arbitration Law expressly confers on the court the power to make interim orders in respect of arbitral proceedings. (See sections 6(3) and 21 thereof.)

A party's request for interim relief would in most cases have effect on the *res,* i.e. the subject matter of the dispute, and the parties' or tribunal's dealings with it, rather than on the tribunal's jurisdiction. However, if the nature of interim relief sought affects the arbitral proceeding itself, such as where the relief is sought to restrain the commencement or continuance of arbitration on the grounds that the dispute is not arbitrable or that the arbitration agreement is not valid, etc., then the tribunal's jurisdiction may be affected by the request for relief. Be that as it may, if an arbitral tribunal has already been constituted, such objections or grounds ought to be brought before the tribunal itself.

Arbitral tribunals are empowered to grant interim measures by virtue of Section 13 of the ACA while, by virtue of Section 34 of ACA, the national courts are restrained from intervention save as specifically provided under ACA. There is no express provision for the enforcement of interim measures granted by an arbitral tribunal but it is foreseeable that in the event a party attempts to flout such an interim measure, recourse could be had to the national court to prevent such contemptuous attitude.

The Arbitration Law of Lagos State 2009 is of great assistance, however, by virtue of its Sections 21 to 30. Specifically, an interim measure granted by an arbitral tribunal is given binding enforceability upon application to the High Court (Section 29).

Interestingly, there are two conditions for the grant of an interim measure, *viz*. (i) that monetary damages will not be adequate remedy should the interim measure not be granted, and (ii) that there is a serious issue to be determined in the substantive claim which would not fetter the discretion of the arbitral tribunal to make subsequent determination.

The arbitral tribunal is additionally empowered to extend, modify, suspend or terminate any interim measure. There is also provision for the tribunal directing for security for the interim measure to be supplied by the applicant party. The applicant party in whose favour an interim measure is granted is also mandated to inform the tribunal of any material change in circumstances on which basis the interim measure was granted *ab initio*. Where a tribunal finds that an interim measure ought not to have been granted, it is empowered to award costs against the beneficiary party.

ACA does not provide for anti-suit injunctions in aid of arbitration and this procedure has not been tested in Nigeria to our knowledge. The courts are, however, empowered under ACA (Sections 4 and 5) to order a stay of court proceedings commenced in breach of an arbitration clause.

ACA also does not provide for anti-arbitration injunctions, but a court can grant them under its inherent jurisdiction. In the unreported case, Court of Appeal ***Case No: CA/L/331M/2015 – Shell Petroleum Development Company of Nigeria and Ors v Crestar Integrated Natural Resources Limited***, the Court granted an anti-arbitration injunction against the Claimant in the arbitral proceedings.

The national courts have the power to order security for costs under the various Rules of Court. ACA confers similar powers on an arbitral tribunal, but does not confer an express power on the courts to order security for costs in relation to arbitration proceedings. Section 13(b) of ACA provides that the arbitral tribunal may require any party to provide appropriate security in connection with any interim measure made or taken. Sections 26(1) and 29(3) of the Lagos Law contain similar provisions.

Arbitration award

Section 26 of ACA sets out the legal requirements of an arbitral award. It provides that an arbitral award must be written, signed by the arbitrator (or a majority of them in the case of three arbitrators), state the date and place it was made, contain the reasons on which it is based and be published to the parties. Also, an arbitral award must not contain decisions or deal with disputes or matters not submitted to arbitration, must be in accordance with the arbitration agreement and governing law, must be enforceable and must not be contrary to public policy. (See sections 48 and 52 of ACA.) ACA does not state that an must award be signed on every page by the arbitrator(s), but in practice, some arbitrators sign every page of the award for authenticity.

Section 49 of ACA provides that the arbitral tribunal shall award costs in its award. Costs include the fees of the arbitral tribunal, travel and other expenses incurred by the arbitrators, the cost of expert advice and of other assistance required by the arbitral tribunal, travel and other expenses of witnesses to the extent approved by the tribunal, reasonable costs of legal representation and assistance of the successful party that were claimed during the arbitral proceedings. The general practice is that costs follow the event and the unsuccessful party pays the costs, subject, however, to the circumstances of each case, for instance, the extent

to which the other party has been guilty of delay in the course of the arbitral proceedings. Article 40 of the Arbitration Rules gives the arbitral tribunal the power to apportion costs between the parties based on the circumstances of the case. ACA does not list all the circumstances that may affect apportionment of costs. However, the effect of sealed offers or settlement offers is one relevant factor which arbitrators generally consider. The High Court of Lagos State Civil Procedure Rules 2012 has expressly introduced the effect of settlement offers in the award of costs in judicial proceedings by the provision of Order 49(2) that where an offer of settlement made in the course of Case Management or ADR is rejected by a party and the said party eventually succeeds at trial but is awarded orders not in excess of the offer for settlement made earlier, the winning party shall pay the cost of the losing party from the time of the offer of settlement up to judgment. It is hoped that the proposed amendments to ACA would include this express provision.

ACA does not give an arbitrator express powers to award interest. However, an arbitrator has inherent powers to award interest on amounts successfully claimed based on the overriding principle of award of interest, which presupposes that interest should be awarded to the claimant not as compensation for the damage done, but for being kept out of money which ought to have been paid to him. (See ***N.B.N. Ltd. v. Savol W.A. Ltd.*** *(1994) 3 NWLR (Part 333) Page 435 at 463;* and ***R.E.A. v. Aswani Textile Industries*** *(1991) 2 NWLR (Part 176) 639 at 671*.)

Challenge of the arbitration award

In Nigeria, an arbitral award is final and binding. An award can only be challenged on limited grounds as stipulated in ACA. A party may apply to court to set aside the award or to refuse recognition and enforcement of the award on special grounds under sections 29, 30, 48 and 52 of ACA. Such grounds include:

- Incapacity of a party to the arbitration agreement.
- The arbitration agreement is not valid under the law which the parties have indicated should be applied or under Nigerian law.
- A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case.
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.
- The award contains decisions on matters which are beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place.
- The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.
- The subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or the recognition or enforcement of the award is against public policy of Nigeria.

Beyond these, an award cannot ordinarily be challenged in substance. See: ***Baker Marina (Nig.) Ltd. v. Danos & Curole Contractors Inc.*** *(2001) 7NWLR (Part) 712 p. 340;* ***Ebokan v. Ekwenibe & Sons Trading Co.*** *(2001) 2NWLR (Part) 696 p. 32 at 36;* and ***Ras Pal Gazi Const.Co. v. F.C.D.A.*** *(2001) 10NWLR pt.722 p. 559 at 564.*

In the case of ***Mutual Life and General Insurance Ltd v. Kodi Iheme*** (*2013) 2, CLRN, 68*, the court held that "there must be an error of law on the face of the award to set aside an arbitral award". This demonstrates that the Nigerian Courts will not be eager to set aside awards where the parties have agreed to resolve their dispute by arbitration and abide by the decision of the arbitral tribunal.

Also, in the case ***NAEL v. NNPC*** (*supra*), the Court of Appeal justified the restrictions for setting aside an award by stating that "the underlining principle of arbitration is to ensure that parties who have voluntarily elected independent umpires whom they trust to settle their matters should be bound by the decision of the arbitrator without resort to the courts". ACA provides for certain exceptions for the court to intervene in the "interest of justice and fair play".

An arbitral tribunal is properly empowered to clarify, correct, amend or make an additional award pursuant to the provisions of Section 28 of ACA. This power may be exercised *suo motu* or upon a request by a party. It is germane to note that this power is limited to thirty (30) days and is therefore not a power open to be wielded in perpetuity.

Enforcement of the arbitration award

A foreign arbitral award is enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 which has been domesticated by ACA. In practice, the courts in Nigeria will recognise and enforce an arbitral award in the absence of any valid and convincing ground for setting aside or for refusal of recognition and enforcement. A party applying for the recognition and enforcement of an arbitral award shall furnish the court with:

(i) the duly authenticated original award or a duly certified copy thereof;

(ii) the original arbitration agreement or a duly certified copy thereof; and

(iii) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.

If the application is brought in the High Court of Lagos State, the application is by motion on notice, stating the grounds with supporting affidavit and the above-mentioned documents. See Order 39 Rule 4 of the Lagos High Court Civil Procedure Rules 2012. Under Order 52 Rule 16 of the Federal High Court Civil Procedure Rules 2009, an application for enforcement of an award may be made *ex parte,* but the court hearing the application may order it to be made on notice. The application shall be supported with an affidavit which shall:

(a) exhibit the arbitration agreement and the original award or certified copies;

(b) state the name, usual or last known place of abode or business of the applicant and the person against whom it is sought to enforce the award; and

(c) state, as the case may require, either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

Generally, the courts would enforce a foreign arbitral award unless there is a compellable reason not to, such as evidence that the arbitral award has been set aside by the national court in the seat of the arbitration.

Investment arbitration

Nigeria ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States in August 1965. The Convention came into force in Nigeria in October 1966.

Nigeria is a party to a significant number of Bilateral Investment Treaties (BITs). For instance, there is the BIT between the Republic of Turkey and the Federal Republic of Nigeria Concerning the Reciprocal Promotion and Protection of Investments. Article VI thereof provides for submission of disputes to the ICSID, or to an *ad hoc* court of arbitration under the UNCITRAL Arbitration Rules or to the Court of Arbitration of the Paris International Chamber of Commerce. Others include the U.S-Nigeria Trade and Investment Framework Agreement (TIFA), Nigeria-Egypt, Nigeria-France, Nigeria-UK, Nigeria-Germany BITs for the Promotion and Protection of Investments, and many others. *Nigeria is not a party to the Energy Charter Treaty, although Nigeria became an observer to the Charter in 2003.*

Domestically, the Nigerian Investments Promotion Commission Act allows settlement of disputes under the auspices of the ICSID. Section 26 provides that any dispute between a foreign investor and the Nigerian government shall be settled within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the investor's country are parties and, where there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the ICSID Rules shall apply.

In Nigeria, section 308 of the 1999 Constitution of the Federal Republic of Nigeria provides immunity from court proceedings for the sovereign who is the executive arm of government. Thus actions that are similar to this must be strictly construed in favour of the sovereign. The defence of state immunity does not, however, prevent Nigeria as a state or sovereign from agreeing to submit to the authority of an arbitral tribunal. As regards jurisdictional immunity, where Nigeria, as a sovereign state, has agreed to arbitrate, such agreement would be treated as a waiver of immunity. Generally, by virtue of the New York Convention which is domesticated in Nigeria as Schedule 2 to ACA, Nigerian courts have jurisdiction to recognise an arbitral award made under an agreement to arbitrate where the seat of arbitration is Nigeria. Similarly, by virtue of the New York Convention, where Nigeria has signed a valid agreement to arbitrate, an award against it may be recognised and enforced by courts in a foreign jurisdiction in which she has assets. Thus, a valid and binding agreement to arbitrate to which Nigeria is a party will also operate as a waiver of immunity from execution.

There have, however, not been any recent investment arbitrations initiated against Nigeria.

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Norway

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Introduction

Arbitration is the preferred method of dispute resolution in commercial matters. In Norway, the majority of commercial disputes of some importance are resolved by arbitration, not by litigation in the ordinary courts. The obvious question is why this is so. There may be a number of possible explanations. In arbitration, the parties are free to elect the arbitrators of their choice. An arbitration panel established by mutual agreement may be tailored so as to secure the required expertise for the particular dispute. As there is normally no right to appeal an arbitral award, the parties will have a binding decision after one hearing. Finally, the parties retain control over the arbitration process; this flexibility is normally not available within the ordinary court system.

A particular feature of arbitration in Norway is the extensive use of *ad hoc* arbitration. Whereas institutional arbitration is widely used in Denmark and Sweden, there is no generally recognised arbitration institute in Norway. Arbitration *ad hoc* provides the parties with the necessary dynamics to resolve a commercial dispute as quickly and correctly as possible. The parties are at liberty to appoint the arbitrators of their choice, and to agree on a binding time frame for the case preparation. Specific rules for the proceedings may be established. The Norwegian legislation is generally regarded as "arbitration friendly". The courts will normally assist with the services rendered by an arbitration institute, such as the appointment of arbitrators and legal service of documents.

A large proportion of the arbitrations in Norway are international. Norwegian arbitrators are, due to their neutrality, in high demand. The similarity of the law in Denmark, Norway, and Sweden has created a common Scandinavian market for arbitration. Thus, it is not uncommon for a Norwegian arbitrator to sit on a case in Sweden, or for a Danish arbitrator to take up an appointment in Norway. Scandinavian law is often described as a hybrid between the typical common law and civil law jurisdictions. In international commercial disputes, Scandinavian law is therefore often regarded as a convenient compromise, both for choice of law and for seat of arbitration. The international flavour of commercial arbitration is increasing.

The Norwegian Arbitration Act 2004 provides the legal framework for arbitration in Norway. The Act applies equally to national and international arbitrations. As only a few of the rules are mandatory, the parties retain autonomy over the dispute resolution process. The Arbitration Act is to a large extent based on the UNCITRAL model law.

Arbitration agreement

An agreement to arbitrate may be made in nearly any commercial matter. The agreement

may concern a dispute that has already arisen, or the parties may agree that all potential disputes in a particular relationship, typically a contract, shall be resolved by arbitration. Today, most commercial contracts contain an arbitration clause. There are no formal requirements to such agreements, and even an oral agreement to arbitrate is 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.

An arbitration agreement may be drafted in different ways. At the initial stage of arbitral proceedings, it is not uncommon that the parties disagree as to the extent of the arbitration agreement they have entered into. Much effort is therefore made to ensure that an arbitration clause in a commercial contract is properly drafted so as to correspond to the common intention of the parties at the time of entry into of the contract. In the event that a contract with an arbitration clause is later supplemented with an addendum or an amending agreement, it is assumed that the arbitration clause in the original agreement will also apply to any dispute arising under the subsequent agreement.

When the parties agree to refer to arbitration a dispute that has already arisen, the arbitration agreement will often take the form of "terms of reference". In order to save time and costs, the parties may agree on some basic facts that the arbitration tribunal can use as a factual background for the award.

Arbitration procedure

The arbitration process is normally initiated by the issuance of a "notice to arbitrate". This is a formal letter from one of the parties to the other where particulars of the dispute are given, and a request to resolve the dispute by arbitration is made. A particular point to note is that such notice will prevent prescription of a claim.

As most arbitrations in Norway are *ad hoc*, the parties will then agree on a panel of arbitrators. Normally, the panel will consist of three arbitrators, and it is not uncommon that the parties reach agreement on all the arbitrators. The advantage of such procedure is that the arbitration tribunal will have the necessary expertise. Alternatively, each of the parties may nominate one arbitrator, who then jointly appoint the third arbitrator. Once the arbitration panel has been established, the chair will invite to a case management conference. The purpose is to fix a date for the main hearing and to agree on a time frame and format of the written submissions. The parties will also agree on the presentation of evidence and witnesses.

In smaller disputes, the parties may agree to appoint a sole arbitrator. As there is no requirement for an oral hearing, the arbitration award may be given on the basis of the case documents.

Arbitrators

As most arbitration tribunals are established by the agreement of the parties, it is relatively rare to see disputes as to the suitability of a particular arbitrator. In commercial disputes, counsel will normally conduct extensive scrutiny of potential candidates in order to avoid complications at the enforcement stage. However, the Arbitration Act empowers the ordinary courts to decide on objections made against an arbitrator appointed in accordance with the prescribed procedure. Appointment of an arbitrator may only be challenged on specific grounds. Such grounds may be that there is serious doubt as to the arbitrator's

impartiality or independence, or that the arbitrator does not have the qualifications agreed between the parties.

Interim relief

Unless otherwise agreed between the parties, an arbitral tribunal has the power to order the parties to undertake certain measures, such as preserving assets or the production of evidence. An order to this effect, however, is not enforceable. Failure to comply with an order made by the tribunal, may influence on the assessment of the evidence. The parties may ask the ordinary courts to issue an order for interim relief. Such court order will be enforceable.

The arbitral tribunal may request the ordinary courts to take depositions from witnesses and 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.

Arbitration award

The arbitration award shall be in writing and signed by all the arbitrators. The Arbitration Act contains a provision that is rarely used, to the effect that the majority of the tribunal may sign, provided that the reason for all arbitrators not signing is stated in the judgment. The place and date of the award must be given. There is no fixed time limit for the award. However, most arbitrators avoid delay. If time is of the essence, a separate agreement may be made as to time limits for the award. According to the Arbitration Act, a signed copy of the arbitration award shall be filed with the local court and kept in the court's archive. Non-compliance with this provision does not make the award unenforceable.

The arbitration tribunal is empowered to make such cost order as it deems just. Although the rules of cost in the Civil Procedure Act are not directly applicable in arbitration, these rules may nevertheless exert some influence on the cost award. In essence, the winning party is entitled to have his cost paid by the other party. However, exemption from the cost liability may be made if there has been doubt about the result, or if there is some other justification for each of the parties paying their own costs and expenses.

Challenge of the arbitration award

An arbitration award is final and binding. There is no right of appeal. It is, of course, possible for the parties to agree on a right to appeal, but this is rarely seen in practice.

An arbitration award may be challenged on the grounds of procedural impropriety. Such challenge must be made within three months of receipt of the arbitration award. The most frequent grounds for challenging an award are that a party has not been given notice of the arbitration, that the award falls outside the scope of the arbitration agreement, and that there has been a violation of the basic principles of due process. It is very rare that a claim for the setting aside of an arbitration award succeeds.

Enforcement of the arbitration award

Norway ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1961. The Convention has since been in effect, and its provisions are now incorporated into the 2004 Arbitration Act.

Investment arbitration

Norway is currently party to 15 bilateral investment treaties (BITs) and 29 treaties with investment provisions (TIPs). Norway signed the ICSID Convention in 1966, the Energy Charter Treaty in 1995, and the International Energy Charter in 2015. So far, there has been no investment arbitration case against Norway.

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Portugal

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Introduction

In recent years, arbitration as a dispute resolution method has become more common in Portugal and has been increasingly used in both international and domestic disputes involving both private and public law.

The new Portuguese Arbitration Law (PAL) appears in the Annex to Law no. 63/2011, of December. This Law is in line with the Model-Law on International Commercial Arbitration, UNCITRAL / UNCITRAL of 1985, remodelled in 2006, which entered into force in March 2012.

This new law of arbitration aims to introduce a more modern arbitration regime and promote Portugal as a seat for international arbitrations. It also tried to reconcile – whenever it saw usefulness in this – the solutions already tested in the application of Law no. 31/86, with the guidelines and inspirations in several national laws regulating arbitration that have been approved in the last 15 years in other countries. Several countries with which Portugal has great cultural affinities and legal institutions have studies of legal science on arbitration and experience accumulated by the practical use of it, which in the Portuguese panorama have not achieved any real depth.

This new PAL is characterised by the following fundamental features:

- requirements of the formal validity of the arbitration agreement: at the same time as the one advocated by UNCITRAL, the current provisions of the new PAL give greater flexibility to compliance with the written form requirement;
- focus on the principle of autonomy of the arbitration process: this new law clearly states this principle, in line with what was also included in the UNCITRAL Model Law; and
- reaffirmation of the negative effect of the principle of competence-jurisdiction of the arbitral tribunal. The new PAL confers jurisdiction on state courts to rule on the competence of arbitral tribunals only where the arbitration agreement is manifestly null and void, inoperative or incapable of being performed.

In addition to the UNCITRAL Model Law, Portugal also acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("CNI 1958") on 16 January 1995. However, it is in force in the Portuguese legal system with an express reservation of reciprocity (but not with the commercial reserve), and applies only in relation to arbitration decisions rendered in states that are also party to this Convention. The grounds for the refusal of recognition and for the annulment of arbitral awards are, in the Portuguese law, broadly in line with the grounds for refusal of recognition laid down in CNI 1958.

The regime of international arbitration is provided and regulated in Chapter IX of the new PAL. According to Article 49, international arbitration is a private and voluntary means of resolving a dispute, with a contractual nature or not, interests of international trade being at stake.

Thus, except for the provisions of this chapter, the provisions of this law relating to internal arbitration, as required by Article 49, no. 2, of the PAL are susceptible to international arbitration, with due adaptations. There is, in fact, no different arbitration law for international arbitration.

The new PAL integrates the general arbitration regime and must be applied to all arbitral proceedings, including the necessary arbitration and certain special arbitrations, unless a special law expressly determines otherwise. Only those special laws may punctually or generically derogate from the application of the PAL or by establishing a procedural regime different from that provided for therein.

Arbitration agreement

The arbitration agreement is provided for and regulated in the first chapter of the PAL.

Pursuant to Article 1, any litigation concerning patrimonial interests may be submitted by the parties, through an arbitration agreement, to the decision of arbitrators, unless the same litigation is subject exclusively to the courts of the State or Arbitration required by special law.

The arbitration agreement may have as its subject matter a present dispute, even if it concerns a State court (arbitration agreement), or any litigation arising out of a contractual or non-contractual legal relationship (arbitration clause), as determined by Article 1, no. 3 of the PAL.

The State and other legal persons of public law may also conclude arbitration agreements if such agreements have the object of private law disputes and since they are authorised by law.

The arbitration agreement must, in order to be valid and effective, comply with several requirements. In fact, the arbitration agreement must be in written form, and this requirement is fulfilled when it appears in a document signed by the parties, an exchange of letters, telegrams, facsimiles or other means of communication.

It is considered that the arbitration agreement meets the requirement in written form when it appears in electronic, magnetic, optical, or other type of support, offering the same guarantees of reliability, intelligibility and conservation.

Also referred to as an arbitration agreement is the reference made to a contract containing an arbitration clause, provided that such contract complies with the written form and the remission is made in such a way as to make that clause an integral part, thereof, of the contractual clauses.

In terms of objective requirements, the arbitration agreement must contain the determination of the subject-matter of the dispute and specify the legal relationship underlying the disputes from which they may emerge.

In fact, the arbitration clause shall include a detailed statement of the dispute in order to ensure that no matter submitted to arbitration is excluded, since the arbitral tribunal may only know of the issues contained therein.

Any arbitration clause that does not comply with the requirements set forth in Articles 1 and 2 of the PAL is void, as determined in Article 3 of the PAL.

Article 4 of the PAL, for its part, provides that the arbitration agreement may be modified, revoked and expire:

- *Modification*: it may be modified by the parties until the acceptance of the first arbitrator, or with the agreement of all the arbitrators, until the delivery of the arbitral award.
- *Revocation*: can be revoked until the delivery of the arbitration award.
- *Expiry*: the death or extinction of the parties does not terminate the arbitration agreement nor extinguish the arbitration.

Regarding the competence of the arbitral tribunal, Article 18 refers that the arbitral tribunal may decide on its own jurisdiction, even if for that purpose, it becomes necessary to assess the existence, validity or effectiveness of the arbitration agreement – see Article 18/1 of the PAL.

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

Arbitration procedure

The beginning of the arbitration proceedings is defined in Article 33 of the PAL, and it begins on the date that the request for submission of that dispute to arbitration is received by the Respondent in dispute – if nothing otherwise is stipulated by Agreement of the parties. This request for submission of the dispute to arbitration is generally termed as "notice to arbitration". The law does not provide for the minimum contents of that request.

This occurs even before the constitution of the arbitral tribunal, outside the jurisdiction of the arbitral tribunal.

Within the time limits stipulated by the parties or determined by the arbitral tribunal, the claimant submits its petition, expressing his request and the facts on which this is based. In turn, the defendant makes his complaint, explaining his defence in relation to the plaintiff's petition.

With the application and defence, plaintiff and defendant, respectively, may join documents which they deem relevant, and mention in the written pieces other documents or other evidence that may emerge.

The arbitral tribunal has the power to admit or not admit any evidence, as well as to consider the relevance and assess the probative value of the evidence.

The Respondent may deduct counterclaims, provided that its subject matter is covered by the arbitration agreement.

Although the PAL is silent on this point, the truth is that it is usual for the notification for arbitration to contain the following elements:

- names of the parties;
- clear formulation of the intention to submit the dispute to arbitration;
- summary description of the dispute;
- identification of the arbitration agreement;
- number of arbitrators to be constituted by the arbitral tribunal;

- identification of the arbitrator that the Claimant intends to intervene as sole arbitrator – if applicable;
- identification of the referee of the appointing party; and
- place of arbitration.

Portuguese law gives arbitral tribunals wide discretion in conducting the proceedings, especially concerning procedural rules and evidence. In the absence of party agreement or applicable institutional rules, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, defining the procedural rules it deems adequate.

About the permissible scope of disclosure or discovery there is no specific rule in Portuguese law establishing limits on it. The Portuguese general practice takes into account the IBA rules, also known as "soft law", which have tended to overcome the differences between the legal systems and the way the courts operate. Such rules confer on the arbitrators the power to decide, with considerable latitude and discretion, on the admissibility of the evidence, the pertinence of those means and the value of any evidence produced or to be produced.

This orientation was also accepted in the norm established in the second part of Article 19, no. 2 of the UNCITRAL Model Law – and, by its influence, in the norm of Article 30, no. 4 of the PAL which, however, as was clear from the preparatory work, should be considered non-imperative.

In relation to the other matters regulated in this article, the hierarchy of norms is as follows:

- fundamental principles of the process and other mandatory rules established by law;
- contractual freedom of the parties; and
- the arbitral powers of the arbitral tribunal in matters of procedure.

The Portuguese Legislator took into account, in the preparation of the new PAL, the guidelines of all major international arbitration institutions, for its antiquity, efficiency, flexibility and neutrality to all parties involved in resolving a dispute under its auspices.

The new PAL also took into account the combination of the best features of the civil law and common law systems, in several of its legal provisions. As an example of it, we have the specific case of third-party intervention, provided for and regulated in Article 36 of the PAL.

Arbitrators have a duty to be impartial and independent. Arbitrators are also subject to the rules of suspicion and impediment that apply to judges.

The duty of confidentiality is imposed also on the parties and intervening arbitrators. That duty shall also apply at all pre-procedural stages, in the course of the proceedings and after the proceedings have been completed, and shall relate to the whole content of the arbitration proceedings and to its effects, without prejudice to the duty to communicate or disclose information or activities to the competent authorities, if so imposed by law (e.g., corruption and money laundering prevention).

Notwithstanding the above, unless a party objects, awards and other decisions may be published, excluding the details that would identify the parties.

Arbitrators

The parties are free to agree on the number of arbitrators. However, the panel must comprise an uneven number of arbitrators and, if the parties fail to agree on the number, the tribunal will have three arbitrators (Art. 8 of the PAL).

The parties have the right to choose the arbitrator or the arbitrators. One of the means used by the parties to make this choice is the arbitration agreement or in a later written document signed by them (Art. 10/1 of the PAL).

However, if the arbitration tribunal is to be constituted by a single arbitrator and there is no agreement between the parties on such designation, such arbitrator is appointed by the state court at the request of either party – Art. 10/2 of the PAL.

If the arbitral tribunal is to consist of three or more arbitrators, each party chooses an equal number of arbitrators and such arbitrators so designated elect the presiding arbitrator – Art. 10/3 of the PAL.

No one may be required to act as arbitrator until acceptance of the respective nomination. However, under the provisions of Article 12 of the PAL, if the arbitrator accepts the burden, only the excuse based on a supervening case that prevents the arbitrator to perform such function is legitimate.

Each appointed arbitrator shall, within 15 days of the notification of his designation, declare in writing the acceptance of the charge to the party appointing him (unless otherwise agreed by the parties). If, within this period, nothing is declared, the non-acceptance of the order by the arbitrator shall be understood.

Anyone who is invited to serve as an arbitrator must disclose all circumstances that may give rise to doubts as to his impartiality and independence – Art. 13. An arbitrator can only be refused if there are grounds giving rise to doubts as to impartiality and/or independence, or if he does not possess the qualifications which the parties have agreed.

It should also be noted that if an arbitrator who has accepted the charge, unjustifiably excuses himself from the exercise of his function, he is liable for damages caused – Art. 12/6 of the PAL.

This last question also converges with the matter of the immunity of judges. For that, the PAL opted for the express provision of the two cases in which arbitrators may incur liability, namely:

- Article 12/6: "The arbitrator who accepted the charge, unjustifiably excused himself from the performance of his duties shall be liable for damages caused".
- Article 43/4: "Arbitrators who unjustifiably prevent the decision from being delivered within the prescribed period shall be liable for the damages caused".

Making a preliminary examination of the Law, it appears that the mere arbitrator's fault may suffice. However, as a general rule, the responsibility of the arbitrators is only the result of particularly serious situations, and fraud is often required.

Usually, however, it is the rules of the institutionalised arbitration centres themselves that serve as a reference to cases of immunity of arbitrators.

Interim relief

State courts may issue interim, urgent and provisional measures in aid of arbitration (Art. 29/1. The law provides that it is not incompatible with an arbitration agreement for a party to request from a state court, before or during the arbitral proceedings, an interim measure, and for a state court to grant that measure (Art. 7).

Once constituted, the arbitral tribunal has the legal power, unless it is expressly agreed otherwise by the parties or provisions of an arbitration regulation, to grant interim measures (Art. 20) and modify, suspend or terminate an interim measure or a preliminary order it has

granted or issued, upon application of any party or, in exceptional circumstances and after hearing the parties, on the arbitral tribunal's own initiative (Art. 24/1). An interim measure issued by an arbitral tribunal shall be binding on the parties and, unless otherwise provided by the arbitral tribunal, shall be enforced upon application to the competent state court, irrespective of the arbitration in which it was issued being seated abroad (Art. 27/1).

In practice, the PAL's precautionary measures coincide with those foreseen for Portuguese civil proceedings – foreseen and regulated in Articles 362 to 409 of the Code of Civil Procedure Portuguese (CPCP). But these are not exhaustive because, in arbitration, what matters is to resolve the conflict in the most effective and timely manner, irrespective of the scope and nature of the measure.

An interim measure required under Article 20 of the PAL can only be made if:

- there is serious likelihood of the existence of the right claimed by the applicant and he can show sufficiently founded fear of his injury; and
- the damage resulting to the defendant from the order does not considerably exceed the damage that the applicant intends to avoid.

In this regard, two concrete situations have to be distinguished: the decree of the injunction, and the execution of it.

In fact, the arbitral tribunal may order the precautionary measures required and timely to the good outcome of the litigation. However, certainly, due to lack of coercive powers of the arbitral tribunal, it cannot ensure the execution of the decreed measures. Thus, the injunction can be decreed by the arbitral tribunal and be enforced through recourse to the state court in accordance with Articles 27 and 28 of the PAL.

Although the arbitration procedure is strictly based on the principle of adversarial proceedings, if the request of the party requesting the precautionary measures must be known by the opposing party before the precautionary measure is decided, it is certain to be frustrated.

To remedy this situation, PAL, inspired by the UNCITRAL Model Law in its 2006 version, in Article 17-B, found the solution by introducing the preliminary orders, foreseen and regulated in Article 22 of the PAL.

These measures, the specific regime of which is provided for in Article 23 of the PAL, allow the arbitral tribunal to take a decision on the conduct to be taken by one party, at the request of the other, without hearing the requested party.

Arbitration award

The arbitrators decide the dispute under the law, unless the parties agree that they shall decide *ex aequo et bono* or as *amiable compositeur* (Article 39).

In this way, in an arbitral proceeding with more than one arbitrator, any decision of the arbitral tribunal shall be taken by a majority of its members, except in cases in which a majority cannot be formed, in which case the judgment is given by the president of the court – Article 40/1.

Efficacy requirements and validity of the award are set out in Article 42 of the PAL; in the case of very important matters, the breach of these requirements can lead to the nullity of the award in accordance with the provisions of Article 46, no. 3, a), vi) of the PAL.

Form of decision

- The award should be reduced to writing and signed by the arbitrator or arbitrators.

Content of award

- The award must state the reasons upon which it is based, unless the parties agree to waive the reasoning or if there is an agreement – Article 41 of the PAL.
- The award must mention the date on which it was given and the place of arbitration (determined in accordance with Article 31 of the PAL).
- The award must include in the judgment the apportionment by the parties of the costs directly resulting from the arbitration proceedings.

Awards by consent are specifically permitted by the PAL. Indeed, if the parties settle the dispute during the proceedings, the arbitral tribunal will terminate the proceedings. If the parties so request and provided that their settlement is not in violation of public policy, the arbitral tribunal will record the settlement in the form of an arbitral award on agreed terms. Awards by consent must meet the same formal requirements as any other award. Such awards have the same status and effect as any other award on the merits of the case.

Unless otherwise agreed by the parties, the arbitrators may issue a single award or as many partial awards as they deem necessary (Art. 42). The award should apportion the costs directly resulting from the arbitration, and if the arbitrators deem it fair and appropriate, they should decide in the award that one or some of the parties shall compensate the other party or parties for all or part of the reasonable costs and expenses that they can prove to have incurred due to their participation in the arbitration (Art. 42).

Moreover, the award shall be issued within the set time limit (12 months from the date of acceptance of the last arbitrator). Such time limits may be freely extended by agreement of the parties or by decision of the arbitral tribunal, once or twice, always for consecutive periods of 12 months, duly substantiated. However, the parties, by agreement, may oppose the extension.

Once rendered the award, it must be immediately notified to the parties, a copy signed by the arbitrator or arbitrators being sent to each of them, producing the award's effect on the date of its notification.

Challenge of the arbitration award

Correction and clarification of the award

Within 30 days of receiving notice of the award, any party may ask the arbitral tribunal to make an additional award concerning parts of the claim or claims submitted in the arbitral proceedings but omitted from the award. Any additional award must be rendered within 30 days of the request. (Art. 45/5).

Challenge of the award

The challenge of an arbitration award before a state court may only take the form of a request for annulment in the terms provided for in Article 46 of the PAL.

This request for an arbitral award must be submitted to the competent state court accompanied by the following elements:

- certified copy of the arbitral award; and
- translation of the award rendered in a foreign language (if applicable) to Portuguese.

The Portuguese law, like the New York Convention, sets narrow grounds to set aside the award. Indeed, the arbitral award can only be annulled by the competent state court if:

A) the party making the request demonstrates that:

I. one party to the arbitration agreement was affected by incapacity, or that the agreement is not valid under the law to which the parties have subjected it or even the terms of this law;

II. in the proceedings, some of the fundamental principles referred to in Article 30 (1) were violated and had a decisive influence on the resolution of the dispute;

III. the judgment has been given on a dispute not covered by the arbitration agreement or contains decisions that go beyond the arbitration agreement;

IV. the composition of the arbitral tribunal or the arbitration proceedings were not in accordance with the agreement of the parties, unless this agreement conflicts with a provision of this law from which the parties cannot derogate or, in the absence of such an agreement, which has not complied with this Law and, in any case, that this disagreement had a decisive influence on the resolution of the dispute; or

V. the arbitral tribunal ordered a higher amount or a different object of the request, knew of issues that it shouldn't take a decision on, or did not decide on questions that it had to consider;

VI. the judgment was rendered in violation of the requirements established in Article 42, nos. 1 and 3;

VII. the judgment was notified to the parties after the maximum deadline for the effect fixed in accordance with Article 43; or

B) the court finds that:

I. the subject-matter of the dispute cannot be settled by arbitration under Portuguese law; or

II. the content of the award offends the principles of the international public order of the Portuguese State.

The Portuguese courts have developed a restrictive approach to the public policy exception. For example, in a decision issued on 29 November 2007, the Lisbon Court of Appeal rejected the challenging party's argument that an arbitral award violated public policy because it: a) ordered the respondent to pay the claimant an amount arising from a contractual "penalty clause"; and b) did not contain sufficient reasoning.

A violation of the so-called "domestic" public policy is not grounds for the annulment of the award. The court may only set aside an award on public policy grounds where the award violates the "international" public policy of Portugal.

The request for annulment may be filed only within 60 days of the date on which the party seeking such annulment has received the notification of the judgment or, if an application has been made in accordance with Article 45, from the date on which the arbitral tribunal rendered a decision on that request.

In the process of annulment of an arbitration award or in other circumstances, with the exception of an appeal, the state court may not know the merits of the matter decided by the arbitral tribunal, and such questions must be referred to another arbitral tribunal for consideration – Article 46, no. 9 of the PAL.

Enforcement of the arbitration award

National awards

The possibility of executing an arbitration award is provided for and regulated in Chapter VIII of the PAL, and Article 46 provides that the party requesting the execution of the

award to the competent state court must provide, together with the request for enforcement, the following documents:

- the original of the judgment or a certified copy thereof;
- translation of the award into Portuguese, if it is written in a foreign language.

In the case of a generic award of condemnation, their settlement is made in accordance with paragraph 6 of Article 716 of the Civil Procedure Code. This liquidation may also be requested from the arbitral tribunal under the terms of paragraph 5 of Article 45, in which case the arbitral tribunal, hearing the other party, and producing evidence, makes a complementary decision, judging equally within the limits proved.

It should be noted that an arbitral award, even if it has been the subject of an application for the annulment of a judgment, may be enforced. However, the challenging party may request that the challenge have suspensive effect on the execution provided, for that purpose, it offers a bond within the period set by the court. In this case, the provisions of Article 733 of the CPCP apply.

International awards

As established in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Portugal recognises and enforces arbitration awards handed down in other Contracting States under the rules laid down in national law.

Investment arbitration

The new Portuguese legal framework, introduced by the new PAL, has paved the way for Portugal to follow best international arbitration practices, as well as to offer stability and legal familiarity to foreign investors.

However, despite the recent advent of Portugal to international arbitration, it is curious that between 1851 and 1930, a number of disputes were recorded in a book by Francisco Castro Caldas, dating from 1935, in which Portugal was a party, 13 of which were international investment arbitrations, and where one of the parties was the State. These arbitrations were related, namely, to amend to British and American "subjects" for the termination of the concession of the railroad of *Lourenço Marques* to the border of the Transvaal, and for its appropriation by the Portuguese Kingdom.

In the last 20 years, Portugal has ratified a vast set of Investment Protection Treaties (TIPs), which are integrators of arbitration clauses, and with a broad protection of investment.

The ICSID Convention

Among the various instruments that over the past decades have focused on investment arbitration stands the Convention for the Resolution of Disputes, relating to investments between States and Nationals of other States, held in Washington, DC, in 1965, which established the International Center for the Settlement of Investment Disputes (ICSID) of which Portugal has been a member since 1984.

Treaty of the Energy Charter

Another multilateral treaty that covers rules about the resolution of disputes occurring specifically in the energy sector is the Energy Charter Treaty, also signed in Lisbon in 1994.

In fact, from the late 1960s onwards, several States began to enunciate a program of bilateral treaties for the promotion and protection of investment ("Bilateral Investment Treaties" or "TBI"), mechanisms of the Washington Convention. In recent decades,

Portugal has been following, along with other countries of the European Union, ratifying and signing bilateral agreements and treaties.

However, nowadays, investment arbitration has been expanding in Portugal, counting on the diligent performance of companies that are already aware of this reality and are starting to adopt investment arbitration as a mean of settling disputes.

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Romania

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Introduction

Legal provisions. Starting from 2013, the main body of law applicable to arbitration in Romania is set out in Book IV "*On Arbitration*" (hereinafter *"Domestic arbitration provisions"*) and in Book VII, "*On International Arbitration and the Effects of Foreign Arbitral Awards",* of the Civil Procedure Code (hereinafter*, "International arbitration provisions*").

UNCITRAL Model Law. Although the Civil Procedure Code is not based on UNCITRAL Model Law, it does accord with its principles.

International treaties. Romania ratified the New York Convention on 21.07.1961, reserving the right to apply the convention only to: (i) disputes arising from contractual or non-contractual relationships which are considered commercial under Romanian law; and (ii) recognition and enforcement of arbitral awards made in the territory of another contracting State.

Romania has also ratified through Decree No. 281/1963 the European Convention on International Commercial Arbitration (Geneva) and, through Decree No. 62/1975, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Provisions regarding recognition and enforcement of arbitration awards are also included in bilateral treaties concerning legal assistance in civil and commercial matters. Such treaties have been concluded by Romania with Macedonia (ratified through Law no 356/2004), Algeria (ratified through Decree no 418/1979), Cuba (ratified through Decree no 67/1981), etc.

Domestic arbitration vs international arbitration. Romanian Civil Procedure Code includes a distinction between domestic arbitration and international arbitration.

However, the differences in treatment are not substantial. The principal difference is that in international arbitration, procedural time-limits are extended in recognition of the possible extra-jurisdictional complexities of international disputes.

However, to classify a dispute as "international", the law requires a foreign element. International arbitration provisions stipulate that an arbitration is international if it arises out of a private law relationship with a foreign element and such provisions govern any international arbitration seated in Romania, provided that at least one of the parties has its domicile/residence or offices outside Romania. The parties can exclude the applicability of the international arbitration provisions only in writing.

Arbitration bodies in Romania. Romanian law also recognises the jurisdiction of permanent arbitration bodies. In Romania, arbitration institutions are usually attached to the regional Chambers of Commerce or to bilateral (international) Chambers of Commerce.

A recent prominent project of such nature is the *Bucharest International Arbitration Court* (BIAC) organised under the aegis of the American Chamber of Commerce in Romania with the cooperation of some of the major national and international law firms in the market (www.bucharestarbitration.org).

The oldest arbitration body in Bucharest is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (http://arbitration.ccir.ro/).

National courts. The parties or arbitral tribunals can resort to court assistance – at "Tribunal" level – in matters such as the taking of evidence and the enforcement of Interim Relief. Furthermore, as arbitration awards may be challenged before the Courts of Appeal which have exclusive jurisdiction to hear annulment actions and (where annulment is granted and where retrial is not appropriate) to seize the matter and judge on merits.

Arbitration agreement

Written form. Pursuant to Romanian provisions on international arbitration, the arbitration agreements require *written form* (document, wire, telex, fax, email, etc.) *that can provide text evidence* of agreement for validity purposes.

Validity. The arbitration agreement is deemed valid in Romania if it meets the formation conditions according to any of the following laws: (i) the law chosen by the parties − *lex voluntatis*; (ii) the law governing the dispute − *lex causae*; (iii) the law of the agreement that comprises the arbitration clause − *lex contractus*; or (iv) Romanian law.

Moreover, any arbitration agreement governed by Romanian law has to abide by the Romanian Civil Code, which states that agreements are valid if the following conditions are met: the parties have legal capacity to conclude the agreement; the consent of the parties is free from any coercion or undue influence; and the subject matter and the *causa* of the agreement are in accordance with the applicable law.

Autonomy. The validity of the arbitration agreement may not be challenged on the grounds of invalidity of the contract containing it, as the international arbitration provisions expressly stipulate the separability principle.

Principle of competence-competence. As regards both international arbitration and domestic arbitration, the principle of competence-competence applies, and arbitral tribunals rule on their own jurisdiction. Moreover, arbitral tribunals will decide on competence even if identical disputes are pending before the courts or other arbitral tribunals, except if the arbitral tribunal considers it necessary to stay the proceedings.

Relevant provisions also stipulate that parties must plead jurisdiction matters before any pleading on the merits. However, in international arbitration disputes, tribunals may decide to rule on jurisdiction matters together with the final award on merits.

Arbitrability of disputes. International arbitration provisions stipulate that all disputes are arbitrable as long as: (i) the relief sought has a pecuniary character (i.e. it is expressed in money); (ii) it concerns rights that parties can freely dispose of; and (iii) the jurisdiction of such dispute is not exclusive to a State Court according to the law governing the seat of arbitration.

Under the international arbitration provisions, if a State or a State undertaking is involved in a dispute, such State cannot invoke its own incapacity to stand in arbitration or the lack of arbitrability of the dispute, on the ground of its own laws.

Consolidation and joinder of third parties. Where the Arbitration Agreement is silent in respect of third party joinders or consolidation, third parties are entitled to participate in

arbitration proceedings only with their agreement and the agreement of all parties (except for parties that only support the defence of one of the parties).

Arbitration procedure

Arbitration rules. International arbitration provisions stipulate that parties to an *ad hoc* arbitration can set out their own arbitration rules, or they can refer to a pre-existing set of rules (of an arbitration institution, or those set out by a procedural law).

If parties fail to do so, the arbitral tribunal shall determine the arbitration rules, using either their own set of rules, or a pre-existing set of rules.

However, in both institutional and *ad hoc* arbitration, as a matter of public order, the arbitral tribunal must observe due process principles such as equality of treatment of the parties, respecting their right to defence and the principle of hearing both parties on all issues in dispute.

Commencing an arbitration. To initiate an arbitration, one must submit the request for arbitration to the arbitral tribunal (for *ad hoc* arbitration) or to the secretariat of the court of arbitration (for institutional proceedings). In case of *ad hoc* arbitration, usually parties follow the provisions of the arbitration agreement regarding the appointment of the arbitral tribunal.

Hearings. Hearings are to be held at the indicated place of arbitration, which can differ from the seat of arbitration. The place of arbitration is agreed upon by the parties or, in the absence of such indication, established by the arbitral tribunal. There are no legal restrictions in this regard.

Language. Under international arbitration provisions, parties can choose the language of the procedure. Should the parties fail to choose, the language shall be that of the contract giving rise to the dispute, or a widely spoken language to be decided by the arbitral tribunal.

Administration of evidence. Generally, all evidence is ordered and taken by the arbitral tribunal. However, if the intervention of a court is required to such end (e.g. to apply sanctions on witnesses or experts), the arbitral tribunal or the parties (with the arbitral tribunal's agreement) may request the assistance of the State Court which rules in accordance with the State law.

Unless the parties have agreed otherwise in the arbitration agreement, the provisions regarding the taking of evidence for domestic arbitration also apply for international arbitration. For example, the parties can agree on the applicability of IBA Rules on the Taking of Evidence in International Commercial Arbitration; the only limit in this matter is public order. In this matter, the Rules of Arbitration of Bucharest International Arbitration Court expressly specify that the Arbitral Tribunal may refer to internationally recognised procedural principles or practices or other codified procedures such as the applicable International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration.

Nevertheless, in case of institutional arbitration, specific rules can apply, rules which can differ from the above-specified provisions.

Under domestic arbitration provisions, parties should submit the evidence in *limine litis* (at the start of the procedure). Accepted evidence are written documents, witnesses, expert reports, local research, and the cross-examination of the other party, under the condition that such evidence is useful for the arbitral tribunal to grant the award.

Disclosure and privilege. Full disclosure is not customary in domestic procedural law and default rules on international arbitration are silent on the matter. However, parties can seek

and plead that tribunals order disclosure of specific documents showing relevance, and arbitral tribunals can seek support from local courts in enforcing such orders.

With regard to limits to disclosure, the arbitration provisions are silent, but the provision regulating State litigations provides certain limits, such as regarding: documents that refer to personal or private matters; documents that could break one's obligation to professional secrecy; or documents that could expose a person to criminal charges.

Civil Procedure Code is silent on the existence and treatment of issues of privilege. However, the common body of the law and precedent of the European Convention of Human Rights protects legal privilege as part of the right to defence, and can be invoked accordingly.

Arbitrators

Appointment. Rules for the appointment of arbitrators are common to domestic and international arbitration.

In general, unless otherwise regulated by the arbitration clause or the rules of the relevant arbitration institution, parties are free to appoint the arbitrators of their choosing.

Where the parties disagree with regard to appointment of a sole arbitrator, or of the presiding arbitrator, or if a party fails to make an appointment, the parties can request the court (at "Tribunal" level) with territorial jurisdiction to appoint the arbitrator/presiding arbitrator. The court decides within 10 days, and such decision is not subject to appeal.

Rules of arbitration of the Bucharest International Arbitration Court provide that the arbitral tribunal shall consist of one or three arbitrators in accordance with the choice of the parties. Where parties fail to choose, then the Governing Board shall appoint the arbitrator (the party appointed arbitrator / the sole arbitrator / the chairman) from the BIAC's then current list of arbitrators.

Challenging the appointment of an arbitrator. Similar to the challenge to sitting judges in regular courts, the parties can challenge an arbitrator, within 10 days from the date when such party became aware of the arbitrator's appointment or, as the case may be, from the occurrence of the ground for challenge. The challenge is settled by the tribunal within 10 days, and the decision is not subject to appeal.

Institutional rules on this may differ: for example, Rules of Arbitration of the Bucharest International Arbitration Court provide that parties can submit a challenge, whether for an alleged lack of impartiality or independence, or otherwise within 15 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator / from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based, and the Governing Board shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge.

IBA Guidelines on conflict of interest are not adopted as such by Romanian law, unless expressly provided in the arbitration agreement or the institutional arbitration rules (for instance, the current edition of the Rules of Arbitration of the Bucharest International Arbitration Court – www.bucharestarbitration.org – incorporate the IBA Guidelines by reference).

Immunity of arbitrators. Arbitrators are not expressly granted immunity with regard to the award, but they can only be held liable if: (i) they resign after accepting the appointment; (ii) they fail to attend the hearings or present their decision within the deadline provided in the arbitration agreement or the law; (iii) they fail to observe the confidential nature of the arbitral proceedings; or (iv) they breach their duties with bad faith or gross negligence.

Secretaries to the arbitral tribunal. Arbitration provisions set out in the Civil Procedure Code are silent on this matter, but usually this issue is regulated by the applicable rules of the arbitration, especially in institutional arbitration. Rules of Arbitration of the Bucharest International Arbitration Court provide that the Arbitral Tribunal may appoint a secretary or clerk. In *ad hoc* proceedings, the matter is decided by agreement among the parties and arbitral tribunal.

Interim relief

As per international arbitration provisions, unless otherwise stated in the arbitration agreement, the arbitral tribunal, upon request, can order interim or conservatory relief.

In case the measures ordered by the arbitral tribunal are wilfully not observed, the enforcement of such measures can be ordered by the court, which shall rule in accordance with the State law.

Arbitration award

Formal requirements for an arbitration award are set up in the Domestic Arbitration Provisions of the Civil Procedure Code, which also apply to international arbitration.

An arbitral award must be in a written form and, must include: (i) the members of the tribunal; (ii) the place and date of the award; (iii) the names of the parties and their identification data; (iv) a reference to the arbitration agreement; (v) the subject of the dispute and the summary of arguments presented by each party; (vi) the factual and legal grounds of the award; (vii) the decision; (viii) the signatures of all arbitrators; and, if applicable, (ix) the signature of the arbitral assistant.

In the case of dissenting opinion, the dissenting arbitrator drafts and signs his own opinion, which is attached to the majority award.

Nevertheless, if the arbitration is institutional, specific rules of such institution may add other requirements.

In international arbitration proceedings, an arbitral award must be delivered within 12 months from the constitution of the arbitral tribunal.

Costs. Where the parties fail to agree on the running costs of arbitration, the rules on international arbitration provide that each party shall bear the fees and expenses of its appointed arbitrator or, if the dispute is referred to a single arbitrator, they shall equally split the costs. In institutional arbitration, this is subject to variation by the rules of an arbitration.

On the question of costs awards, unless otherwise agreed or provided by institutional arbitration rules, the general rule applies, in that the unsuccessful party bears the costs of the other party to the extent of the award on merits.

Interest. The arbitral tribunal may award interest, on request, if the substantive law allows it. Currently, under Romania substantive law, if the interest rate is not contractually agreed, the interest rate is 6% *per annum* for agreements including a foreign element or expressed in foreign currency.

Challenge of the arbitration award

Grounds for challenging the award. Once served to the parties, the arbitration award can be challenged within one month to the Court of Appeal, the following grounds:

(a) the dispute was not arbitrable;

(b) the arbitral tribunal decided the dispute in the absence of an arbitration agreement or on the basis of a void or inoperative agreement;

(c) the arbitral tribunal was not constituted according to the arbitration agreement;

(d) the party challenging the award was absent on the hearing on the merits and the summoning procedure was not legally fulfilled;

(e) the decision was rendered after the expiry of the agreed time limit although termination had been invoked by one of the parties and there was no party agreement for the continuation of the arbitration;

(f) the arbitral tribunal decided on matters not requested, or awarded more than was requested;

(g) the decision did not include the reasons, did not state the date and place where it was rendered, or was not signed by the arbitrators;

(h) the arbitral award is in violation of public policy, good morals or mandatory provisions of the law; or

(i) after the award was rendered, the Constitutional Court rendered its decision on the unconstitutionality objection raised in the arbitration, declaring unconstitutional the law or piece of legislation or provision thereof which formed the subject of the objection. (In this situation, the time limit for challenging the award is three (3) months from the publication of the Constitutional Court decision in the Romanian Official Journal.)

If the award is set aside, the Court can remand the award to the arbitral tribunal if: (i) at least one party requested it; or (ii) the award was annulled for the following grounds:

(a) the arbitral tribunal was not constituted according to the arbitration agreement;

(b) the party challenging the award was absent on the hearing on the merits and the summoning procedure was not legally fulfilled;

(c) the arbitral tribunal decided on matters not requested or awarded more than was requested;

(d) the decision did not include the reasons, did not state the date and place where it was rendered, or was not signed by the arbitrators;

(e) the arbitral award is in violation of public policy, good morals or mandatory provisions of the law; or

(f) the Constitutional Court rendered its decision on the unconstitutionality objection raised in that arbitration.

If the parties do not request the case to be remanded, the court shall retain jurisdiction and settle the case on the merits, within the limitations of the arbitration agreement.

Enforcement of the arbitration award

Domestic and national awards. Domestic arbitral awards are directly enforceable once vested by writ of execution (*formula executorie*).

Foreign arbitral awards must first be granted recognition and enforcement by the Romanian courts; thereafter they also require vesting regular writ of execution.

The Civil Procedure Code applies mainly to the recognition and enforcement of international arbitral awards that do not fall under the international conventions [New York, (1958), Geneva, (1961)] or by bilateral agreements.

Foreign arbitral awards can be recognised and enforced in Romania, under the Civil Procedure Code, by Romanian State Courts, if the following two conditions are met: (i) the dispute is arbitrable in Romania; and (ii) the award is in accordance with Romanian private international law public order.

The request for recognition and enforcement of an arbitral award shall be submitted to the Tribunal and shall enclose the award and the arbitration agreement.

Recognition and enforcement of the foreign award may be refused, in the event that the party against whom the award is being recognised and enforced proves any of the following:

(a) the parties lacked capacity to conclude the arbitration agreement in accordance with the provisions applicable to each party, as determined by the law of the State where the award was rendered;

(b) the arbitration agreement was void in accordance with the law governing such agreement as per the parties' choice or, absent such choice, in accordance with the law of the State where the award was rendered;

(c) the party against which the award is invoked was not duly informed on the appointment of arbitrators or on the arbitral procedure, or was prevented from using all its defences in the arbitration;

(d) the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or, absent such agreement, with the law of the place of arbitration;

(e) the award resolves a dispute that exceeds the arbitration agreement. Nevertheless, if certain elements of the award are in accordance with such arbitration agreement and such aspects can be separated from the remaining aspects, the award can be partially recognised; or

(f) the arbitral award has not become binding for the parties, or was set aside or suspended by a competent authority of the State where it was rendered or in accordance with the law of such State.

In ruling over the recognition and enforcement of the foreign awards, Romanian courts cannot proceed to analysing the merits of the dispute.

Should a request for setting aside the award or a request for suspending the award have been filed to the competent authority of the State where such award was rendered, the Romanian court can stay the recognition and enforcement proceedings. To this end, the party seeking enforcement and recognition of the award may request the court to order the other party to deposit a certain bail.

Investment arbitration

Bilateral Investment Treaties. Romania ratified over 80 BITs (a comprehensive list can be found on the Romanian Ministry of Foreign Affairs website (http://www.mae.ro/en)).

Most BITs provide that the investor may choose to submit the dispute for settlement to: (i) ICSID; (ii) an *ad hoc* tribunal established either according to the parties' mutual agreement (if allowed and if the parties reach an agreement); or (iii) an *ad hoc* arbitral tribunal established by UNCITRAL arbitration rules.

Currently, there are five ICSID pending cases involving Romania, based on a Canada BIT, a Netherlands BIT, a Sweden BIT, a Switzerland BIT and an Italy BIT.

In respect of BITs, European Parliament and European Council adopted Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, which addresses the status of the bilateral investment agreements of the EU Member States under EU law, and establishes the terms, conditions and procedures under which the EU Member States are authorised to amend or conclude bilateral investment agreements.

Also, Romania enacted Law no. 18/2017 regarding the termination of the BITs concluded between Romania and EU Member States. All BITs concluded with EU Member States are to be terminated either through parties' agreement or through denunciation.

Under this Law, a total of 22 BITs will be terminated. Several BITs contain sunset clauses providing that their clauses shall continue to be effective for a certain period of time for investments made before termination occurred.

Energy Charter Treaty. Romania ratified the Energy Charter Treaty in 1994 and International Energy Charter in 2015. Currently, ICSID case no. ABR/14/28/2014 is based upon the Energy Charter Treaty arbitration agreement and the Switzerland BIT.

Treatment of investment arbitration awards by Romania. The Romanian State did not voluntarily comply with the first award against Romania rendered by ICSID. The annulment proceedings filed by Romania were rejected on 26.02.2016, but to date, the State has not observed the award, as EU Commission Decision no. 2015/1470 of 30.03.2015 concluded that the compensation awarded by ICSID amounts to incompatible State aid.

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Russia

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Introduction

As of 1 September 2016, new arbitration legislation came into force in Russia. The new legislation was adopted in the course of the arbitration law reform and affects both international and domestic arbitration regimes.

One of the reasons for reform was to update and modernise the arbitration legislation in Russia. The Law on International Commercial Arbitration (the "***ICA Law***") was adopted in 1993, and was largely based on the UNCITRAL Model Law 1985, with some minor changes. The legislation on domestic arbitration was adopted much later – in 2002 – but did not follow the UNCITRAL Model Law framework. The reform legislation updated the ICA Law and introduced a new legal regime for domestic arbitration – the Federal Law on Arbitration (Arbitral Proceedings) in the Russian Federation (the "***Law on Arbitration***").

However, the real driving factor beyond the reform was the desire to clear the arbitration market in Russia, which was said to be flooded with so-called 'pocket' and other shady arbitral institutions allegedly involved in various illegal and half-legal schemes – from money laundering to confirming non-existent monetary claims in bankruptcy proceedings. While the activity of such institutions was barely noticeable for foreign businesses dealing with major Russian businesses, it spoiled the court practice and the overall attitude of the Russian judiciary towards arbitration. Accordingly, the primary goal of the reform was to eliminate non-trustworthy institutions and thereby to enhance trust in arbitration amongst the users and the Russian courts.

Arbitration agreement

The new legislation updates the provisions dealing with arbitration agreements. Based on Option I of Article 7 of the 2006 version of the UNCITRAL Model Law, the new legislation retains written form requirement, but clarifies when such a requirement is deemed to be met.

Generally speaking, the written form requirement is satisfied when the agreement concluded in the form allows the recording of information contained in it, or access to such information for subsequent use. In addition to insertion of an arbitration clause in a main contract (or signing the self-standing arbitration agreement), the requirement is satisfied if: the agreement is concluded through electronic communications (with digital signatures); exchange of statement of claim and defence by the parties; and incorporation by clear and unequivocal reference. The arbitration agreement can also be included in the rules of the exchange house and, in some cases, in the charter of a Russian legal entity.

The legislation further restates that in case of assignment, new and old creditors (or debtors, as the case may be) will be bound by an arbitration agreement.

The new laws also introduce a number of interpretation presumptions. Most importantly, the law provides that all doubts with respect to interpretation of the arbitration agreement should be construed in favour of its validity and enforceability. So far, Russian courts have been very keen to interpret even minor mistakes against the validity of the arbitration clauses. It remains to be seen if this interpretative presumption would be capable of bringing about a change in the attitude.

Arbitration agreements entered into before 1 September 2016 remain effective and the terms of such agreements remain generally unaffected. Validity of such arbitration agreements and their enforceability are determined in accordance with the law in force on the date of their conclusion.

When concluding new arbitration agreements after 1 September 2016, the parties may expressly exclude certain types of recourse to state courts. Importantly, these exclusions shall be spelled out in the arbitration agreement itself, and it is not sufficient to have similar wording in the applicable arbitration rules. This is available only in case of a Russia-seated institutional arbitration (not *ad hoc*) administered by the licensed arbitral institution (see below for more details). In particular, the parties can:

- exclude the set-aside proceedings against a final award on the merits;[1]
- exclude the right to challenge a separate award confirming jurisdiction of the tribunal;[2] and
- exclude assistance of the state courts in appointment[3] and challenge[4] of arbitrators or suspension of an arbitrator's mandate.[5]

Arbitral institutions

As the reform was intended to eliminate questionable arbitral institutions, the significant part of the new legislation is dedicated to the establishment and functioning of arbitral institutions in Russia. While these matters are governed by the Law on Arbitration, they are applicable not only in a domestic context, but also with respect to international arbitrations seated in Russia.

To address the issue of the 'pocket' arbitral institutions, the legislation requires that arbitral institutions can only be established by non-commercial organisations. At the same time, to ensure the quality of Russian arbitral institutions, the legislation provides a fairly lengthy list of requirements with which each institution should comply. In particular, the institution should have a recommended list of arbitrators with at least 30 names in it. One third of the arbitrators in the list should hold a Russian academic degree in law, while no less than half of the arbitrators in the list should have at least 10 years of experience in resolving commercial disputes (as a judge or an arbitrator). Notably, the same person cannot be included in more than three recommended lists. As strange as these requirements may sound, their obvious purpose is to limit the number of arbitral institutions operating in Russia.

Arbitral institutions should obtain a permit (licence) from the Government of Russia to administer disputes in Russia. The permits should be obtained by 1 November 2017. While the existing institutions are entitled to administer disputes, arbitral institutions without a licence would no longer be allowed to do that after the expiry of the said deadline, unless they have obtained a licence. Their arbitration agreements would nevertheless remain in force and would be deemed to provide for *ad hoc* arbitration.

The requirement to obtain a licence does not apply to the two oldest Russian arbitral institutions – the International Commercial Arbitration Court (the "**ICAC**"; also known as

MKAS) and the Maritime Arbitration Commission (the "**MAC**") at the Russian Chamber of Commerce and Industry. They will continue to administer arbitrations as usual. All other Russian arbitral institutions will need to seek a licence. At the time of writing, no licences have been issued yet. Therefore, the ICAC and the MAC are the only existing Russian arbitral institutions that definitely remain operative after 1 November 2017.

Foreign arbitral institutions wishing to administer disputes seated in Russia will also need to obtain a licence, but the requirements for doing so are much more relaxed compared to the requirements applicable to Russian ones. In essence, the foreign arbitral institution will only need to show to the Russian Government that it has a solid international reputation. If a foreign arbitral institution fails to obtain the relevant licence, arbitral awards rendered under its rules in Russia would be deemed *ad hoc* awards. While some institutions have already indicated that they will not be seeking a licence and others have said that they will wait, a number of foreign arbitral institutions have suggested that they will apply for a licence. At the time of writing, no licences have been issued to foreign arbitral institutions either.

While the legislation does not expressly govern *ad hoc* arbitration, it imposes certain restrictions with respect to *ad hoc* tribunals. In particular, *ad hoc* tribunals would not be able to seek a state court's assistance in obtaining evidence. Furthermore, the parties to the *ad hoc* arbitration are not entitled to exclude the relevant recourses by express agreement (see above). Finally, corporate disputes cannot be resolved by *ad hoc* tribunals.

Arbitrability

Russian legislation provided initially that all commercial and private law disputes were capable of being referred to arbitration, unless otherwise provided for in the federal laws. However, only bankruptcy legislation contained a clear prohibition on referring bankruptcy cases to arbitration. However, the court practice broadened the scope on non-arbitrable disputes significantly. For example, the courts considered real estate disputes,[6] corporate disputes, other disputes involving public elements,[7] etc. to be incapable of being referred to arbitration.

The Reform sought to limit the scope of judicial creativity. Now, only disputes specifically excluded by federal laws may not be referred to arbitration. The list of non-arbitrable disputes is not contained only in the procedural legislation,[8] but can be extended by further legislation.

For now, the lists of non-arbitrable disputes include, *inter alia*, the following categories:

- bankruptcy procedures;
- disputes arising out of administrative regulation and public matters;
- disputes relating to convocation of general meetings, challenging actions of a notary, contesting non-regulatory acts, acquisition and buying-out of shares by a company, acquisition of over 30% of shares in a public joint stock company;
- shareholders' disputes in relation to companies of strategic importance;
- disputes relating to privatisation of property;
- disputes on environmental damages;
- disputes arising out of public procurement contracts;[9]
- employment, family and inheritance cases; and
- several other categories of disputes.

Arbitration of shareholders' disputes

The definition of shareholders' (or so-called "corporate") disputes was introduced in 2009 in Russian *Arbitrazh* (Commercial) Procedural Code to ensure that all matters relating to a corporation fall within the exclusive jurisdiction of an *arbitrazh* (commercial) court at the place of its incorporation. For this reason, the legislator used the broadest possible definition of corporate disputes, which covers any dispute "related to the establishment and management of, or participation in, a legal entity".

As it was intended to resolve a potential jurisdictional conflict between various courts within the Russian state courts' system, it was not until 2011 that the notion of exclusive jurisdiction of the arbitrazh court over corporate disputes affected their arbitrability. In the infamous *NLMK v Maximov* case, the panel of Supreme *Arbitrazh* Court judges refused to grant leave for the case to be considered by the Presidium and upheld the lower courts' judgments which set aside the ICAC award. Amongst other grounds, the Supreme *Arbitrazh* Court judges noted that corporate disputes, including disputes arising out of share purchase agreements, are not arbitrable, as they fall within the exclusive jurisdiction of the state *arbitrazh* courts.[10]

Notably, this position was not followed universally as, in certain instances, the courts considered similar disputes arbitrable.[11] Hence, the arbitrability of corporate disputes remained an area of controversy in Russia. The reform legislation introduced more certainty in this regard.

As the procedural legislation already contained a definition of corporate disputes, the reform used the categorisation of disputes from the procedural legislation as a starting point. All corporate disputes were divided into three categories:

- Corporate disputes involving a public element (e.g., disputes on state registration of corporations or expulsion of a shareholder) cannot be referred to arbitration.
- Disputes involving contracting parties only (e.g., disputes arising from share purchase agreements) can only be referred to the administered (not *ad hoc*) arbitration.
- Disputes involving a greater number of parties (e.g., disputes relating to the challenge of corporate resolutions and disputes arising out of shareholders' agreements with respect to Russian entities) may be referred to arbitration if certain conditions are met.

With respect to the third category of corporate disputes, the legislation established the following requirements:

- the arbitration shall be seated in Russia;
- the arbitration shall be administered by an arbitral institution which has obtained a licence from the Russian Government and adopted special rules for arbitration of corporate disputes; and
- arbitration is only possible if all the shareholders and the legal entity itself have entered into an arbitration agreement providing for arbitration of such corporate disputes.

Importantly, under the updated laws, the arbitration agreement with respect to any category of corporate disputes is only enforceable if entered into after 1 February 2017.

According to the legislation now in force, the definition of corporate disputes applies only to disputes relating to a Russia-registered company. Consequently, the above-mentioned restrictions should not apply to disputes arising out of shareholders' relationships at the level of a foreign-registered holding company which in turn owns the shares in the Russian company. While another interpretation has no support in the wording of the law, it cannot be excluded that the courts may interpret the scope of the new legislation more broadly so

as to cover also disputes between indirect shareholders of the Russian companies.

The rules for arbitration of corporate disputes have already been adopted by a number of arbitral institutions. Most notably, the ICAC has published its own version of the corporate arbitration rules. The Russian Arbitration Association (the "**RAA**") has also created its own rules for corporate arbitration. Looking at these two sets of rules may give a certain understanding as to how the procedure is expected to function in practice.

According to the new legislation, the rules on arbitration of corporate disputes shall provide for the institution's duty to notify the commencement of the corporate dispute, and the shareholders' rights to intervene at any stage.

Notification about the dispute

Both the RAA and the ICAC Rules provide (addressing the legislative requirements) that upon receipt of the claim the institution must (i) notify the company concerned and send it a copy of the claim (and exhibits), and (ii) post the information regarding the commencement of the shareholders' dispute on the institution's website. The information on the website does not have to provide any details of the dispute beyond notification of its commencement.

Following that, it is the company's duty to notify all its shareholders of the commencement of the dispute. As the institutions have no powers to compel the company to fulfil this duty, the rules provide that the company's failure to notify its shareholders does not preclude arbitration from continuing. However, it remains to be seen whether shareholders would be precluded from challenging the award, relying on their lack of information about the commencement of the dispute.

Shareholders' right to intervene

The notification of the shareholders is important, as each of them has a statutory right to intervene at any stage of the proceedings.

The RAA Rules make a distinction between a party that intervenes as a co-claimant or as a 'third party' (typically a party opposing claims and not advancing any claims in its own name). Under the RAA Rules, such a third party will have all procedural rights and duties of a party, with the exception of rights that only a claimant may enjoy (e.g., the right to amend the claim). The ICAC Rules do not seek to put any label on the intervening party and simply state that it would have the same rights and duties as any party to the dispute.

Importantly, the party intervening into the proceedings has to accept the state of the proceedings at the time of such a joinder.

Formation of the tribunal

As the disputes under the corporate arbitration rules would likely involve multiple parties, the rules for formation of the arbitral tribunal may be of particular importance.

The ICAC Rules provide that all claimants and all respondents will have to agree on an arbitrator for each side. If that is not possible, all three arbitrators shall be appointed by the ICAC.

According to the RAA Rules, all parties have to agree on all three members of the panel. If the parties are unable to come to an agreement, all members of the tribunal will be appointed by the RAA.

No parallel proceedings with identical claims

The philosophy behind the legislative provisions on litigation of shareholders' disputes is that any given dispute shall be resolved in one set of proceedings, with all shareholders being able to join in.

The same approach was adopted for the arbitration of corporate disputes. The shareholders' right to intervene at any stage implies that no identical claims can be brought separately. A shareholder willing to arbitrate the same issue shall join the existing proceedings. If the claim is brought after the arbitration on the same issue has commenced, such claim will be treated as a request for intervention.

Effect of the final award

The ability to intervene also has one additional practical consequence – once the award is rendered, it shall be binding upon all parties to the arbitration clause (i.e. all of the shareholders).

Furthermore, the RAA Rules expressly provide that if an identical claim is submitted after the final award in the initial dispute is rendered, the newly constituted arbitral tribunal will have to dismiss such claims due to the *res judicata* effect of the previous award. While the ICAC Rules are not as express on this matter, the practical consequences should be the same.

Assistance of the state courts

It is not uncommon that the parties to arbitration may require certain support from the state courts. Even under the previous legislation, the state courts could grant interim measures in support of arbitration (including a foreign-seated arbitration). Following the reform, the courts can also assist with obtaining evidence and in relation to the appointment and replacement of arbitrators.

Interim measures

The reform legislation did not change the rules in relation to obtaining interim measures in support of arbitration.

Article 90(3) of the APC provides that interim measures may be granted at the request of a party to arbitration by a court at the place of arbitration, or location of the respondent or its assets.

In 2010, the Presidium of the Supreme *Arbitrazh* Court in the case No. A40-19/09-OT-13 ruled that Russian *arbitrazh* courts generally have powers to grant interim measures in support of foreign arbitral proceedings.[12] The background of this case may be described as follows. In 2009, the claimant commenced arbitration against a Russian businessman at the LCIA for payment of over US$30m for the unpaid purchase price of the shares. The claim arose out of the letters of guarantee given by the respondent as security for various legal entities under the share purchase agreements. The claimant sought attachment of certain property in Russia in aid of the LCIA proceedings. The first instance court rejected the claimant's application, stating that the necessary conditions for granting interim measures were not established by the applicant. This decision was overruled by an appellate court, which granted the requested attachment. However, the cassation court quashed the appellate court's ruling on the basis that the *arbitrazh* court did not have jurisdiction to grant interim measures. The claimant appealed to the Supreme *Arbitrazh* Court and the Presidium ruled that Russian *arbitrazh* courts may grant interim measures in support of international arbitration proceedings, if the matter in dispute is commercial by nature.

On 9 July 2013 the Presidium of the Supreme *Arbitrazh* Court issued Informational Letter 158 – the Practice Review on Certain Questions Relating to the Resolution of Disputes Involving Foreign Parties by the *arbitrazh* courts (the "***Practice Review***"). Section 29 of the Practice Review reaffirms the state courts' powers to issue interim measures in support

of arbitrations. Such measures can be issues by the courts at the place of arbitration, place of incorporation or residence of the debtor, or the place of the debtor's property. When considering an application for interim measures, the *arbitrazh* court should check the validity of the arbitration agreement as well as the arbitrability of the dispute in question. The Presidium further recommended that the court should take into account whether an arbitral tribunal had ordered the interim measures and whether the respondent had complied with such interim measures voluntarily.

Generally speaking, Russian courts are very reluctant to issue interim measures. Therefore, in practice there are only few examples where interim measures have been granted in support of arbitration. The most recent case where the claimants were successful in obtaining interim measures is the case No. A55-22/2016. The case relates to the LCIA arbitration where the claimants sought specific performance of the respondent's obligations to transfer shares in certain Russian companies. In support of the LCIA arbitration, the claimants obtained a freezing order from an English court prohibiting transfer of the shares. As the foreign freezing order would not be directly enforceable in Russia, the claimants applied to the Russian court for a similar measure. The court granted the interim measures.[13]

Collecting evidence

The reform legislation introduced a new provision according to which the state courts may assist in collecting evidence for the purposes of arbitration.

The assistance is only available in the context of administered (i.e. not *ad hoc*) arbitration with a place of arbitration in Russia. This means that, for example, it would not be available for arbitration under the rules of foreign institutions which have not obtained a licence from the Russian Government.

The court would act on the application from an arbitral tribunal or the party acting with the tribunal's permission. The scope of this assistance is also rather limited, as the court would only assist with collecting of documentary evidence or physical objects, but not the witness or any other type of evidence (e.g. site inspections).[14]

The court could not entertain an application, *inter alia*, when the underlying dispute cannot be referred to arbitration or where the documents in question contain classified information or commercial secrets of persons who are not parties to arbitration.

Assistance concerning appointing, challenging and removing the arbitrators

The updated legislation provides also for the courts' power to intervene in relation to appointment, challenge or removal of an arbitrator.

Appointment. The court would assist with the appointment of an arbitrator upon the request of a party to an arbitration agreement, if the parties or an arbitral institution is unable to form the tribunal.[15] The court would need to have regard to the qualifications and criteria provided for in the arbitration agreement and appoint independent and impartial arbitrators. It is not entirely clear how the courts would select arbitrators in practice, but most likely the courts would either be guided by the list of arbitration of the relevant institution or choose among the candidates proposed by the parties. Most likely, the parties would be expected to have cleared the conflicts with the prospective arbitrator and obtained his or her consent to act prior to filing the application with the courts. The guidance in this regard may be taken from the practice of selecting court-appointed experts in Russian litigation.

Challenge and removal. If a party was unsuccessful in its attempt to challenge an arbitrator, it could refer the matter to the state court within a month of receiving the relevant decision.[16] The legislation also provides for an application to remove the arbitrator, if he or she does

not resign voluntarily after becoming unable to execute the mandate.[17]

The relevant applications will be considered by the court at the place of arbitration and its decisions appear to be final and not subject to subsequent appeal. The parties to an arbitration agreement providing for institutional arbitration may exclude the courts' interference in the above matters by express agreement. Notably, assistance with respect to the above matters in relation to ICAC and MAC arbitrations is exercised not by the state courts, but by the President of the Russian Chamber of Commerce and Industry.[18]

Challenge and enforcement of the arbitration award

Russia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Accordingly, the grounds for refusal to enforce (and by implication, for setting the award aside) are exactly the same as provided for under Article V of the New York Convention.

Court proceedings on the setting aside or enforcement of arbitral awards in Russia are generally pretty quick. Before the reform, the first instance court shall decide on the matter within three months from the date of filing of the relevant application.

Starting from 1 January 2017, this time frame is reduced to only one month for the first instance court. The reduced time frame to enforce or set aside the award is intended to promote efficiency, but it has its downsides as well. Firstly, respondents to the applications will need to be prepared to act very promptly, and most likely to monitor any application to make sure that defence submissions can be made within a very short period in time. Secondly, this change will put additional pressure on first-instance judges, who are known to make many mistakes in arbitration-related cases. On the top of being unfamiliar with arbitration and having many other cases before them at the same time, they now will not have sufficient time to study and understand parties' submissions. It is quite possible, therefore, that judges would have to take decisions intuitively and their subconscious biases may have to be rectified by the higher courts.

As discussed, the parties to the Russia-seated administered arbitrations (both domestic and international) can now expressly agree on the finality of the award and thereby to exclude any set-aside proceedings. This development essentially reflects recent court practice which has extended the analogous provision in the law on domestic arbitration to international arbitration cases. However, while court practice previously considered the reference to finality of the awards in the arbitration rules to be sufficient to trigger the exclusion of the set-aside proceedings, now an agreement will need to be expressly stated in the arbitration clause.

The reform legislation also expressly allows non-parties to arbitration to challenge arbitral awards which concern their rights or duties. Most likely, such challenges cannot be excluded, irrespective of the express agreements of the parties to the contrary, but in practice, situations where the arbitrators would render an award directly affecting non-parties are pretty rare.

Furthermore, the Reform provides for the mechanism of staying set-aside proceedings to allow the arbitral tribunal to rectify defects. Upon the application of a party, the court can stay the proceedings and remit the case to the arbitration tribunal, if the grounds for application to set aside are based on lack of proper notice or inability to present one's case; or the award being rendered on matters not falling within the scope of the arbitration agreement; or the arbitral tribunal's composition or the procedure being incompliant with the agreement of the parties. The stay can be granted for up to three months and within this

period of time the arbitral tribunal will have to rectify the procedural defects. Article 34(4) of the ICA Law provided for such an opportunity even before the reform, but there was no mechanism for that under the relevant procedural legislation. This gap has been filled by the reform legislation.

The Reform also will introduce a new provision on recognition of foreign declaratory judgments and arbitral awards.[19] If the international treaty provides for the recognition of such judgments and awards, they will be recognised in Russia without further enforcement proceedings. Thereby the declaratory judgments and awards may be directly applicable in Russia and may be relied upon in the Russian court and arbitration proceedings. It is, however, not quite clear whether there needs to be a specific international treaty to this effect or the treaties providing for recognition and enforcement (e.g. the New York Convention) would suffice.

Notably, the burden to oppose recognition of the awards would be on the respondent. The application to oppose recognition would need to be filed in the Russian court within one month from the date when the applicant learnt of the judgment or the award. The grounds for refusal of recognition are essentially the same as the grounds for refusal for enforcement. Hence, the burden of proving that a declaratory judgment or award should not be recognised rests on the losing party and, unless that burden is promptly discharged, the relevant judgment or award can be used in the proceedings in Russia without further formalities. This development also adds pressure on respondents, who need to be aware of the risk of the judgment or award being used against them in Russia, and be ready to file the relevant application at very short notice after they are notified of the judgment or award.

* * *

Endnotes

1. Article 34(1) of the ICA Law.
2. Article 16(3) of the ICA Law.
3. Article 11(5) of the ICA Law.
4. Article 13(3) of the ICA Law.
5. Article 14(1) of the ICA Law.
6. This practice was later overturned by the Constitutional Court.
7. A. Panov, *Court affirms non-arbitrability of disputes involving public element* at: http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Russia/Norton-Rose-Fulbright-Central-Europe-LLP/Court-affirms-non-arbitrability-of-disputes-involving-public-element.
8. Article 33 of the *Arbitrazh* Procedural Code (the "***APC***") and Article 22.1 of the Civil Procedural Code (the "***CPC***").
9. This exception appears to apply only to state or municipal public procurement, but not the procurement conducted by state-owned companies. However, it cannot be excluded that the courts would interpret this prohibition broadly.
10. Ruling of the Supreme *Arbitrazh* Court of 30 January 2012 No. VAS-15384/11.
11. Resolution of the Federal *Arbitrazh* Court for the Moscow Circuit of 3 April 2013 in the case No. A40-111506/2012; Resolution of the Thirteenth *Arbitrazh* Appellate Court of 15 November 2013 in the case No. A56-37022/2013 is available in Russian.

12. A Resolution of the Presidium of the Supreme *Arbitrazh* Court used the same reasoning. The Resolution of the Supreme *Arbitrazh* Court of 20 April 2010 in the case No. A40-19/09-OT-13.
13. Ruling of the *Arbitrazh* Court of Samara Region dated 12 January 2016 in the case No. A55-22/2016.
14. Article 27 of the ICA Law; Article 30 of the Law on Arbitration; Article 74.1 of the APC; Article 63.1 of the CPC.
15. Article 11(4) of the ICA Law, Article 11(4) of the Law on Arbitration, Article 240.1 of the APC, Article 427.1 of the CPC.
16. Article 13(3) of the ICA Law, Article 13(3) of the Law on Arbitration, Article 240.1 of the APC, Article 427.1 of the CPC.
17. Article 14(1) of the ICA Law, Article 14(1) of the Law on Arbitration, Article 240.1 of the APC, Article 427.1 of the CPC.
18. Paragraph 11 of Annex I and paragraph 10 of Annex II to the ICA Law.
19. Article 245.1 of the APC.

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Sierra Leone

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Introduction

In Sierra Leone, arbitration is governed by the Arbitration Act, Chapter 25 of the Laws of Sierra Leone 1960 (Cap. 25). This is a rather outdated piece of legislation that is insufficient and incapable of meeting modern international standards. There is now a draft Arbitration Bill but this is yet to be passed into law. This proposed Act, based on the UNCITRAL arbitration rules, will bring arbitration proceedings in Sierra Leone up to international standards.

In the meantime, Sierra Leone is a signatory to a plethora of international instruments, some of which make it a safe destination for business people. These include:

- WIPO Convention (formally, the Convention establishing the World Intellectual Property Organization).
- Multilateral Investment Guarantee Agency (MIGA), which offers political risk insurance and credit enhancement guarantees.
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which sets down minimum standards for many forms of intellectual property (IP) regulation as applied to nationals of other WTO Members.
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States Party. Although no specific reference is made to the International Centre for Settlement of Investment Disputes (ICSID) Convention, the Investment Promotions Act 2004 allows recourse to arbitration under ICSID for foreign investors.

Within the court system, there is an in-built alternative dispute resolution for the speedy disposal of commercial disputes. Pursuant to the Commercial and Admiralty Court Rules 2010, all claims filed in the Fast Track Commercial Court are referred to a judge for a pre-trial settlement conference within three days of the filing of a reply. The Judge assigned will then invite the parties to settle the issues for trial or effect settlement of the claim. A case will only be referred for trial if the matter or any part of it is not settled at this stage.

However, insofar as international arbitration and the enforcement of such awards is concerned, Sierra Leone is not a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" or the "New York Convention".

Arbitration agreement

Cap. 25 of the Law of Sierra Leone 1960 does not define arbitration agreements. The term defined in that Act is "submission", which means "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". Generally,

arbitration agreements are contained in the instrument that governs the relationship between the parties. It is important to note that the pre-trial settlement conference used in the Admiralty and Commercial Court Rules operates regardless of whether there is an arbitration agreement or not.

Arbitration procedure

The current law does not state the precise procedure to follow in arbitration proceedings. It is presumed that the parties will agree on the procedure and for local arbitration the law applied will be Sierra Leonean law, unless otherwise agreed.

Stay of legal proceedings

Cap. 25 states that any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Arbitrators

The parties may agree on the number of arbitrators to form an arbitral tribunal and the chairman or umpire. Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two (or any even number) shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal and where there is no agreement on the number, the tribunal shall consist of a sole arbitrator.

Cap. 25 outlines the circumstances wherein the court shall appoint arbitrator(s). It states that the court can make an appointment:

- Where the agreement provides for an arbitrator and the parties do not concur on the appointment.
- If an appointed arbitrator refuses to act or is incapable of acting, or dies and the agreement does not show that it was intended that the vacancy should not be filled, and the parties do not fill the vacancy.
- Where the parties, or two arbitrators, are at liberty to appoint an umpire or third arbitrator and do not appoint him.
- Where an appointed umpire or third arbitrator refuses to act or is incapable of acting, or dies and the agreement does not show that it was intended that the vacancy should not be filled, and the parties or arbitrators do not fill the vacancy.

Interim relief

Cap. 25 is silent on interim reliefs. It is suggested that there is no legal bar to an arbitrator making an interim award.

Arbitration award

Under Cap. 25, arbitration awards are only discussed with reference to the power of the court to extend the time for making an award, remittance, setting aside, and enforcement.

Challenge of the arbitration award

Pursuant to paragraph (h) of the Schedule to Cap. 25, the award by the Arbitrators shall be final and binding on the parties and all persons who are claiming under it.

Enforcement of the arbitration award

Section 13 of Cap. 25 empowers the court to enforce an arbitration award in the same manner as a judgment or order of a court. However, the situation is more problematic when it comes to enforcement of international arbitration awards. As Sierra Leone is not yet a signatory to the New York Convention, recognition and enforcement of international awards would be difficult to achieve.

Investment arbitration

Cap. 25 is silent on investment arbitration. The current trend is that parties agree to submit any dispute to international arbitration, for example before the London Court of Arbitration or the International Chamber of Commerce. Locally, the Sierra Leone Chamber of Commerce and Agriculture runs its own internal mediation service for disputes between its members, within its own structure. In 2009, the Chamber formalised this through the creation of the Centre for Alternative Dispute Resolution, which is a company limited by guarantee. They obtained funding from Cordaid for the creation of a database and record-keeping, training of judges, lawyers and other professionals in arbitration and mediation. They have also formed a partnership with the Dispute Resolution Foundation in Jamaica. The long-term aim is to develop close cooperation with the Judiciary, develop their own rules based on the UNCITRAL model, and to be able to record certain aspects of the process for the purpose of developing a precedent base.

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Glenna Thompson was called to the Bar of England and Wales in 1993 and enrolled at the Sierra Leone Bar in 1995. She was a practising Barrister at the Chambers of Wilfred Forster-Jones in Middle Temple, London until 2002 when she left the UK for Sierra Leone. An experienced advocate, she undertakes work in the areas of commercial and corporate law, mining, share issue, international arbitration and criminal law. She works with a number of new and existing investors in Sierra Leone and has worked on major acquisitions, joint ventures and the incorporation of new companies, and has advised international agencies in their negotiations with government. She has drafted international agreements with the government and government agencies and worked on public offering of shares for local companies. She has also acted successfully for a local company in an international arbitration with a foreign company before the London Court of International Arbitration, and for Receivers in the administration of an insolvent multi-national company. She was a member of the drafting committee on several legislations. She led the team that developed the Justice Sector Reform and Investment Strategy II for the Government of Sierra Leone (2011–2013) developed the Strategic Plan for the Ministry of Justice for 2013–2015, the Manual for State Prosecutors, and drafted a report on Commercial Law and Justice in Sierra Leone which is part of the Justice Sector Reform and Investment Strategy. She is a member of the Constitutional Review Committee, a body set up to review the current Constitution of Sierra Leone. She is ranked in the International Chambers Directory and is a member of the Chartered Institute of Arbitrators, and is the Chairman of the Board of Directors of Ecobank Sierra Leone. She is also the current Chairman of the General Legal Council.

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Singapore

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Introduction

New York Convention

Singapore acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") on 21 August 1986, with reservation that the New York Convention will only apply to the recognition and enforcement of awards which are made in the territory of another contracting State. On 19 November 1986, the New York Convention entered into force.

Arbitration legislation

Arbitration in Singapore is primarily governed by two laws: the Arbitration Act (Cap. 10) ("**AA**"), which governs domestic arbitrations; and the International Arbitration Act (Cap. 143A) ("**IAA**"), which primarily governs international arbitrations.

Generally, Part II of IAA, which governs International Commercial Arbitrations, will only apply to arbitrations that are an "international arbitration". Arbitrations will be considered international if:[1]

(a) at least one of the parties to the arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore;

(b) one of the following places is situated outside the State in which the parties have their place of business:

  (i) the seat of the arbitration agreement;

  (ii) any place where a substantial part of the obligations is to be performed or the place with which the subject matter of the dispute is most closely connected; or

  (iii) the parties expressly agree that the subject matter of the arbitration agreement relates to more than one country.

(c) the seat of the arbitration if determined in, or pursuant to, the arbitration agreement is situated outside the State in which the parties have their place of business; or

(d) any place where a substantial part of the obligations of the commercial relationship is to be performed.

In addition to the above, Part II of the IAA will also apply to arbitrations where the parties have agreed in writing that the IAA shall apply.[2]

On the other hand, the AA applies to arbitrations where the seat of arbitration is Singapore and where Part II of the IAA does not apply to that arbitration.[3]

The IAA has essentially incorporated the UNCITRAL Model law ("**Model Law**"), with some modifications. Such modifications include, but are not limited to:

(a) the default number of arbitrators shall be one[4] (the default number is three under the Model Law);

(b) in an arbitration with three arbitrators, the third arbitrator shall be appointed by agreement of the parties[5] (the third arbitrator is appointed by the two party-nominated arbitrators under the Model Law);

(c) the inclusion of additional grounds for setting aside an award;[6] and

(d) the replacement of the Model Law provisions on the recognition and enforcement of foreign arbitral awards.

In addition, the IAA provides for the recognition and enforcement of foreign arbitral awards which are made in the territory of another New York Convention contracting State.

The primary difference in approach between the AA and the IAA is the level of judicial supervision over the arbitration. For example, the AA permits an appeal to the Singapore Court on a question of law arising out of the award made in a domestic arbitration[7] (though such avenue of appeal may be excluded by agreement of the parties[8]) whereas no such avenue of appeal is available for international arbitrations under the IAA.

Arbitration body

The principal arbitration body for Singapore is the Singapore International Arbitration Centre ("**SIAC**"). The SIAC Rules (6th Edition, 1 August 2016) ("**SIAC Rules**") are the primary rules of arbitration at the SIAC. In addition, the following rules may be used at the SIAC:

(a) the Investment Arbitration Rules of the SIAC (1st Edition, 1 January 2017), used for international investment arbitrations;

(b) the UNCITRAL Arbitration Rules (2010), primarily used for *ad hoc* arbitrations; and

(c) the SIAC SGX-DT Arbitration Rules (1st Edition, 1 July 2005) and the SIAC SGX-DC Arbitration Rules (1st Edition, 27 March 2016), used for disputes arising from derivative trading and derivative clearing, respectively.

In addition to administering the aforementioned rules, the IAA has also:

(a) appointed the President of the SIAC as one of the statutory authorities for the appointment of arbitrators under the IAA;[9] and

(b) appointed the Registrar of the SIAC as the statutory authority for taxation of costs.[10]

Arbitration agreement

Requirements of an arbitration agreement

Under the IAA, an "arbitration agreement" is an agreement by the parties to submit to arbitration disputes which have arisen or may arise between them in respect of a legal relationship.[11]

An arbitration agreement may be in the form of a clause in a contract or in the form of a separate agreement. An arbitration agreement must be in writing and may include electronic communications.[12]

Where the arbitration agreement does not expressly provide the governing law of the arbitration agreement, the implied choice of law for the arbitration agreement is likely to be the same as the expressly chosen law of the substantive contract.[13]

Arbitrable disputes

Generally, all disputes are arbitrable unless it would be contrary to public policy.[14] The Singapore Courts have held that there will ordinarily be a presumption of arbitrability, provided the dispute falls within the scope of the arbitration agreement.[15] This presumption

(of arbitrability) may be rebutted if it can be shown that:

(a) the Singapore Parliament intended to preclude a particular type of dispute from being arbitrated, such intention being evidenced by either the text or the legislative history of the statute in question; or

(b) it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration.[16]

As such, disputes concerning the liquidation of an insolvent company[17] and claims which arise upon insolvency[18] are not arbitrable.

Joinder and consolidation of third parties

Parties who are not parties to the arbitration agreement are not permitted to be joined in an arbitration unless all parties to that arbitration agreement consent to the joinder.[19]

Where parties have adopted the SIAC Rules, such rules permit the consolidation or joinder of third parties under certain circumstances.

Rule 7 of the SIAC Rules provides that a party or non-party to the arbitration may file an application with the Registrar of the SIAC (for joinders prior to the constitution of the arbitral tribunal) or the arbitral tribunal (for joinders after the constitution of the arbitral tribunal) for one or more additional parties to be joined as a claimant or a respondent in an arbitration, provided that any of the following criteria are satisfied:

(a) the additional party is *prima facie* bound by the arbitration agreement; or

(b) all parties, including the additional party to be joined, consent to the joinder.

The SIAC Court will then, after considering the views of all parties (including the additional party to be joined) and the circumstances of the case, decide whether or not to grant the joinder.

Rule 8.1 of the SIAC Rules provides that, prior to the constitution of any arbitral tribunal, a party may file an application with the Registrar of the SIAC to consolidate two or more arbitrations pending under the SIAC Rules provided that any of the following criteria are satisfied:

(a) all parties have agreed to the consolidation;

(b) all the claims in the arbitrations are made under the same arbitration agreement; or

(c) the arbitration agreements are compatible, and: (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions.

Generally, where consolidation is sought for arbitrations that have already constituted a arbitral tribunal, the same arbitral tribunal must be constituted in each arbitration. Thus, Rule 8.7 provides that, after the constitution of any arbitral tribunal, a party may file an application with the arbitral tribunal to consolidate two or more arbitrations pending under the SIAC Rules provided that any of the following criteria are satisfied:

(a) all parties have agreed to the consolidation;

(b) all the claims in the arbitrations are made under the same arbitration agreement, and the same arbitral tribunal has been constituted in each of the arbitrations, or no arbitral tribunal has been constituted in the other arbitration(s); or

(c) the arbitration agreements are compatible, the same arbitral tribunal has been constituted in each of the arbitrations, or no arbitral tribunal has been constituted in the other arbitration(s), and: (i) the disputes arise out of the same legal relationship(s);

(ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions.

The SIAC Court (for consolidations prior to the constitution of a arbitral tribunal) and the arbitral tribunal (for consolidations after the constitution of a arbitral tribunal) will, after considering the views of all parties and the circumstances of the case, decide whether or not to grant the consolidation.

Competence of arbitral tribunal to rule on its jurisdiction

The arbitral tribunal may rule on its own jurisdiction, including on any objections as to the existence or validity of the arbitration agreement (doctrine of *kompetenz-kompetenz*).[20] In addition, an arbitration clause which forms part of a contract shall be treated as a separate and independent agreement from the other terms of the contract (doctrine of separability). As such, a decision by the arbitral tribunal that a contract is null and void will not necessarily lead to the invalidity of the arbitration agreement.

If a party objects to the arbitral tribunal's jurisdiction, it must raise this objection no later than the submission of the statement of defence. However, the arbitral tribunal may admit an objection to jurisdiction outside this time if it considers the delay justified.[21]

A party may appeal the arbitral tribunal's ruling on jurisdiction to the Singapore High Court.[22] Such appeal may be made regardless of whether the arbitral tribunal had ruled that it had or did not have jurisdiction.[23] The appeal must be made within 30 days after having received notice of the arbitral tribunal's ruling on jurisdiction.[24] However, this avenue of appeal is not open to a party if the arbitral tribunal's preliminary ruling on jurisdiction touches upon the merits of the dispute.[25]

If the arbitral tribunal's preliminary ruling on jurisdiction does touch upon the merits of the dispute, a party may apply to the Singapore Court to set aside the award on the grounds set out in Article 34(2) of the Model Law, as added to by Section 24 of the IAA. Such grounds include the setting aside of the award on the basis that the arbitral tribunal has no jurisdiction for lack of a valid arbitration agreement.[26]

Arbitration procedure

Commencement of arbitration

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.[27]

Where parties have adopted the SIAC Rules, Rule 3 of the SIAC Rules provides that the arbitration is commenced when a claimant files a Notice of Arbitration with the Registrar of the SIAC, which shall include:

(a) a demand that the dispute be referred to arbitration;

(b) the names, addresses, telephone numbers, facsimile numbers and electronic mail addresses, if known, of the parties to the arbitration and their representatives, if any;

(c) a reference to the arbitration agreement invoked and a copy of the arbitration agreement;

(d) a reference to the contract or other instrument (e.g. investment treaty) out of or in relation to which the dispute arises and, where possible, a copy of the contract or other instrument;

(e) 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;

(f) a statement of any matters which the parties have previously agreed as to the conduct of the arbitration or with respect to which the Claimant wishes to make a proposal;

(g) a proposal for the number of arbitrators, if not specified in the arbitration agreement;

(h) unless otherwise agreed by the parties, 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;

(i) any comment as to the applicable rules of law;

(j) any comment as to the language of the arbitration; and

(k) payment of the requisite filing fee under these Rules.

Rules of evidence

The arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.[28] This is similarly reflected in Rule 19 of the SIAC Rules.

The arbitral tribunal is also empowered by the IAA to make orders or give directions to any party for, among other things: (a) the giving of evidence by affidavit; and (b) the preservation and interim custody of any evidence.[29] This is similarly reflected in Rule 27 of the SIAC Rules.

Nevertheless, from our past experience, as a matter of practice, arbitral tribunals typically use the IBA Rules on the Taking of Evidence in International Arbitration as a guideline. However, there is no mandatory requirement to adopt the IBA Rules.

Confidentiality

The IAA does not provide specifically for confidentiality in arbitration. Nevertheless, the Singapore Courts have held that the obligation of confidentiality is to be implied in arbitration proceedings,[30] the scope of which is to be determined in the context of each case and the nature of the information or documents at issue.[31]

Where parties have adopted the SIAC Rules, Rule 39 of the SIAC Rules expressly provides that, generally, arbitral proceedings are to be kept confidential, unless otherwise agreed by the parties. However, Rule 39.2 of the SIAC Rules provides that disclosure may be made to a third party in the following circumstances:

(a) for the purpose of making an application to any competent court of any State to enforce or challenge the Award;

(b) pursuant to the order of, or a subpoena issued by, a court of competent jurisdiction;

(c) for the purpose of pursuing or enforcing a legal right or claim;

(d) in compliance with the provisions of the laws of any State which are binding on the party making the disclosure or the request or requirement of any regulatory body or other authority;

(e) pursuant to an order by the arbitral tribunal on application by a party with proper notice to the other parties; or

(f) for the purpose of an application for joinder or consolidation under the SIAC Rules.

Emergency arbitration

The IAA recognises emergency arbitrations by defining "arbitral tribunal" to include emergency arbitrators. As such, emergency arbitrators are treated no differently to other arbitral tribunals, are provided with the same powers as other arbitral tribunals and may, with leave of the Singapore High Court, have their awards enforced in the same manner as a judgment or order to the same effect.[32]

Where parties have adopted the SIAC Rules, such parties may seek emergency interim relief by applying to the Registrar of the SIAC.[33] If the President of the SIAC determines that such application should be accepted, the President shall appoint an emergency arbitrator.[34] The

emergency arbitrator shall have the power to order or award any interim relief and shall make his/her interim order or award within 14 days from the date of his/her appointment.[35] The emergency arbitrator shall have no power to act once the arbitral tribunal is constituted and such arbitral tribunal: (i) may reconsider, modify or vacate any interim order or Award issued by the emergency arbitrator; and (ii) is not bound by the reasons given by the emergency arbitrator.[36]

Arbitrators

Appointment of arbitrators

Unless otherwise agreed by the parties, the default number of arbitrators to be appointed is one.[37] In an arbitration with three arbitrators, unless otherwise agreed by the parties, each party shall appoint one arbitrator and the parties shall, by agreement, appoint the third arbitrator.[38] However, where parties have adopted the SIAC Rules and unless otherwise agreed by the parties, the third arbitrator shall be appointed by the President of the SIAC.[39]

Challenging the appointment of an arbitrator

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.[40] This is similarly reflected in Rule 14 of the SIAC Rules.

The Singapore Courts have held that bias may be manifested in three forms:[41]

(a) actual bias;

(b) imputed bias, which arises where an arbitrator may be said to be acting in his/her own cause (e.g. where he/she has a pecuniary or proprietary interest in the case); and

(c) apparent bias, which arises when a reasonable and fair-minded person with knowledge of all the relevant facts would entertain a reasonable suspicion that the circumstances might result in the arbitral proceedings being affected by apparent bias if the arbitrator was not removed.

Termination of arbitrator's mandate

Generally, the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.[42] Notwithstanding this general rule, the arbitrator is still permitted to:

(a) correct the award, either when requested to do so by a party within 30 days of the receipt of the award by such party,[43] or of its own initiative within 30 days of the date of the award;[44]

(b) if so agreed by the parties, interpret the award when requested to do so by a party within 30 days of receipt of the award by such party;[45]

(c) unless otherwise agreed by the parties, make an additional award as to claims presented in the arbitral proceedings but which were omitted from the award;[46] and

(d) where a court suspends the setting-aside proceedings in order 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.[47]

Immunity of arbitrators

An arbitrator shall not be liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator or for any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.[48]

Interim relief

Interim powers

The arbitral tribunal is empowered to make orders or give directions to any party for an interim injunction or any other interim measure.[49] Unless otherwise agreed by the parties, the arbitral tribunal may also make any interim measures of protection it considers necessary in respect of the subject matter of the dispute. This includes directing a party to provide appropriate security in connection with such measure.[50] The broad powers granted to the arbitral tribunal by the IAA are also mirrored in the SIAC Rules.[51]

Where the arbitral tribunal has not yet been constituted, it is not incompatible with the IAA for a party to apply to the Singapore Court for an interim measure of protection and for the Singapore Court to grant such measure. However, the power of the Singapore Court to order an interim measure only applies where an arbitral tribunal (including an emergency arbitrator[52]), institution or other person vested by the parties with such power has no power or is unable for the time being to act effectively.[53] Moreover, an order by the Singapore Court for an interim measure shall cease to have effect if the arbitral tribunal makes an order which expressly relates to the whole or part of the court-ordered interim measure.[54]

Stay of proceedings

If a party institutes proceedings against another party in respect of a matter that is the subject of an arbitration agreement between the parties, the other party may apply to the Singapore Court to stay the proceedings. The Singapore Court shall make an order to stay proceedings unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.[55]

In determining whether there is a valid and operative arbitration agreement, the Singapore Court will only conduct a *prima facie* review.[56] If the Singapore Court is satisfied that, *prima facie*, there is a valid and operative arbitration agreement, the Singapore Court will stay the proceedings in favour of arbitration.

Arbitration award

An arbitral award must:[57]

(a) be in writing and signed by the arbitrator or arbitrators;[58]

(b) state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or if the award is issued pursuant to a settlement; and

(c) state the date of the award and the place (seat) of arbitration.

Where parties have adopted the SIAC Rules, the arbitral tribunal shall submit the draft award to the Registrar of the SIAC within 45 days from the date on which the arbitral tribunal declares the proceedings closed.[59]

Award on costs

Unless otherwise agreed by the parties, an arbitral tribunal may award costs. In addition, unless the award states otherwise, an arbitral award may be taxable by the Registrar of the SIAC.[60]

Unless otherwise agreed by the parties, an arbitral tribunal may award simple or compound interest (at such rate as the arbitral tribunal considers appropriate), for any period ending not later than the date of payment, on the whole or any part of any sum awarded in the arbitral proceedings.[61]

There is no express requirement for an arbitral tribunal to award costs to the successful party

(i.e. costs following the event). In addition, there is no public policy of Singapore to ensure that costs are assessed on the basis of any particular principle, including the proportionality principle.[62] Nevertheless, from our past experience, arbitral tribunals typically award costs to the successful party.

Challenge of the arbitration award

Setting aside of award

An award may be set aside on the following grounds:[63]

(a) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid;

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

(c) the award deals with a dispute that does not fall within the terms of the arbitration agreement or contains decisions on matters beyond the scope of submission to arbitration;[64]

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

(e) the subject matter of the dispute is not capable of settlement by arbitration; or

(f) the award is in conflict with the public policy of Singapore.

In addition, the main body of the IAA provides that an award may also be set aside on the following grounds:[65]

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

(b) there is a breach of natural justice in connection with the making of the award.

A party challenging an award must file an application with the Singapore High Court within three months from the receipt of the award.

Singapore is generally regarded as 'pro-arbitration'. It is generally well established under Singapore arbitration jurisprudence that the Singapore Court's power to set aside awards must and should only be exercised charily.[66]

In keeping with the above principle:

(a) a high threshold must be crossed before the Singapore Court will set aside an award for breach of natural justice on account of a procedural breach. Such breach cannot be of a trifling nature and must be serious enough to justify the Singapore Court's discretion to set aside the award;[67] and

(b) there is a presumption of arbitrability so long as the dispute falls within the scope of an arbitration agreement (see above).[68]

In addition, the Singapore Court may, where appropriate and requested to do so by a party, suspend the setting aside proceedings and remit the matter back to the original arbitral tribunal to resume the arbitral proceedings or to take such action that, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside.[69] The court's power to remit matters back to the original arbitral tribunal is an *alternative* to setting aside the award. Therefore, the court will not have the power to remit the matter back to the original tribunal if the award has already been set aside.[70]

Modification of award

Within 30 days of receipt of the award (or such other period as agreed upon by the parties), a party may request the arbitral tribunal to:

(a) correct in the award any errors in computation, any clerical or typical errors or errors of a similar nature; or

(b) provide an interpretation of a specific part of the award.

If the arbitral tribunal considers the request justified, it shall make the correction or give the interpretation within 30 days of receipt of the request.[71] An arbitral tribunal may also correct any errors in computation, any clerical or typical errors or errors of a similar nature of its own initiative within 30 days of the date of the award.[72]

Enforcement of the arbitration award

Awards made in Singapore

An award made in Singapore may, by leave of the Singapore High Court, be enforced in the same manner as a judgment or order to the same effect. Where such leave is given, the judgment may be entered in terms of the award.[73]

In addition, given that Singapore is a party to the New York Convention, an award made in Singapore may also be enforced in other New York Convention States, subject to the applicable arbitration laws of that State.

Foreign awards

An award made in a New York Convention State other than Singapore ("**Foreign Award**") may, by leave of the Singapore High Court, be enforced in the same manner as a judgment or order to the same effect. Where such leave is given, the judgment may be entered in terms of the award.[74]

A party seeking to enforce a Foreign Award must produce to the Singapore Court:[75]

(a) the duly authenticated original award or a duly certified copy of such award;

(b) the original arbitration agreement under which the Foreign Award purports to have been made under or a duly certified copy of such agreement; and

(c) if the Foreign Award or arbitration agreement is in a foreign language, a translation of it in the English language, duly certified in English as a correct translation.

The Singapore Courts may refuse enforcement of a Foreign Award if the party against whom enforcement is sought proves any one of the following grounds:[76]

(a) the party to the arbitration agreement was, under the law applicable to such party, under some incapacity at the time the arbitration agreement was made;

(b) the arbitration agreement is not valid;

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

(d) the award deals with a dispute that does not fall within the terms of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration;[77]

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

(f) the Foreign Award has not yet become binding on the parties or has been set aside by a competent authority of the State in which the award was made.

The Singapore Courts may also refuse enforcement of a Foreign Award, without the application of a party, on the following grounds:

(a) the subject matter of the Foreign Award is not capable of settlement by arbitration under the law of Singapore; or

(b) the enforcement of the Foreign Award would be contrary to the public policy of Singapore.

An award made in a State that is not a signatory to the New York Convention may also be enforced in Singapore in the same manner as a judgment to that effect with leave of the Singapore High Court.[78]

As stated above, Singapore is generally regarded as 'pro-arbitration' and typically recognises and enforces Foreign Awards. The Singapore Courts will typically employ a mechanistic approach to the enforcement process of Foreign Awards and will only refuse enforcement if the grounds provided in the IAA are established.[79]

Investment arbitration

Singapore ratified the International Convention for the Settlement of Investment Disputes ("**ICSID**") between States and Nationals of Other States ("**ICSID Convention**") on 14 October 1968. The ICSID Convention was made effective in Singapore, via the Arbitration (International Investment Disputes) Act on 13 November 1968. To date, there have been no claims made against Singapore under the ICSID Convention.

Singapore is also a party to over 40 bilateral investment treaties, around 20 free trade agreements and numerous multilateral investment treaties. In particular, Singapore is a party to the ASEAN Comprehensive Investment Agreement ("**Comprehensive Investment Agreement**"), a multilateral investment treaty between all ASEAN States.[80] Generally, under the Comprehensive Investment Agreement, a disputing investor may submit a claim under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings provided that both the disputing Member State and the non-disputing Member State are parties to the ICSID Convention.

* * *

Endnotes

1. Section 5(2) of the IAA.
2. Section 5(1) of the IAA.
3. Section 3 of the AA.
4. Section 9 of the IAA.
5. Section 9A of the IAA.
6. Section 24 of the IAA.
7. Section 49(1) of the AA.
8. Section 49(2) of the AA.
9. Section 8(2) of the IAA.
10. Section 21 of the IAA.
11. Section 2A(1) of the IAA.
12. Section 2A(3)-(4) of the IAA.
13. *BCY v BCZ* [2016] SGHC 249, [49].
14. Section 11(1) of the IAA.

15. *Tomolugen Holdings Ltd and another v Silica Investors Ltd* and other appeals [2015] SGCA 57, [76].
16. *Tomolugen Holdings Ltd and another v Silica Investors Ltd* and other appeals [2015] SGCA 57, [76].
17. *Tomolugen Holdings Ltd and another v Silica Investors Ltd* and other appeals [2015] SGCA 57, [77].
18. *Larson Oil and Gas Pte Ltd v Petropod Ltd* (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] 3 SLR 414, [45].
19. *PT First Media TBK v Astro Nusantara International BV & others* [2013] SGCA 47.
20. Article 16(1) of the Model Law, First Schedule of the IAA.
21. Article 16(2) of the Model Law, First Schedule of the IAA.
22. Article 16(3) of the Model Law, as modified by Section 10 of the IAA.
23. Section 10(3) of the IAA.
24. Pursuant to Section 10(4) of the IAA, a party may appeal the decision of the Singapore High Court only with leave of the Singapore High Court.
25. *AQZ v ARA* [2015] SGHC 49.
26. *AQZ v ARA* [2015] SGHC 49, [72].
27. Article 21 of the Model Law, First Schedule of the IAA.
28. Article 19 of the Model Law, First Schedule of the IAA.
29. Section 12(1) of the IAA.
30. *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR(R) 945.
31. *AAY and others v AAZ* [2011] 1 SLR 1093; [2009] SGHC 142, [54].
32. Section 2(1) of the IAA.
33. Paragraph 1, Schedule 1 of the SIAC Rules.
34. Paragraph 3, Schedule 1 of the SIAC Rules.
35. Paragraph 8-9, Schedule 1 of the SIAC Rules.
36. Paragraph 10, Schedule 1 of the SIAC Rules.
37. Section 9 of the IAA.
38. Section 9A of the IAA.
39. Rule 11 of the SIAC Rules.
40. Article 12 of the Model Law, First Schedule of the IAA.
41. *PT Central Investindo v Franciscus Wongso and others* and another matter [2014] SGHC 190, [15]–[18].
42. Article 32(3) of the Model Law, First Schedule of the IAA.
43. Article 33(1)(a) of the Model Law, First Schedule of the IAA.
44. Article 33(2) of the Model Law, First Schedule of the IAA.
45. Article 33(1)(b) of the Model Law, First Schedule of the IAA.
46. Article 33(3) of the Model Law, First Schedule of the IAA.
47. Article 34(4) of the Model Law, First Schedule of the IAA.
48. Section 25 of the IAA.
49. Section 12(1) of the IAA.
50. Article 17 of the Model Law, First Schedule of the IAA.
51. Rule 30 of the SIAC Rules.

52. Under the IAA, the definition of "arbitral tribunal" includes emergency arbitrators.
53. Section 12A(6) of the IAA.
54. Section 12A(7) of the IAA..
55. Section 6 of the IAA.
56. *Tomolugen Holdings Ltd and another v Silica Investors Ltd* and other appeals [2015] SGCA 57, [63].
57. Article 31 of the Model Law, First Schedule of the IAA.
58. Where the arbitration has more than one arbitrator, the signature of the majority of arbitrations shall suffice, provided that the reason for the omitted signature(s) is stated (Article 31(1) of the Model Law, First Schedule of the IAA).
59. Rule 32.3 of the SIAC Rules.
60. Section 21(1) of the IAA.
61. Section 20(1) of the IAA. See also Section 12(5) of the IAA.
62. *VV and another v VW* [2008] 2 SLR® 929, [31].
63. Article 34(2)(a) of the Model Law, First Schedule of the IAA.
64. 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 (Article 31(2)(a)(iii) of the Model Law, First Schedule of the IAA).
65. Section 24 of the IAA.
66. *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972, [1].
67. *Prometheus Marine Pte Ltd v King, Ann Rita* and other matters [2017] SGHC 36, [86].
68. *Tomolugen Holdings Ltd and another v Silica Investors Ltd* and other appeals [2015] SGCA 57, [76].
69. Article 34(4) of the Model Law, First Schedule of the IAA.
70. *AKN and another v ALC and others* and other appeals [2015] SGCA 63.
71. Article 33(1) of the Model Law, First Schedule of the IAA.
72. Article 33(2) of the Model Law, First Schedule of the IAA.
73. Section 19 of the IAA.
74. Section 29 of the IAA.
75. Section 29 of the IAA.
76. Section 31(2) of the IAA.
77. When the Foreign Award contains decisions on matters not submitted to arbitration but those decisions can be separated from decisions on matters submitted to arbitration, the award may be enforced to the extent that it contains decisions on matters so submitted (Section 31(3) of the IAA).
78. Section 46 of the AA.
79. *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174, [46].
80. Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam.

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Spain

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Introduction

Spain has a longstanding tradition of promoting and holding domestic and international arbitration, which has consolidated its position as a solid alternative to the courts, and it is currently the seat of a number of arbitration proceedings involving national and foreign businesses.

From an international perspective, Spain's commitment to developing arbitration as an alternative dispute resolution system began with the ratification of the European Convention on International Commercial Arbitration in 1975, followed by the ratification without reservation in 1977 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and, finally, the ICSID Convention in 1994.

In 1988, Spain set up a legal regime through Act 36/1988 of 5 December on Arbitration, in order to give greater certainty to this type of dispute resolution, and in order to harmonise provisions on arbitration and consolidate the practice in this field.

As a response to the progression and promotion of commercial arbitration and due to its quickly changing needs, the legal regime was improved and updated by means of Act 60/2003 of 23 December on arbitration (the "**Arbitration Act**"), which is still the applicable law after having been amended in 2011 in order to modernise and adapt its regulation to current trends in the international arbitration field.

For the sake of uniformity of international commercial arbitration practice, Spain followed the United Nations recommendation and took as a point of departure the Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985 (UNCITRAL Model Law). The current Spanish legal regime on arbitration was greatly inspired by its provisions and aligned, as a consequence, with the global trend pursued by the majority of jurisdictions.

The Arbitration Act encompasses a legal regime applicable both to domestic and international arbitration. Thus, with few exceptions, the same provisions are equally applicable to both, which allows for easier understanding and implementation. Additionally, having a unique legal framework substantially increases the trustworthiness of Spain as an international arbitration benchmark.

Regarding the main arbitration institutions in Spain, the Madrid Arbitration Court (*Corte de Arbitraje de la Cámara Oficial de Comercio e Industria de Madrid* – 'CAM') and the Civil and Mercantile Court of Arbitration (*Corte Civil y Mercantil de Arbitraje* – 'CIMA'), both based in Madrid, have taken the lead in the promotion and contribution to the now well-established practice of arbitration; however, despite the widespread use of the abovementioned courts, a significant number of other smaller institutions are gaining

considerable importance and growing in size.

Finally, the Spanish Arbitration Club (*Club Español del Arbitraje*) has also strongly contributed to the current good health of the arbitration sector, thanks to its interest in the latest international trends and its effort to promote high standards of ethics and good practice among practitioners and to create a robust corpus of soft law, as their Recommendations on the Independence and Impartiality of Arbitrators and the Code of Good Arbitration Practices are generally accepted in practice.

In the following sections, further detail will be given on how the arbitration legal regime works in Spain and to what extent the Spanish Arbitration Act is aligned with current trends in global arbitration practice.

Arbitration agreement

Validity requirements and arbitrability

The key issue in arbitration, as reflected in the Arbitration Act, is the parties' willingness to submit a controversy or part of a controversy to arbitration. As arbitration is a party autonomy-based dispute settlement system, the parties' consent is essential for its legitimacy and, therefore, its existence must be strictly guaranteed.

Additional validity controls are foreseen for those domestic arbitration agreements contained in adhesion contracts entered into by consumers, since the Spanish Arbitration Agreement considers arbitration agreements contained therein to be null and void, except if they relate to consumer arbitration.

(i) *Arbitrable matters*

According to article 2.1 of the Arbitration Act, any matters that may be freely disposed of at law are capable of being settled by arbitration. Therefore, the vast majority of disputes between private parties are arbitrable except, most notably, (i) those engaging rights related to personality, (ii) filiation and custody matters, (iii) those linked with civil status, (iv) controversies in which the Public Prosecutor must take part, and (v) some issues relating to patents.

(ii) *Formal requirements*

With regards to formal validity requirements, as is common practice in this field, domestic arbitration agreements must be in writing; this requisite, however, is interpreted broadly since no specific format is required inasmuch as a record of the agreement is ensured. Therefore, an arbitration agreement does not need to be signed by the parties as it may be agreed by electronic means in any exchange of communication, or it can also be incorporated by reference. However, as the arbitration agreement can adopt the form of a contract clause or a separate agreement, the existence of an arbitration agreement can be proved in several ways as the mutual consent of the parties can be inferred from any communication that has taken place between them.

Spanish courts pay special attention to the scope of the arbitration agreement in order to analyse whether the parties have submitted a particular dispute to arbitration and have excluded disputes regarding the execution of the contract from arbitration when the arbitration clause only referred to the disputes arising from the interpretation of a contract. In order to avoid the limitations of this strict interpretation, currently all the Spanish arbitral institutions have stated in their model clauses that any dispute arising from or relating to a contract, including any matter regarding its existence, validity or termination, shall be definitively settled by arbitration.

In addition, even if the Arbitration Act strengthens the informal character of the arbitration agreement as long as consent of the parties is found, the courts are also aware of the formalities and will not extend the arbitration agreement to non-signatories except in very exceptional cases when the corporate veil is lifted or consent to the arbitration agreement can be clearly inferred from the parties' statements.

In terms of international arbitration, the previous requirements can differ, as article 9 of the Arbitration Act contains a provision in favour of validity of the arbitration agreement, as long as it complies with the legal rules which were chosen by the parties to govern the agreement, the rules applicable to the substance of the dispute, or the rules laid down in Spanish law.

(iii) *Arbitration agreements established in articles of association*

In 2011, a special provision concerning the arbitrability of intra-enterprise arbitration was introduced by Act 11/2011 of 20 May, which amends the Arbitration Act, recognising arbitration agreements established in companies' articles of association for internal disputes. For this to be the case, however, a majority of no less than two-thirds of the votes attaching to the shares is required.

Apart from the required majority, when the object of submission to arbitration is a challenge made by shareholders or directors of corporate agreements, there is an additional requirement that the arbitration itself and the appointment of arbitrators be entrusted to an arbitral institution.

Separability and competence-competence principles

On the other hand, and not surprisingly, the principle of separability applies under the Spanish Arbitration Act. Therefore, the arbitration agreement remains valid even when the contract of which it is part is declared void; otherwise, the arbitrators' decision would lack legitimacy since there would be no legal basis from which to derive their authority to rule. That is the reason why the separability principle is a cornerstone in arbitration.

With respect to the principle of competence-competence, it also applies to arbitration proceedings held in Spain. By means of this principle, arbitrators can decide whether they have jurisdiction over the dispute before them. Thus, giving full effect to these principles allows the arbitrators to rule on the validity of the arbitration agreement or any other plea that would prevent them from rendering an award on the merits of the case.

Arbitration procedure

Procedural flexibility

As mentioned above, arbitration is a dispute settlement mechanism founded on party autonomy. Therefore, the way proceedings are conducted is mainly left to the parties' discretion, which will be always respected as long as the process they design takes into consideration two imperative principles enshrined in the Spanish Constitution: (i) the principle of equal treatment of the parties; and (ii) the parties' right to fully present their case.

In the absence of agreement and in line with the essence of arbitration as a flexible process, the power to design the arbitral proceeding is given to arbitrators who are in the best position to decide how to conduct the arbitration in the most appropriate manner.

In terms of the foregoing discretion given to arbitrators, the Arbitration Act does not place any limitations on the form of the proceedings (i.e. in writing only) and the place where hearings or consultation meetings can be held.

Additionally, in light of the above-mentioned party autonomy, the Arbitration Act does not establish a set of provisions in relation to how evidence should be examined. Parties, in the first place, and arbitrators, in the second place, will decide on the appropriate means of proof. In any case, arbitrators will have the right to freely evaluate the evidence provided.

However, despite this statutory freedom, arbitrators usually follow the IBA Rules on the Taking of Evidence, which are considered applicable legislation by the Spanish arbitration courts and are generally taken into account in the practice of arbitration in Spain.

As usual, court assistance in taking evidence is expressly envisaged in arbitration laws and in article 33 of the Arbitration Act, which provides that courts can be asked for assistance in taking evidence. The competent court to do so is the Court of First Instance in the place of arbitration or the place where assistance is to be provided.

The competent court's intervention is limited to adopting the appropriate measures to secure the taking of evidence, either before them or before the arbitrators; therefore, its task consists of acting as an assistant without having exclusive supervision of the evidence phase, which is only possible when it is specifically requested.

Apart from court assistance, arbitrators may appoint experts to report on specific issues that demand a deeper knowledge in order to properly rule on the case. The appointed experts, unless otherwise agreed, can also be asked to take part in a hearing where they may be questioned further.

The fast-track proceedings

With the purpose of saving time and costs, the recent trend in international arbitration has been to shorten arbitral proceedings, especially with regard to small claims. Proof of this trend is the issuing of the Expedited Procedure Rules by the International Chamber of Commerce, which entered into force on 1 March 2017.

In Spain, the pioneer was the Arbitral Tribunal of Barcelona (*Tribunal Arbitral de Barcelona*) which, anticipating this trend, issued the new Rules of Abbreviated Procedure as early as 2014. Currently, the main arbitration institutions in Spain offer this procedure as a way of gaining further efficiency.

In line with this new trend, the Madrid Arbitration Court updated its rules in 2015, when the abbreviated procedure was introduced, for claims which do not exceed €100,000.

Arbitrators

Requisites

The Arbitration Act requires there to be an odd number of arbitrators for the appointment to be valid. In the event that the parties have not determined a specific number of arbitrators, the default rule is that a sole arbitrator must be appointed.

Regarding arbitrator qualifications, the Arbitration Act does not impose any conditions on the persons who can serve as arbitrators as long as they are in full possession of their civil rights. However, if the person appointed is subject to any limitations as a result of their profession, these cannot be waived. Furthermore, according to article 15 of the Arbitration Act, at least one of the members of the arbitral tribunal must be a jurist and sole arbitrators must also be jurists unless the arbitration will be decided *ex aequo et bono*.

Appointment of arbitrators

The appointment procedure in the absence of the agreement of the parties varies depending on the number of arbitrators upon which they agreed. There are two possible scenarios: (i) if one

single arbitrator is chosen to conduct the proceedings, the court will make the appointment. This remedy will also apply if more than three arbitrators will constitute the arbitral tribunal; however, (ii) if the number of arbitrators agreed upon is three, each party will be responsible for appointing one arbitrator and the two party-appointed arbitrators will decide on the third one. Any setback in any of the previous appointments will force the court to decide.

The criteria taken into consideration by the court when facing the appointment of arbitrators are the requirements agreed by the parties regarding arbitrator qualifications, the degree of independence and impartiality that an arbitrator can guarantee, and the nationality of the parties and of the would-be arbitrator.

Challenging an arbitrator

In order to challenge an arbitrator, the only grounds available according to article 17 of the Arbitration Act are the existence of "justifiable doubts as to their impartiality or independence"; or "if they do not possess the qualifications agreed to by the parties".

Regarding the time limit for the challenge, the parties, unless they have agreed otherwise, may challenge the arbitrator within 15 days once they are aware of the circumstance that could trigger the challenge or, in any case, after the acceptance of their appointment.

As to who decides on the challenge, the other members of the arbitral tribunal are in charge of ruling on the challenge unless the challenged arbitrator withdraws from office before, or the other party does not object to the challenge.

Deciding on the challenge may sometimes be controversial due to the ambiguity of article 17 when it refers to "justifiable doubts as to their impartiality or independence". This undefined legal concept has been helpfully delimited by the IBA Guidelines on conflicts of interest, which represent a widely accepted standard in the Spanish arbitration practice.

One example of its implementation is the ruling of the High Court of Justice of Madrid in June of 2016 (*Sentencia núm. 46/2016 2 de junio – JUR 2016\182484*) in the context of an annulment proceeding. On that occasion, the court stated that: "*in order to clarify the circumstances from which the arbitrator's impartiality and independence are called into question, and due to the lack of an explicit legal provision […] the IBA Guidelines on conflict of interest can be taken into account despite being soft law […].*" Thus, Spain is aligning its practice with international standards followed in other jurisdictions.

Court assistance

Regarding the proceedings adopted, when an arbitrator is unable to perform their tasks, but there is no agreement between the parties and the arbitrator does not withdraw from office and the other members of the tribunal cannot reach an agreement, the applicable default rules establish oral proceedings as the legal way to terminate the arbitrator's mandate.

The competent court for holding oral proceedings is the Civil and Criminal Branch of the High Court of Justice of the autonomous region where arbitration takes place. If the location is yet to be determined, it will be the court in the place of business or habitual residence of any of the respondents; if none of the respondents has a place of business or habitual residence in Spain, the court in the place of business or habitual residence of the claimant; and if the claimant has none, the court in the place of its choice.

Interim relief

General legal regime

Under article 23 of the Arbitration Act, arbitrators are allowed to grant interim measures

at the request of one of the parties. Following the provisions on interim measures of the UNCITRAL Model Law, the form of the order adopting an interim measure is not defined; however, despite not being formally considered an award, such orders can be set aside and can also be recognised and enforced under the provisions applicable to arbitral awards.

Notwithstanding the arbitrators' power to order such measures, a party can instead request an interim measure from a court. Thanks to a specific provision in the national law of civil procedure (the "**Civil Procedure Code**"), courts are entitled to issue interim relief measures, irrespective of whether the pending arbitral proceeding is in Spain or abroad.

With regard to which court has jurisdiction to grant those measures, the rules laid down in the Civil Procedure Code establish two possible forums: the place where the award must be enforced or, in the absence of any indication, the place where the measures shall be executed.

The emergency arbitrator

As part of their modernisation process, Spanish arbitration institutions, such as the Arbitration Tribunal of Barcelona and the Madrid Arbitration Court, have introduced the figure of the emergency arbitrator to their regulations.

As an example, the regime adopted by the latter foresees a time limit of seven days for the arbitrator to decide, and also foresees emergency arbitrators for both interim measures and preservation of evidence.

The adoption of emergency arbitrators to provide the parties with the opportunity to seek urgent temporary relief is a further step towards the alignment of Spanish arbitration institutions with the international institutions, and a benchmark in the field. Such relief has proved to be a successful remedy aimed at helping to fill the gaps in arbitration as a dispute settlement mechanism.

Arbitration award

Validity of the award

In Spanish arbitration, the validity of an arbitration award depends on its compliance with several formal requirements: (i) it must be rendered in writing; (ii) the award must be signed by either the majority of arbitrators or the president of the tribunal, as long as the reason for the omission of the other signatures is specified; (iii) it must state the grounds upon which the decision is based; and (iv) finally, it must include the date and the place of arbitration.

In terms of timing, in the absence of an agreement between the parties, the award shall be rendered within six months of having submitted the first round of memorials on the merits (after constitution of the arbitral tribunal). The foregoing period may be extended by up to two months provided that such an extension is duly justified. However, it is specifically stated that under no circumstances does failure to deliver the award within the stipulated time frame constitute grounds for setting aside the arbitral award, without prejudice to any liability the arbitrators may incur.

Ruling on costs

With regard to the arbitrators' decision on costs, there are no legal criteria in the Arbitration Act according to which they can be ordered. However, in practice arbitrators usually follow the rule applied by courts and therefore, it is common for the losing party to bear costs if all their claims have been entirely dismissed or otherwise, to split the costs.

Challenge of the arbitration award

The sole recourse available

A fundamental principle of arbitration is that arbitral awards are final, which means that there is no judicial review on the merits. Therefore, the challenge of an Arbitration Award is meant to be an exceptional remedy for those awards that should never have been rendered, such as if there is a party autonomy flaw which the arbitration is based on, or if the arbitral tribunal went beyond the scope of the arbitration agreement.

A pro-arbitration practice that is pursued is to find the proper balance when facing the annulment of an arbitration award – thus, simultaneously guaranteeing the finality principle of arbitration awards and strict compliance with the parties' consent to arbitration should be the result sought.

With regard to the challenge of an arbitration award in Spain, filing a lawsuit in order to set aside an arbitral award is the sole recourse available against the presumed validity of a final and binding award. Although final judgments and awards can be reviewed in cases, for instance, where forgery of documents is involved, such a remedy is exceptional and residual. As a consequence, it can be stated that there is no other appellate mechanism for challenging the award aside from the annulment according to article 43 of the Arbitration Act.

Grounds

The Arbitration Act follows the UNCITRAL Model Law reasonably faithfully, by establishing the same grounds on which the annulment of an award can be based: (i) the absence or invalidity of the arbitration agreement; (ii) the party applying for the annulment was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case; (iii) the arbitrators rendered an award over a dispute not contemplated by or not falling within the terms of the submission to arbitration; (iv) the formation of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless this agreement was in conflict with a provision of the Arbitration Act from which the parties cannot derogate or, in the absence of agreement, was not in accordance with the aforementioned Act; (v) the subject matter of the dispute cannot be settled by arbitration under Spanish law; and (vi) the award is in conflict with public policy.

It should be noted that whereas the first four grounds have to be alleged and proved by the party requesting the annulment of the award, the last two can be alleged *ex officio* by the court.

In respect of the competent court to rule on the application for setting aside arbitral awards, this competence is entrusted to the Civil and Criminal Branch of the High Court of Justice of the autonomous region where the award was rendered. However, the time limit for applications for setting aside the award differs slightly from the UNCITRAL Model Law. Whereas the UNCITRAL Model Law sets the period at three months, it is one month shorter in the Arbitration Act.

In terms of numbers, conflict with public policy is the argument most commonly raised by the parties to attempt to annul an award. It is important to note that recently, the High Court of Justice of Madrid introduced "economic public policy" as grounds for setting aside awards concerning the validity of swap agreements entered into between banks and consumers. Although these highly controversial decisions refer to very specific proceedings involving swaps and have attracted abundant criticism from arbitration practitioners, they

do not mark a departure from the self-restraint generally displayed by the Spanish courts.

Spain, as demonstrated in recent decades, is an arbitration-friendly country, which carefully applies the finality principle by restricting the judicial review on the merits. Proof of this is the fact that the majority of attempts to set aside an award are being dismissed and the reasons behind those that are granted are the consequence of the strict application of the grounds for annulment.

Enforcement of the arbitration award

The New York Convention

Since 1977, Spain has been one of the Contracting States of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**NY Convention**").

Adhesion to the NY Convention and, therefore, its current application, has not been subject to any of the reservations that section 3 of article I allows, neither the reciprocity exception nor the commercial.

The consequence of the above-mentioned position is that Spain shall apply the NY Convention to any award rendered in a foreign state without taking into consideration whether that state is a Contracting State. Besides, the application of the Convention is not restricted to "commercial legal relationships" considered as such under Spanish law, which means that a Spanish court will recognise and enforce an international award related to legal controversies of any kind.

Rules of procedure to recognise and enforce arbitral awards

In order to have a foreign award recognised and enforced in a Contracting State, article III of the Convention establishes that "the rules of procedure of the territory where the award is relied upon" must be followed.

In this sense, an initial distinction between the legal regime applicable to the recognition and the regime applicable to the enforcement needs to be made.

In terms of recognition, on 20 August 2015, a new Act relating to international legal cooperation in civil matters entered into force (Law 29/2015, of 30 July, "*Ley 29/2015, de 30 de julio*"), which signalled a significant step forward for the recognition of foreign court decisions.

From an international arbitration perspective, the International Legal Cooperation Act has replaced obsolete articles 951 to 958 of the 1881 Civil Procedure Code, in order to design a whole new process of exequatur regulation to handle the proceedings for the recognition of foreign awards under the NY Convention.

Despite this new Act, the competence for recognition of foreign arbitral awards or decisions is still incumbent upon the Civil and Criminal Branch of the High Court of Justice of the region where the party whose recognition is requested or where the person affected by such awards or decisions has their place of business or residence.

In terms of enforcement, article 44 of the Arbitration Act establishes the Civil Procedure Code as the body of law that shall be applied to enforce foreign arbitral awards.

Accordingly, article 517.2 of the Civil Procedure Code deems an award an appropriate enforcement order under Spanish Law, which can be enforced as long as the period of five years has not elapsed from the time that the arbitral award became final.

In respect of the competent court for proceeding with the enforcement, and pursuant to article 545 of the Civil Procedure Code, the Court of First Instance in the place where the award was rendered is the competent court to enforce such award.

Suspension in the event of application to set aside an award

On the other hand, it is worth noting how the Arbitration Act deals with the recognition and enforcement of awards that have been or are pending to be set aside at the courts of the seat of arbitration.

This scenario is foreseen in article 45 of the Arbitration Act, which states that the award is enforceable even if it is being challenged before the courts of the country where it was rendered. However, as enforcing an award that may end up being invalidated is usually an undesired result, the Arbitration Act allows the court where the enforcement is sought to suspend the proceedings.

Thus, in line with established case law, the challenge of an award at the seat of arbitration is not itself grounds for automatically denying recognition and enforcement of said award. In fact, the court can either stay the proceedings until the annulment decision has been rendered or recognise and enforce the award anyway.

Even though staying proceedings is usually the solution adopted by the courts in such circumstances, when the award is being challenged at the seat of arbitration and the suspension of the enforceability of the award is denied therein, a Spanish court deemed it appropriate to respect such enforceability when there is no other legal encumbrance that prevents the court from ordering the sought enforcement (*Auto núm. 29/2015 de 29 julio de la Sección 1ª del Tribunal Superior de Justicia de Andalucía, Granada – AC 2016\236*).

The fact that the same award is the object of other recognition and enforcement proceedings in other jurisdictions is not grounds for suspending or denying its recognition. The reason is the territorially limited effectiveness of the ruling recognising the award given by the Convention, whose recognition and enforcement system is not opposable *erga omnes*.

In this area, Spain shows itself again to be an advocate of international arbitration effectiveness and its loyalty to strict application of the NY Convention. Proof of this is last year's statistics, which show the trend towards the positive enforcement of foreign arbitral awards in the Spanish jurisdiction, since all recognition and enforcement attempts were granted by Spanish courts.

Investment arbitration

In 2007 and 2008, the Spanish Government promoted a new energy policy in order to help boost investment in the renewable energy industry, by granting subsidies to those choosing to invest in various energy subsectors, principally in photovoltaic energy, but also, to a lesser extent, in solar, thermal and wind energy.

The ambitious reforms, which were enacted with the aim of converting Spain into a world leader in renewable energies which will attract international investors, included a feed-in tariff in the photovoltaic sector, as well as certain tax benefits and soft loans.

However, the severe paralysis of the financial crisis revealed the unsustainability of the system and consequently led to the amendment of the energy policy. The generous incentives given to investors were progressively rolled back in order to contend with the growing Spanish deficit and a legal battle under the provisions of the Energy Charter Treaty (ECT) then ensued against Spain.

Several companies and international investment funds claimed compensation before the international arbitration courts. According to the ECT, the investor can choose from ICSID arbitration, the Stockholm Chamber of Commerce, or *ad hoc* arbitration under UNCITRAL rules. These disgruntled investors claimed that government incentives and subsidy cuts

significantly damaged their renewable energies businesses and were essentially indirect expropriations.

The claims against Spain started in 2011, after the first legislation modifying the special regime for solar energy producers entered into force in 2010. The number of claims rose sharply as new legislative changes were implemented by the Spanish Government in 2013 and 2014, which further reduced incentives. By the first quarter of 2016, some 30 claims (most of which were held before the ICSID court of arbitration) had been filed against Spain, which led Spain to earn the unwelcome title of most sued country in the world.

At present, the outcome of the proceedings remains uncertain as, although the first two awards issued in the first quarter of 2016 were rendered in favour of the Spanish Government, the most recent ICSID decision rendered in May 2017 broke the winning streak and ordered Spain to pay €128 million to a British investor.

According to the information on the first of the awards to be made public at the time of writing (*Charanne B.V. and Construction Investments, S.à.r.l. vs Kingdom of Spain, SCC* 062/2012), the Arbitral Tribunal considered that the claimants had not received any specific commitment regarding the stability of the special regime and could not reasonably expect that the legal framework within which the subsidies were conceded would not be amended, and therefore the changes to the energy policy by the Spanish Government did not affect the investor's legitimate expectations.

As the second of the awards remains confidential (*Isolux Infraestructure BV vs The Kingdom of Spain*) this new award against the interests of the Spanish authorities (*Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. vs The Kingdom of Spain*) constitutes a major setback for the country in investment arbitration proceedings and creates uncertainty regarding the awards that are still to be rendered.

Therefore, it is difficult to anticipate the result of the upcoming awards, but what is certain is that they will introduce solid case law under the ECT regarding whether or not investors had reasonable and legitimate expectations that were breached as a result of the state's actions.

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Sweden

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Introduction

Sweden has established itself as one of the most favoured places for the resolution of international disputes through arbitration. Sweden has a long history of being perceived internationally as an arbitration-friendly, neutral and reliable jurisdiction which has attracted parties from all over the world to resolve their disputes by arbitration in Sweden or using Swedish arbitrators. Arbitration has for a long time also been the preferred dispute resolution method for commercial disputes in Sweden. A large number of Swedish commercial contracts include an arbitration clause. As a result, many Swedish lawyers have a sound knowledge of arbitration law and Swedish courts are experienced in handling challenge proceedings and other arbitration-related matters.

The Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) has had an important role in this development and is one of the main reasons why many international contracts include an arbitration clause designating Sweden as the seat of arbitration. The SCC is an internationally renowned arbitration institute with approximately 200 new cases filed per year, which makes it one of the leading arbitration institutions in the world. Approximately half of the cases handled by the SCC are international. The SCC also plays a leading role as an administrator of investor-state disputes and has a caseload second only to ICSID.

The SCC is committed to conform with the latest developments in international arbitration. A set of revised rules for arbitrations and expedited arbitrations entered into force on 1 January 2017, in time for the SCC's 100-year anniversary. The purpose of the revision of the rules was to make arbitration in Sweden even more attractive to both international and domestic parties by improving the efficiency of the proceedings even further. Some of the key changes in the 2017 SCC Rules are presented in the chapters below, for example, new provisions on joinder, consolidation, multiple contract arbitration and so-called summary procedure.

Another important factor behind Sweden's position as a popular arbitration seat is the modern and flexible arbitration law of Sweden, which is built on the fundamental principle of party autonomy. The Swedish Arbitration Act is the main law governing arbitration in Sweden. The Arbitration Act allows the parties to tailor-fit their dispute resolution to suit the needs of commercial parties, and there are only a few mandatory rules which are there to ensure due process. The Arbitration Act also offers accessibility to independent and arbitration-friendly courts, which are widely regarded as swift and effective. Lawyers familiar with the UNCITRAL Model Law will find few surprises in the Arbitration Act since it follows the Model Law in substance, with only minor deviations. The act is applicable

to both domestic and international arbitration. Sweden has signed and ratified the New York Convention without any reservations. Sweden is also a member of the Energy Charter Treaty (the ECT) and the ICSID Convention.

Efforts are made in order for Swedish arbitration law to stay in line with the best practices of international arbitration. In 2015, a committee of prominent legal experts issued a report, proposing certain revisions of the Arbitration Act for the purpose of making arbitration in Sweden even more attractive to both Swedish and international parties. The suggested revisions include allowing English language in challenge proceedings before ordinary courts, and specific rules to facilitate multi-party arbitrations. More details of some of the proposed amendments are mentioned below. A government bill has not yet been issued, but is expected during 2017.

Arbitration agreement

Lawyers familiar with the UNIDROIT principles will find that Swedish contract law shares many of its traits. The cornerstones are the principles of party autonomy and *pacta sunt servanda* and, as in the UNIDROIT principles, it is the common intention of the parties that determines the content of an agreement. This also applies to arbitration agreements governed by Swedish law. Unless otherwise agreed, Swedish law governs the arbitration agreement if the agreed seat of the arbitration is Sweden.

An arbitration agreement is defined in the Arbitration Act as an agreement between two or more parties to refer disputes arising from an identified legal relationship to resolution by one or more arbitrators. The Act thereby stipulates three cumulative requirements that must be fulfilled in order for an arbitration agreement to be valid and enforceable:

(i) an agreement between the parties to refer the dispute to arbitration;

(ii) identification of a legal relationship; and

(iii) an unambiguous reference to arbitration.

Contrary to many other arbitration laws, there is no mandatory requirement that an arbitration agreement be in writing under Swedish law. This is in line with Swedish contract law, which is based on the formation of an agreement by an offer which is accepted. Oral agreements and implied consent, e.g. declaratory conduct, are sufficient for a party to be bound by an arbitration agreement. However, in order to avoid evidentiary problems, most arbitration agreements are in writing. Having no required form allows arbitrators and courts to be flexible when determining if an arbitration agreement has been concluded.

The requirement of identification of a legal relationship excludes the possibility for parties to enter into an arbitration agreement that covers all future disputes in general. The identification of the legal relationship can be explicit or implicit and as such need not necessarily be set out in the arbitration agreement. Typically, the legal relationship consists of a commercial contract or an existing dispute.

In order for an arbitration agreement to be valid, there must be a *reference to arbitration*. However, this does not prevent parties from entering multi-tier clauses, e.g. that they shall pursue other forms of dispute resolution procedure (e.g. negotiation or mediation) before resorting to arbitration.

An arbitration agreement is valid and enforceable as long as the three prerequisites are met. The parties are free to agree on further issues in their arbitration agreement, but the Arbitration Act provides provisions to determine any lack of agreement between the parties concerning aspects such as language of the proceedings, governing law or number of arbitrators.

The scope of the parties' contractual agreement to arbitrate is not only limited by the prerequisites for a valid arbitration agreement, but also by the concept of arbitrability. The arbitrability of a dispute is determined by both Swedish law and the applicable law to the arbitration agreement. All disputes concerning matters which the parties are free to settle by way of agreement are arbitrable under Swedish law. Arbitrability is, therefore, rarely an issue in commercial arbitration in Sweden, since parties are generally entitled to settle commercial disputes by way of agreement.

The arbitral tribunal is authorised to rule on its own jurisdiction under the principle of *competence-competence*. A competent court has, however, the final say on whether or not the arbitral tribunal has jurisdiction to decide the dispute. An action may be brought before court both before and after the initiation of the arbitral proceedings, although the court action does not prevent the arbitration from continuing pending the final outcome of the court proceedings.

To determine whether an issue is covered by an arbitration agreement, a method named *doctrine of assertion* is applied. The doctrine provides that a circumstance asserted by a claimant shall be assumed to exist for the purpose of determining jurisdiction under an arbitration agreement. Thus, if a claimant asserts e.g. that its claim is based on a specific contract, or the breach thereof, the arbitrators shall assume that this is correct when determining whether the claim falls under the arbitration clause contained in such contract. Once the issue of jurisdiction is determined, the circumstances thus asserted will be adjudicated on the merits.

The *doctrine of separability* is also applied in Sweden. Thus, the validity of the arbitration agreement shall be determined independently, and invalidity of the main contract does not automatically affect the jurisdiction of the tribunal under the arbitration agreement.

A fundamental principle in Swedish arbitration law is that a party must consent to be bound by an arbitration agreement. Therefore, third party *intervention* and *joinder* require the consent of all original parties. Consent does not have to be recorded in writing and can, as such, be found impliedly or by declaratory conduct. The same limits apply to *consolidation* of multiple arbitrations between two parties. Unless the parties consent, it is required that all relevant arbitration agreements allow for consolidation of the disputes. There are no explicit rules of this in the Arbitration Act. However, the committee tasked with reviewing the Arbitration Act concluded that consolidation often can save costs and simplify proceedings, and has therefore proposed an explicit provision in the Act stating that consolidation is possible if the parties consent and the arbitrations involve the same arbitrators, provided that the arbitrators deem it advantageous for the arbitral proceedings. Furthermore, the 2017 SCC Rules now contain provisions allowing joinder of additional parties (Article 13) and consolidation of arbitrations (Article 15). Under a new Article 14 of the SCC Rules, a party may under certain circumstances also bring claims under multiple contracts in the same arbitration.

In conclusion, Swedish law and the new SCC Rules respect the parties' agreement to arbitrate and facilitate the common intention of the parties' agreement: to have an effective, expeditious resolution of the dispute.

Arbitration procedure

The fundamental principle of party autonomy is respected under Swedish law and an arbitration seated in Sweden can therefore be arranged to fit the parties' needs and expectations. The Arbitration Act contains few mandatory rules concerning the conduct

of the arbitration procedure, and those that exist serve to protect the principles of equal treatment and due process. The overall aim of the Arbitration Act is to facilitate an arbitration procedure suited to the needs of the parties that is impartial, practical and fast.

The procedure used by Swedish arbitrators is typically in line with best practices for the conduct of international arbitration and the use of international "soft law" rules and guidelines, such as the IBA Rules on the Taking of Evidence, is widespread. The procedure is therefore predictable and normally in line with the expectations of parties, legal counsel and fellow arbitrators from other jurisdictions.

The arbitral procedure, including its commencement, is primarily determined by the parties' agreement (including agreed institutional rules). Failing such agreement, the Arbitration Act generally leaves it to the arbitral tribunal to decide the conduct of the proceedings. Provisions are in place to expedite the procedure when the parties have not specifically agreed to regulate the arbitration procedure by, for example, choosing institutional rules. In practice, institutional rules are applied in most arbitration proceedings seated in Sweden.

Unless otherwise agreed by the parties, arbitration is formally commenced by the filing of a request for arbitration. The following information must be included in a request for arbitration for an arbitral proceeding to be deemed initiated:

(i) an express and unconditional request for arbitration;

(ii) a statement of the issue which is covered by the arbitration agreement and which is to be resolved by the arbitrators; and

(iii) a statement of the party's choice of arbitrator where the party is required to appoint an arbitrator.

A party has an absolute right under Swedish law to a hearing prior to the tribunal's determination of an issue on the merits. However, the parties may agree to exclude that right and it is only absolute in the regard that it may not be denied by the arbitral tribunal. If the tribunal denies a hearing, despite the request from a party, it may be considered a violation of due process. A subsequent challenge proceeding could thereby potentially set aside the award. If the parties have not chosen a venue for the hearing, it is for the arbitral tribunal to decide. Nothing prevents a hearing from being held in a different country than at the seat.

An innovation in the 2017 SCC Rules is Article 39 which introduces a "summary procedure". In cases where, e.g., a party has made allegations that are manifestly unsustainable, or when an award could not be rendered in favour of a party as a matter of law even assuming alleged facts are true, the tribunal may, upon request of a party, decide issues of fact or law by summary procedure.

The parties are free to agree on rules of evidence. Failing such an agreement, it is a general rule that arbitration is adversarial and, therefore, it is for the parties to invoke and present the evidence they wish to rely on. The parties are free to present any and all evidence, in whatever form, that they wish to rely on. Evidence may only be refused by the arbitrators in cases where the arbitrators either find that the evidence is manifestly irrelevant, or if refusal is justified having regard to the time at which the evidence is submitted.

Arbitrators may, upon request by a party, order the other party to produce evidence, including documents and objects. The parties are free to agree on the procedure for the production of documents and other evidentiary issues. Failing such agreement, the arbitrators may decide these issues at their discretion. In international arbitration, arbitrators seated in Sweden are commonly guided by the IBA Rules on the Taking of Evidence in Commercial Arbitration in this regard. The IBA Rules are familiar to Swedish counsel and arbitrators also in the

sense that the approach to document production in the IBA Rules is similar to the approach in domestic court proceedings.

Production orders issued by arbitrators are not enforceable in Sweden, although in practice many parties agree to follow such orders and other procedural decisions issued by the arbitrators during the arbitration. However, Swedish courts are authorised to assist the arbitration process in the taking of evidence. Thus, upon request by a party and after approval of the arbitrators, a party may file a document request with a district court, and this court may order production of documents held by the other party or a third party.

Court assistance can also be obtained when a party would like to examine a witness under oath. Under Swedish law, arbitrators cannot administer oaths, and a witness is not obliged by law, as before a court, to appear and give testimony before an arbitration tribunal. Decisions on the production of documents and witness testimony rendered by a district court under these provisions are enforceable. It should be noted that the same court assistance may also be sought if the arbitration is seated outside Sweden, e.g. in case the documents requested or the witness to be examined are located in Sweden.

Arbitration proceedings in Sweden are private unless otherwise agreed between the parties. Moreover, the arbitrators must adhere to the principle of confidentiality when they perform their duties. The SCC and other arbitration institutions are also bound by the provisions on confidentiality to the extent set out in their respective arbitration rules. As regards the parties, they are not bound by a duty of confidentiality unless this has been agreed between the parties. Witnesses and experts are bound by a duty of confidentiality to the extent this has been agreed with them or if this follows from professional rules.

The Arbitration Act does not contain any provision concerning which substantive law to apply in a dispute, but the choice agreed between the parties should be followed in accordance with the principle of party autonomy. The committee tasked with reviewing the Arbitration Act has also proposed an express provision to this effect. It is proposed that if the parties have not agreed on an applicable law, the arbitrators are to decide on which law to be applied, taking particular account of which law the dispute is most closely connected to. This should be regarded as a codification of current practice.

Arbitrators

An objective of the Arbitration Act is to expedite arbitration proceedings with impartial and independent arbitrators and prevent any obstructing behaviour from a party or a selected arbitrator. In order to do this, the competent courts are authorised to make swift and final decisions on the challenge of an arbitrator, as well as appointing arbitrators when a party is passive.

There are no mandatory requirements in the Arbitration Act with regard to the composition and appointment of the arbitral tribunal other than that the arbitrators must be impartial and have legal capacity. If the number of arbitrators is not specified in the arbitration agreement, the default rule under the Act provides for three arbitrators. The previous SCC Rules also had a default rule of three arbitrators. This has changed in the 2017 SCC Rules. Under Article 16 of the new SCC Rules, the Board shall decide whether the Arbitral Tribunal shall consist of a sole arbitrator or three arbitrators, having regard to the complexity of the case, the amount in dispute and any other relevant circumstances.

With respect to multi-party arbitration, Article 17(5) of the 2017 SCC Rules prescribes a procedure for appointment of arbitrators for when there are multiple claimants or respondents. The procedure implies that if the parties on either side have not been able

to jointly appoint an arbitrator, the SCC shall appoint the entire arbitral tribunal. The commission has proposed that a similar provision should be included in the Arbitration Act, with the difference that the district court shall appoint all arbitrators.

The test for impartiality and independence is based on objective grounds. It does not have to be concluded that the arbitrator is actually partial. The decisive factor is instead whether or not the arbitrator may *appear* partial. Hence, the relevant test is whether there is any circumstance that may diminish confidence in the arbitrator's impartiality. The IBA Guidelines for Conflict of Interest in International Arbitration, and also other international rules and guidelines, have been referred to by the Swedish Supreme Court in its assessment of the impartiality of an arbitrator. This confirms the development of Swedish arbitration law to be closely linked to the developing best practices in international arbitration.

Under the Arbitration Act, assistance by a district court to appoint an arbitrator is available in the following situations:

(i) if the respondent fails to appoint an arbitrator within 30 days after receipt of request for arbitration;

(ii) if the two party-appointed arbitrators fail to appoint a third within 30 days after the second arbitrator's appointment;

(iii) if the parties have agreed that they shall appoint an arbitrator jointly and the parties fail to agree on an arbitrator within 30 days from the date of the notification of one party with regard to the question of such joint appointment; or

(iv) if the parties have agreed that a third party shall appoint an arbitrator and this party fails to appoint one within 30 days after the third party was requested to undertake the appointment.

The competent district court generally handles the application for the appointment of an arbitrator swiftly, by a single judge and without an oral hearing. The final decision of the district court to appoint or remove an arbitrator may not be appealed.

A party may request that an arbitrator is removed if the arbitrator is partial, or lacks independence, as well as if the arbitrator delays the proceedings. If the parties have not agreed on a different procedure, the challenge is to be tried by the arbitral tribunal including the challenged arbitrator. Under the Arbitration Act, the parties may agree that an arbitration institute shall determine challenges against an arbitrator, and institutional rules often contain procedures in this regard. Under the SCC Rules, for instance, the SCC Board may release an arbitrator if challenged by a party.

If the tribunal (or institute) decides to remove the challenged arbitrator, the decision is final and cannot be appealed. However, if the challenge is denied by the tribunal, a party may request within 30 days from the date of the arbitral tribunal's decision that the challenge is tried by a district court. The district court's decision to remove an arbitrator is final, but if the challenge is denied by the district court, the decision may be appealed to the appellate court within 30 days.

A party who wishes to remove an arbitrator must make such request within 15 days from the date of becoming aware of the appointment and the circumstances giving rise to the challenge. If the party fails to make such a request within 15 days, the right to challenge is deemed forfeited.

The arbitral tribunal is to receive reasonable compensation for its work and expenses. Even though the tribunal or the arbitration institute sets the fees, the parties may bring an action before the competent court to have the fees reviewed and possibly reduced. The Supreme

Court has interpreted the right to appeal the fees to include also the fees that may be set by an arbitration institute. It should, however, be noted that with respect to fees determined by an arbitration institute, this right to review of the fees in reality probably should be regarded as a formal right rather than a substantive one. The court would most likely find that the parties are bound by their agreement to let an arbitration institute decide the fees. Nonetheless, the committee that has reviewed the Arbitration Act, has proposed an exception from the right to appeal the fees in certain cases where the fee was set by an arbitration institute.

The arbitral tribunal or the arbitration institute may and normally does require the parties to provide security for the arbitrators', and, when applicable, the arbitration institute's fees and expenses. If a party refuses to pay its part of the advance on costs, and the other party therefore pays the advance for both parties, it has been held by the Supreme Court that a specific agreement is needed between the parties for the arbitral tribunal to be able to order a separate award on the non-paying party's portion of the advance on costs. The SCC Rules include a provision that aims to provide such authorisation for the tribunal.

Interim relief

The arbitral tribunal and the courts have concurrent jurisdiction to order interim measures, unless the parties agree otherwise. Thus, the parties have the choice of selecting the forum that best suits their particular needs.

Swedish courts are authorised to grant a number of different interim measures before or during the arbitral proceedings including, for example, prohibitive measures to restrain a party from carrying out certain actions, positive measures to require a party to take certain action, and measures aimed at ensuring the future enforcement of the final award.

The courts have a wide discretion to grant enforceable orders for interim relief. The courts are also authorised to order *ex parte* measures as well as to impose interim measures on third parties. The parties are not prevented from seeking interim measures from a court by having already applied for, or even been granted, an interim measure by the arbitral tribunal.

The arbitral tribunal is afforded extensive powers to order interim measures. These powers include the authority of the arbitral tribunal to order a party to secure evidence or to undertake certain actions to secure the claim which is to be adjudicated in the dispute. It is for the arbitral tribunal to decide when the granting of interim measures is justifiable. The Arbitration Act essentially allows the arbitral tribunal to grant the same kinds of interim measures as the UNCITRAL Model Law, including ordering a party to:

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

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

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

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

As in many other jurisdictions, an order issued by an arbitral tribunal is not enforceable in Sweden. In practice, however, many parties comply with such orders, and a party's failure to comply may affect the outcome of the arbitration. Tribunals are not empowered to order interim measures against third parties. The committee reviewing the Arbitration Act has proposed that arbitral tribunals should be able to order a security measure through a special award, if this is allowed by the arbitration agreement. Such special awards would then become enforceable.

The courts and the arbitral tribunal normally require the requesting party to provide security for any loss which may be suffered by the other party as a result of the interim measure.

The SCC Rules contain a possibility to appoint an emergency arbitrator that is authorised to try and grant a request for interim relief prior to the constitution of an arbitral tribunal. The SCC shall seek to appoint such emergency arbitrator within 24 hours from the request, and a decision must be rendered by the emergency arbitrator within five days of the referral of the request to the arbitrator.

Arbitration award

Swedish law contains few formal and material requirements regarding the award. The few that exist are in place in order to ensure the enforceability of the award by providing certain minimum requirements. Unless otherwise agreed by the parties, the prerequisites for the *content* of the award are the following:

(i) the arbitral tribunal must apply and base its award on the applicable law or rules of law, i.e. not decide the dispute *ex aequo et bono*, or as *amiable compositeur* unless agreed upon by the parties;

(ii) the arbitral tribunal must limit its determination to the parties' respective request for relief;

(iii) the arbitral tribunal cannot base its award on facts other than those presented by the parties; and

(iv) the arbitral tribunal must consider all claims submitted to it.

Furthermore, clear instructions to the parties as to how to appeal the award must be included in an award whereby the tribunal has concluded the proceedings without ruling on the merits. Furthermore, the award must contain instructions to the parties on how to appeal the decision regarding the compensation to the arbitrators, which may be done by application to the district court within three months from the date the party received the award. Deviations from any of these requirements may make the final award challengeable and mean it could eventually be set aside. Such award may also be difficult to enforce.

The statutory minimum requirements as to the *form* of the award are the following:

(i) the award must be made in writing;

(ii) the award must be signed by the arbitrators;

(iii) the award must state the seat of arbitration; and

(iv) the award must state the date upon which the award is made.

If the award does not fulfil the requirements of being in writing and signed by the arbitrators, it may still be rectified by amendment in order to avoid invalidity of the award. The fact that the award does not contain information about the seat or the date it was made does not automatically lead to invalidity of the award.

There are no formal requirements for the deliberations and the tribunal may organise the deliberations as it sees fit. Every arbitrator has a right to take part in the resolution of the dispute and be given an equal opportunity to influence the award. This right is, however, not unlimited and if two arbitrators are in agreement on the outcome, the third arbitrator cannot prolong the deliberations by demanding continued discussions in order to persuade the others. The majority of the arbitrators may decide an issue if an arbitrator fails to participate in the deliberations without a valid excuse. A dissenting arbitrator is entitled to attach a dissenting opinion to the award.

The arbitral tribunal may not render a default award. Thus, even if a party fails to take part in the proceedings, the award must be based on an adjudication of the merits of the case including all arguments and evidence filed with the arbitral tribunal. Such an award has the same validity as any other award.

The parties are allowed to request that the tribunal records a settlement agreement in a consent award, which is then enforceable and recognisable under the New York Convention. It also renders the dispute *res judicata*.

The tribunal may in the final award order a party to compensate the other party for legal costs incurred in the arbitration. The Arbitration Act does not contain any provisions on how the legal costs should be distributed. However, as a general rule, the costs are distributed in accordance with the principle that costs follow the event, i.e. that the losing party will be ordered to compensate the winning party's reasonable legal costs. Under the new SCC Rules, when apportioning the costs of the arbitration, regard may also be taken to each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.

The parties are free to agree on any time limits with respect to the rendering of the award. If the parties have not done so, there are no specific time limits under the Arbitration Act. The default time limit for rendering the award under the SCC Rules is six months from the date upon which the case was referred to the arbitral tribunal, but upon request from the arbitral tribunal this time limit may be extended by the SCC. According to recent statistics, for the majority of cases administered under the SCC Rules the award has been rendered within 6-12 months.

Challenge of the arbitration award

A Swedish arbitral award is final and binding as of the day it is rendered and cannot be appealed on the merits. The award may only be challenged on certain, narrowly defined formal and procedural grounds. Swedish arbitration law adheres to the principle of the finality of the awards and the parties are considered to have waived their right to challenge the award on the merits. Furthermore, there are only very rare cases where the ruling of the competent court on the challenge may be appealed to a higher court, which requires a leave to appeal from the court of appeal.

There is currently a distinction in the Arbitration Act between an action to declare an award invalid *ab initio* and an action to set aside the award. The grounds for invalidity are limited to the protection of the public interest and the rights of third parties. Such actions do not have to be initiated within a certain time period. The grounds for setting an award aside are designed to protect the interests and individual rights of the parties participating in the arbitration. These challenges must be commenced within three months from the date the award was received by the party challenging the award. Furthermore, a specific ground may be deemed to have been forfeited by a party if the party does not make an objection to any procedural irregularity during the arbitration procedure.

This distinction between grounds for invalidity and grounds for setting aside could, however, soon be history. The committee reviewing the Arbitration Act has proposed that the invalidity rules are to be repealed. Instead, the public policy rule that is currently one of the grounds for invalidity would become a new ground for setting aside an award. This would mean that a challenge on public policy grounds must be initiated within three months.

The committee has also proposed that court proceedings where an award is challenged may be conducted in the English language, if this is requested by one of the parties and

the opposite party agrees to it. In practice, large parts of the challenge proceedings are already today conducted in English, among other things in the sense that documents need not be translated into Swedish.

International parties choosing Sweden as their seat have the opportunity to enter into an agreement in which they waive in advance their right to challenge an award on grounds for setting aside an award, but the grounds for invalidity of awards cannot be waived beforehand. The Arbitration Act allows the tribunal to correct, amend and interpret the award after it has been rendered. This possibility exists in order to avoid unnecessary and costly involvement of courts.

In practice, it is very rare for an award to be set aside or declared invalid.

Enforcement of the arbitration award

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) has been in effect in Sweden since it was ratified without reservations in 1972. The provisions of the Convention have since then been incorporated in the Arbitration Act.

Swedish courts generally have an arbitration-friendly approach, and the provisions of the New York Convention are only seen as minimum requirements. Therefore, an award may be recognised even though it would not be recognised by courts in another contracting state.

The limited grounds for refusal, the burden of proof of the challenging party and the general pro-enforcement attitude of the courts, have resulted in very few cases where enforcement has been refused.

Investment arbitration

Stockholm is one of the leading fora for investment treaty arbitration. About 120 of the bilateral investment treaties (BITs) entered into between states provide that the disputes between the investor and the host states are to be resolved by arbitration under the auspices of the SCC Rules. The 2017 SCC Rules include a set of new provisions on investment treaty disputes, supplementing the SCC ordinary Arbitration Rules. Furthermore, the ECT designates arbitration under the SCC Rules as one of the dispute resolution methods available to foreign investors protected by the ECT.

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Introduction

International arbitration in Switzerland is governed by the 12th chapter of the Swiss Private International Law Act ("SPILA") which entered into force on 1 January 1989. Currently, the 12th Chapter of the SPILA consists of 19 articles (i.e. arts. 176-194 SPILA), constituting a modern and concise arbitration act, independent from the other chapters of the SPILA. Even though the SPILA is not based on the UNCITRAL Model Law these two statutes, which were drafted around the same time, do not differ substantially. The 12th Chapter is currently under revision – on 11 January 2017, the Swiss Federal Council issued a draft bill on the revised Chapter. The proposed revision aims at codifying the Swiss Federal Supreme Court's ("SFSC") case law and clarifying points of debate in practice, while still preserving the core provisions already in force.

Domestic arbitration in Switzerland is governed by the 3rd Part of the Swiss Code of Civil Procedure ("CCP") which entered into force on 1 January 2011. Thereby, the CCP replaced not only the cantonal codes of civil procedure but also the inter-cantonal concordat for arbitration ("Concordat"), which had been in place since 1969 and had originally governed both domestic and international arbitration. The 3rd Part of the CCP (arts. 353-399 CCP) modernised the Swiss law on domestic arbitration and eliminated the differences between the SPILA and the Concordat. The 3rd Part of the CCP is, however, based on the established provisions of the Concordat, while the SPILA, and occasionally the UNCITRAL Model Law, only served as a basis for selected provisions and only to the extent that such reference was adequate for domestic arbitration.

Pursuant to art. 176(1) SPILA an arbitration is considered international if at least one party to the arbitration was not domiciled in Switzerland at the time of the conclusion of the arbitration agreement. By contrast, an arbitration is considered as domestic if all parties to the arbitration have their domicile or residence in Switzerland at the time of conclusion of the arbitration agreement. It should be noted, however, that in its constant case law the SFSC deviates from the wording of art. 176(1) SPILA, insofar that the question whether the arbitration is international or domestic is not determined based on the domicile or residence of the parties at the time of the conclusion of the arbitration agreement, but instead based on the domicile or residence of the parties to the arbitration proceedings (SFSC decision 4A_143/2015 of 14 July 2015, cons. 1.1; SFSC decision 4P.54/2002 of 24 June 2002, cons. 3). The SFSC's case law has been highly criticised, which is why the draft revision of the 12th Chapter seeks to clarify that the decisive factor is the domicile of the parties at the time of conclusion of the arbitration agreement (and not that of the parties to the later arbitration proceedings).

The parties to an arbitration may choose to opt-out of the 12th Chapter of the SPILA and to declare the 3rd Part of the CCP applicable, and vice versa. Opting-out of one of the respective arbitration laws may be in the interest of the parties, depending on the circumstances of the case, since aspects such as e.g. the definition of arbitrability or the grounds to challenge an arbitral award may differ (see below).

In addition to the statutory framework on arbitration in Switzerland, a further source governing arbitration is the rich body of case law of the SFSC.

Given that the 3rd Part of the CCP largely rests on the Concordat, regarding domestic arbitration the practitioners may still rely on the case law and doctrine to the Concordat.

Switzerland hosts many arbitration bodies active in various different industry sectors, such as e.g. WIPO, the Dispute Settlement Body of the WTO or the Court of Arbitration for Sports. With regard to international commercial arbitration, the Swiss Chambers' Arbitration Institution ("SCAI"), which administers cases in accordance with the Swiss Rules of International Arbitration ("Swiss Rules"), has gained significant importance. Besides the ICC in Paris, the SCAI is doubtlessly the most important institution for international commercial arbitration held in Switzerland. In 2016 the SCAI administered 81 new cases (and six mediations), in the vast majority of which (almost 90% of the cases), no party had its domicile in Switzerland.

Arbitration agreement

Under Swiss arbitration law the prerequisites of a valid arbitration agreement are that the parties mutually intend to arbitrate, that the arbitral tribunal may be determined, that the subject matter in dispute is arbitrable, that the parties have legal capacity to act and conduct arbitration proceedings, and that the arbitration agreement is made in any form allowing it to be evidenced by text.

With regard to the form of the arbitration agreement, while the current text of the art. 178 SPILA requires that the relevant declarations of intent of all parties be recorded in writing, it was general practice under both the 12th Chapter of the SPILA and the 3rd Part of the CCP that neither a signature nor an exchange of documents was required, which is in line with the standard set forth by art. 7(4) UNCITRAL Model Law Option I (as amended in 2006) and, therewith, more liberal than the formal requirements of art. II NYC.

The draft bill of the revised 12th Chapter amends and aligns the wording of art. 178 SPILA with that practice. Moreover, the draft bill addresses the controversial issue and clarifies that also unilateral arbitration clauses (e.g. contained in a testament) are subject to art. 178 SPILA.

In general, only the parties to the arbitration agreement are bound by the applicable arbitration law. Nevertheless, in international arbitration an arbitration agreement may extend to non-signatory parties under exceptional circumstances, such as e.g. in case of an assignment of a claim, the simple or joint assumption of an obligation (guarantee), the transfer of a contractual relation or where a third party involves itself deeply enough in the contractual relationship (see e.g. SFSC decision 4A_310/2016 of 6 October 2016, cons. 3.1; SFSC decision 4A_82/2016 of 6 June 2016, cons. 3.3; SFSC decision 4A_450/2013 of 7 April 2014, cons. 3.2; SFSC decision 4A_627/2011 of 8 March 2012, cons 3.1; SFSC decision 4A_44/2011 of 19 April 2011, cons. 2.4.1; SFSC decision 134 III 565 of 19 August 2008, cons. 3.1; or SFSC decision 129 III 727 of 16 October 2003, cons. 5.3.1).

Irrespective of art. 376 CCP which states that "the intervention of a third party and the joinder of a person notified as a party to an action require an arbitration agreement between the third

party and the parties to the dispute and are subject to the consent of the arbitral tribunal", the afore-mentioned principles regarding the extension of the arbitration agreement to non-signatories also apply in domestic arbitration.

The 12th Chapter of the SPILA and the 3rd Part of the CCP contain different rules as to the arbitrability of a dispute. While under the SPILA any dispute involving an economic interest is arbitrable, under the CCP a dispute is considered to be arbitrable if the parties are "free to dispose of" their claim. The latter definition of arbitrability in the CCP requires that the parties are free to settle the dispute out of court or by acceptance in front of the court. The difference of the definitions used can be illustrated e.g. by the following examples:

- On one side, while claims arising out of an exclusion of a cultural organisation or claims of protection of one's personality rights may be freely disposed of by the parties, such claims do not fall under the definition of an economic interest in the sense of art. 177 SPILA.
- On the other side, claims related to the revocation of a state licence may represent an economic interest; the parties, however, cannot freely dispose of such claims (nor of the licence) in the sense of art. 354 CCP.

Arbitration procedure

According to art. 183 SPILA (as well as pursuant to art. 373 CCP), the parties are free to regulate the arbitration proceedings themselves, by referring to a set of arbitration rules or in accordance with a procedural law of their choice. Failing any designation by the parties and subject to their equal treatment and their right to be heard, the arbitral tribunal enjoys discretion about how to regulate and conduct the proceedings.

Arbitration proceedings are pending from the moment a party files a claim with the arbitral tribunal designated in the arbitration agreement or, in the absence of such designation, if a party initiates the procedure for the appointment of the arbitral tribunal (art. 181 SPILA; *cf.* art. 372 CCP). Usually the arbitration rules applicable in the respective case will specify how and where to commence the arbitration. Art. 3 Swiss Rules states, for instance, that the party commencing the arbitration shall submit a Notice of Arbitration to the Secretariat, setting out the necessary details of the dispute as listed in para. 3 of the provision. Similarly, art. 4 of the ICC Rules states the content of the Request for Arbitration to be submitted to the Secretariat of the ICC Court, upon receipt of which the arbitration shall be deemed as commenced.

Within the framework of the Swiss Rules, depending on the amount in dispute, different provisions on procedure may apply. Where the amount in dispute does not exceed CHF 1 million the so-called "expedited procedures", as per art. 42 Swiss Rules apply, which generally provide for a sole arbitrator, for one exchange of briefs and one hearing only, and require the sole arbitrator to render an award within six months upon receipt of the case file. Similarly the revised ICC Rules that enter into force on 1 March 2017 now provide for expedited procedural rules applicable in particular to cases where the amount in dispute is below US$ 2 million. These expedited procedural rules (as per art. 30 ICC Rules in conjunction with Appendix VI) foresee, *inter alia,* a sole arbitrator, the possibility to limit number and volume of written submission, and a six months' time limit to render the final award. Under the expedited procedural rules there are no Terms of Reference and the tribunal has discretion to decide the case based on documents only.

With regard to rules on the taking of evidence, in the light of party autonomy the arbitral tribunal seated in Switzerland is bound by the parties' agreement and will apply the procedural rules chosen by them. Failing any designation by the parties, the arbitral tribunal

will determine the issue and may, if it deems appropriate, seek guidance in the IBA Rules on the Taking of Evidence in International Arbitration. For instance, concerning privilege and disclosure in international arbitration, the arbitral tribunal may rely on arts. 3(3) and 9(2) of the IBA Rules on the Taking of Evidence.

The question of confidentiality is not addressed by the 12th Chapter of the SPILA nor by the 3rd Part of the CCP. While arbitrators are bound by the contract of the arbitrator's appointment ("*receptum arbitri*") to keep the arbitration proceedings confidential, whether or not the parties are bound to confidentiality is subject to their respective agreement in the main contract, in the arbitration clause or depending on what arbitration rules they have adopted.

Pursuant to art. 44 Swiss Rules the parties, the arbitral tribunal and all other actors involved in the arbitration undertake to keep confidential *inter alia* all awards, orders and materials submitted in the framework of the arbitral proceedings as well as the arbitral tribunal's deliberations. Neither the current nor the revised version of the ICC Rules contain a specific provision regarding the confidentiality of the proceedings. Therefore, absent an explicit agreement of the parties to the contrary, or an order of the arbitral tribunal upon a party's request (*cf.* art. 22(3) ICC Rules) arbitration proceedings under the ICC Rules are in principle not confidential.

Arbitrators

Pursuant to art. 179(1) SPILA as well as art. 361 CCP the parties are free to agree on the appointment of the arbitrators. In general, however, each party shall appoint the same number of arbitrators and the so elected arbitrators shall appoint the presiding arbitrator. Where the parties have not agreed on the appointment mechanism, under the 12th Chapter of the SPILA the ordinary court the seat of the arbitral tribunal may be called upon to appoint an arbitrator.

Article 362 CCP specifies for domestic arbitration that, failing an agreement by the parties, the ordinary court may be called upon if a party fails to designate its arbitrator or if the appointed arbitrators cannot agree on the appointment of the presiding arbitrator.

In international as well as domestic arbitration in Switzerland arbitrators are subject to the duty to disclose any conflicts of interest that might raise reasonable doubts as to his or her independence or impartiality. Thereby, it is generally understood that the arbitrator's duty of disclosure continues throughout the proceedings (*cf.* new draft art. 179(4) SPILA; for domestic arbitration art. 363(3) CCP).

Where such reasonable doubts as to an arbitrator's independence or impartiality exist, a party may challenge the respective member of the arbitral tribunal. An arbitrator may further be challenged if he or she does not possess the qualifications agreed upon by the parties or if there exist grounds for challenge in the applicable arbitration rules.

In the course of exercising their duty of disclosure arbitrators may resort to the IBA Guidelines on Conflict of Interest, which have been referred to by the Swiss Federal Supreme Court as a "valuable working tool" that sets out general principles that would likely influence the practice of arbitral institutions as well as that of Swiss state courts (*cf.* SFSC decision 142 III 521, cons. 3.1.2; SFSC decision 4A_506/2007 of 20 March 2008, cons. 3.3.2.2).

While the parties are free to agree on the challenge procedure in principle (art. 181(3) SPILA and art. 369(1) CCP), a party that wishes to challenge an arbitrator must inform the arbitral tribunal and the other party immediately after it has gained knowledge of such ground for challenge, otherwise the party will be deemed to have waived its right to challenge.

Article 369 CCP and the revised draft art. 180(3) SPILA suggest that the submission of a written challenge within 30 days of the challenging party becoming aware of the ground for challenge is considered as "immediate" and, hence, timely. If the written challenge is disputed by the challenged arbitrator the challenging party may within 30 days seek a decision on the challenge by the body designated by the parties or, failing any designation, by the ordinary court at the seat of arbitration.

Where the designated body decided on the challenge of the arbitrator, the decision may only be contested once the first arbitral award has been issued (cf. for domestic arbitration art. 369(5) CCP). In contrast, the decision on the challenge by the ordinary court is final and not subject to appeal at all (cf. [current as well as revised draft] art. 180(3) SPILA).

With the issuance of the final award the arbitrator's mandate is usually terminated, i.e. the arbitrators are "*functus officio*". Moreover, an arbitrator's mandate may be terminated as a consequence of the challenge procedure or if a member of the arbitral tribunal is removed based on the parties' written agreement or because the arbitrator is unable to fulfil his or her duties.

In international arbitration in Switzerland it is generally admissible and rather common in larger or more complex arbitration cases for an arbitral tribunal to appoint an administrative secretary. In principle, administrative secretaries as well as (tribunal-appointed) experts are subject to the same provisions and standards of independence and impartiality as the arbitral tribunal (*cf.* SFSC decision 4A_709/2014 of 21 May 2015, cons. 3; art. 15(5) and 27(5) Swiss Rules; ICC's revised "Note on the Appointment, Duties and Remuneration of Administrative Secretaries", requiring the secretaries' declaration of independence and impartiality; *cf.* art. 365(2) CCP for domestic arbitration in Switzerland).

Interim relief

In arbitrations seated in Switzerland-according arbitral tribunals are competent to order interim measures as well as security for costs (*cf.* art. 183 SPILA, art. 374 and art. 379 CCP). Absent an explicit agreement by the parties, however, the arbitrators' competence is not exclusive. Rather, in principle state courts and arbitral tribunals have concurrent jurisdiction to order interim measures.

As to the content of the interim measures, arbitrators generally enjoy wide discretion. Accordingly, pursuant art. 26(1) Swiss Rules as well as art. 28(1) ICC Rules, an arbitral tribunal may grant any interim measures it deems "necessary" or "appropriate".

Under Swiss arbitration law, the arbitrators' power to order interim measures is limited by the fact that arbitrators do not have coercive power to enforce the interim measures ordered. Accordingly, art. 183(2) SPILA as well as art. 374(2) CCP provide that if a party does not comply voluntarily with the measures ordered, the arbitral tribunal may request the assistance of the competent judge who shall apply his own law.

In urgent cases and before the arbitral tribunal is constituted, there may already exist a need for interim relief. Thus, pursuant to art. 43 Swiss Rules a party requiring urgent interim relief may submit an application for emergency relief to the Secretariat of the SCAI. Thereupon the Secretariat shall appoint and transmit the file to a sole emergency arbitrator who should decide on the application within 15 days from the transmission of the file.

The ICC Rules contain similar provisions concerning urgent interim relief in art. 29 ICC Rules in conjunction with Appendix V, i.e. the so-called "Emergency Arbitrator provisions".

Given the very little case law, one can conclude that anti-suit and anti-arbitration injunctions

are rare in international arbitration proceedings seated in Switzerland. Nevertheless, it is acknowledged that, where appropriate under the circumstances, an arbitral tribunal may issue anti-suit injunctions, ordering the party to refrain from initiating or pursuing parallel proceedings in state courts. While it may be argued that such power of the arbitral tribunal derives from the broad competence to issue interim relief (art. 183 SPILA, art. 371 CCP or e.g. art. 26 Swiss Rules), it has been held that the tribunal's power for issuing anti-suit injunctions (also) roots in the competence-competence principle, as per art. 186 SPILA (and art. 359 CCP for domestic arbitration). Should a party, however, not comply with such injunction it remains questionable whether an anti-suit injunction could be enforced.

While an arbitral tribunal may request the assistance of the competent court as per art. 183(2) SPILA, the court applies its own law and, as such, remains limited to the relief it is entitled to grant in accordance with that law. Now, Swiss procedural law does not provide for anti-suit or anti-arbitrations injunctions. Taking into account that also under the Brussels Convention/Lugano Convention anti-suit injunctions are illegal, it is considered that anti-suit or anti-arbitration injunctions cannot be enforced by state courts in Switzerland. The situation may be different, however, if the parties' contract, out of which the dispute arises, provides for a contractual obligation (such as a e.g. a coexistence agreement) on the basis of which the state court may issue a measure amounting to an anti-suit injunction (*cf*. SFSC decision 138 III 304 of 5 April 2012, cons. 5.3).

Arbitration award

In international arbitration proceedings in Switzerland the parties have the autonomy to decide on the procedure and the form of an arbitral award (art. 189(1) SPILA), be it an interim, partial or final award. In the absence of such agreement, according to art. 189(2) SPILA the award will be rendered by a majority or, in the absence of such majority, by the chairman alone, the award will be in writing, set forth the reasons on which it is based, and be dated and signed.

In contrast, in domestic arbitrations in Switzerland, the parties are not absolutely free to decide on the procedure or the form of the arbitral award. Article 382(1) CCP requires that all members of the arbitral tribunal must participate in the deliberations and decisions. The parties may, however, stipulate how to proceed where an arbitrator refuses to participate in deliberations or a decision. Absent any parties' agreement, the other arbitrators may deliberate or decide without the arbitrator refusing the participation. Moreover, as per art. 382(3) CCP, absent any other agreement by the parties, the award is determined by a majority decision. Where a majority cannot be reached the presiding arbitrator may render the award.

As far as form and content of the award are concerned, pursuant to art. 384 CCP an award must be in writing, set forth the reasons on which it is based, be dated and be signed at least by the chairman. The award has to detail the composition of the tribunal, the place of arbitration, the parties and their representatives, the parties' prayers for relief, a statement of facts and legal considerations, the conclusions on the award on the merits, on the amount, on the allocation of the costs and party costs, and the date of the award. Given the mandatory character of art. 384 CCP, the parties may only dispense with the requirement of a statement of facts and legal considerations.

In both international and domestic arbitration in Switzerland an arbitral tribunal can order costs for the parties. Thereby, the tribunal enjoys wide discretion on how it intends to apportion the costs between the parties.

Challenge of the arbitration award

Pursuant to art. 191 SPILA, parties to an international arbitration may challenge the award in front of the Swiss Federal Supreme Court, as the only and final instance. In international arbitration as per art. 192 SPILA parties may also, by express declaration in the arbitration agreement or in a subsequent written agreement, exclude the right to challenge the arbitral award.

In contrast, under the CCP parties cannot waive their right to challenge the award. The parties may, however, by express declaration in the arbitration agreement or in a subsequent agreement, agree that the arbitral award will be challenged before the competent cantonal court (such as e.g. the Court of Appeals of the Canton of Zurich), instead of before the SFSC.

Article 190(2) SPILA and art. 393 CCP set forth the grounds of challenge of an international, and respectively of a domestic arbitral award. Under the SPILA an arbitral award may be challenged only: (a) if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; (b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction; (c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; (d) if the equality of the parties or their right to be heard was not respected; and (e) if the award is incompatible with public policy (*ordre public*). The "public policy" challenge allows for a limited review of the award in substance. The scope of review, however, is limited to the issue whether the arbitral award complies with the most fundamental principles, laws and values of Switzerland, such as e.g. *pacta sunt servanda*, the principle of good faith, the prohibition of the abuse of rights or the prohibition of discrimination.

For domestic arbitration proceedings, art. 393 CCP stipulates very similar grounds for challenge as under the SPILA. It contains one more ground to challenge the award in lit. f, namely that the arbitral award may be challenged if the costs and compensation fixed by the arbitral tribunal are obviously excessive. The provision therefore entitles the parties to a domestic arbitration to challenge the compensation or the expenses of the arbitral tribunal where they exceed a reasonable amount. The parties, however, may not challenge the compensation of the parties or the apportionment of costs between the parties.

Moreover, under art. 393 lit. e. CCP parties may challenge the award if it is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constituted an obvious violation of law or equity. Similar to the public policy challenge in art. 190(2) lit. e SPILA in international arbitration, in domestic arbitration proceedings art. 393 lit. e CCP is the only ground for challenge allowing for a limited review of the award in substance. Unlike the "public policy" challenge in international arbitration, however, the review in the light of "arbitrariness" for domestic arbitration is much broader. Under said ground for challenge as per art. 393 lit. e CCP, it is sufficient that the arbitral tribunal committed an obvious miscarriage of justice.

Under the SPILA and the CCP the parties may challenge both partial awards and final awards on the basis of the afore-mentioned grounds. Interim awards may only be challenged for lack of jurisdiction or irregular constitution of the arbitral tribunal.

Pursuant to the most recent survey regarding the challenges of Swiss arbitral awards (see *Dasser/Wojtowicz, Challenges of Swiss Arbitral Awards* – Updated and Extended Statistical Data as of 2015, in ASA Bulletin, vol. 34, 2/2016, pp. 280-300), since 2009 (and by the end of 2015) 17 appeals to the Swiss Federal Supreme Court were successful (out of 213

decisions of the SFSC), whereas in the preceding period between 1989 and 2009 merely 13 challenges had been brought before the SFSC with success (out of 289 decisions rendered by the SFSC). The slightly growing success rate of challenges, however, goes in hand with the increase in number of challenges. Nevertheless, the success rate stays low, i.e. at approx. 7% in commercial arbitration cases, while in sports arbitration cases the success rate reached almost 10%. The grounds for challenge raised more often in challenge procedures before the SFSC are the violation of equal treatment, violation of public policy and lack of jurisdiction. While around 11% of all challenges for lack of jurisdiction were approved, only 1% of the challenges filed on the ground of a violation of public policy were approved. In fact, only in the last five years have the first two awards been set aside due to violation of public policy.

Due to the "cassatory" nature of the challenge to the Swiss Federal Supreme Court, the SFSC may dismiss or approve the challenge but generally must not decide on the substance of the matter. Hence, in principle the original arbitral tribunal will be called upon to re-decide the case (SFSC decision 4A_247/2014 of 23 September 2014, cons. 2.2). This scenario is one of the exceptions to the general rule that the mandate of the arbitrator is terminated with the issuance of the award. Should the members of the original arbitral tribunal, however, have deceased, be unattainable or should they simply refuse to serve as arbitrators for a second time, a new arbitral tribunal will have to be established (see SFSC decision 142 III 521 of 7 September 2016, cons. 21; SFSC decision 134 III 286 of 14 March 2008, cons. 2; for domestic arbitration *cf.* art. 394 and 399 CCP).

Moreover, in international arbitration in Switzerland the SFSC is competent to decide upon a party's request of revision of an arbitral award (see new draft art. 190a SPILA; SFSC decision 142 III 521 of 7 September 2016; 134 III 286 of 14 March 2008, cons. 2). In principle, an arbitral award may be revised upon a party's request if: (a) the party subsequently discovers significant facts or decisive evidence that could not have been submitted in the earlier proceedings, excluding facts and evidence that arose after the arbitral award was made; (b) criminal proceedings have established that the arbitral award was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no-one is convicted by a criminal court; if criminal proceedings are not possible, proof may be provided in some other manner; or (c) it is claimed that the acceptance, withdrawal or settlement of the claim is invalid. In domestic arbitration an arbitral award may further be revised on the grounds of a violation of the European Charter of Human Rights (art. 396(2) CCP).

For domestic arbitration, art. 396 CCP further makes clear that a party may file a request for revision of the arbitral award for the afore-mentioned reasons with the ordinary cantonal courts (e.g. the Court of Appeals of the Canton of Zurich).

Finally, under Swiss arbitration law, upon application of a party the arbitral tribunal has the right to correct, clarify or amend the arbitral award rendered (cf. new draft art. 189 SPILA; for domestic arbitration art. 388 CCP).

Enforcement of the arbitration award

With regard to the enforcement of arbitral awards, in 1965 Switzerland ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("NYC"), as well as further bilateral treaties with individual countries, such as e.g. Germany, Austria, Italy, Spain, Sweden, etc. Switzerland, however, is not a signatory to the European Convention on International Commercial Arbitration 1961.

Pursuant to art. IV(1) NYC, a party requesting recognition and enforcement of an award shall supply the authenticated original or a duly certified copy of the award as well as the original arbitration agreement or a duly certified copy thereof. Where these documents are not in the official language of the country, pursuant to art. IV(2) NYC the party shall provide a translation. In Swiss arbitration practice, however, these formal requirements are not to be applied very strictly:

- First, pursuant to the Federal Supreme Court's case law it is sufficient if a party supplies a mere copy of an arbitral award as long as the opposing party does not challenge the authenticity of the document (see SFSC decision 5A_467/2014 of 18 December 2014, cons. 2.3).
- Second, the SFSC has held that an arbitral award drafted in English does not need to be translated in an official language of Switzerland (see SFSC decision 138 III 520 of 2 July 2012, cons. 5).

It is the predominant view that in the light of the wording of art. V NYC ("may be refused") it lies in the discretion of the court whether to recognise and enforce an arbitral award. While Switzerland pursues a pro-arbitration bias, the SFSC has held that recognition and enforcement of awards will be refused if the party opposing the recognition and enforcement furnishes proof that the award has not become binding upon the parties or if it has been annulled or suspended by the competent authority (see SFSC decision 5A_427/2011 of 10 October 2011, cons. 5; SFSC decision 4P.173/2003 of 8 December 2003, cons. 3.1).

If the arbitration was seated in Switzerland, international and domestic arbitral awards are considered as equivalent to final decisions rendered by state courts and, hence, automatically enforceable (*cf.* art. 190(1) SPILA).

Enforcement and recognition of international arbitral awards are generally governed by the NYC. However, the enforcement of the arbitral award will be subject to further rules depending on the nature of the claim. In Switzerland, the enforcement of monetary claims is governed by the Debt Enforcement and Bankruptcy Act ("DEBA"), while the enforcement of non-monetary claims is subject to arts. 335 *et seqq.* CCP.

In the context of the enforcement of a monetary claim under the DEBA, it may be of particular interest that on the basis of an arbitral award a creditor may request the attachment of assets of a debtor located in Switzerland in order to secure the satisfaction of its monetary claims. Irrespective of where the debtor is domiciled, provided that the creditor can identify specific assets of the debtor located in Switzerland and provided that an award has been rendered in its favour, the creditor is entitled to the attachment of assets *eo ipso* (*cf.* art. 271(1)(6) DEBA).

Investment arbitration

Switzerland is party to more than 120 Bilateral Investment Treaties ("BIT"s) in force and has ratified a further (approx.) 30 Investment Agreements, the Energy Charter Treaty being one of them. Switzerland is also party to the ICSID Convention.

Swiss BITs have been subject to arbitration proceedings in around 15 reported ICSID cases and in further investment arbitrations under the UNCITRAL Rules. To the Authors' knowledge until the end of 2016 Switzerland has never appeared as respondent in investment arbitration proceedings.

The challenge procedures as well as recognition and enforcement of arbitral awards in international investment arbitrations is either governed by the 12th Chapter of the SPILA

and the pertinent provisions of the NYC or, in case of arbitral awards rendered in ICSID proceedings, by art. 52 *et seqq.* ICSID Convention.

Recent legislative developments

As mentioned, the Swiss Federal Council has issued the draft revised bill of the 12th Chapter of the SPILA on 11 January 2017. The draft bill may be considered a "brush-up", in the sense that the Federal Department of Justice was not mandated to draft an entirely new arbitration act, but rather to codify case law and arbitral practice established in international arbitration in Switzerland and filling certain gaps within the 12th Chapter. The draft bill proposes several changes and amendments, including the relaxation of the requirement of form of the arbitration agreement, the possibility to correct, elaborate or supplement an arbitral award, the introduction of the remedy of revision of an arbitral award, and the possibility in setting aside proceedings and revision proceedings before the Federal Supreme Court to file submissions in English.

Further issues had been subject of controversy, such as e.g. whether the "negative effect" of competence-competence should explicitly be introduced or whether to codify the issue of extension of arbitration agreements to non-signatories. However, these points were dropped in the course of the legislative process, be it for lack of practical evidence or because the matter was best to be dealt with flexibly by the arbitral tribunals.

Further to the current efforts to revise the 12th chapter of the SPILA, the preliminary draft of the revised law on stock corporations further promotes arbitration as a dispute resolution tool for internal disputes of stock corporations. The preliminary draft suggests a new provision according to which the articles of association could contain statutory arbitration clauses. This would mean that by becoming a shareholder, one would be bound *ipso iure* by an arbitration clause contained in the articles of association.

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Introduction

Despite its size and complex dual federal and state legal system, the United States is a favourable forum for international arbitration. The country's federal and state arbitration statutes and decisional law reflect a strong public policy in favour of arbitration, especially international arbitration. Nowhere is this pro-arbitration policy more clearly expressed than in the Federal Arbitration Act (the "FAA") and the cases decided under the act, which together govern international arbitration in the United States. The FAA has three chapters. The first chapter of the FAA governs cases involving interstate or foreign commerce. The second chapter implements the New York Convention, which the United States signed in 1958.[1] The third chapter of the FAA implements the Panama Convention, which the United States signed in 1978.[2]

The FAA governs the scope of arbitration agreements and requires courts to enforce the agreements according to their terms.[3] Taking into account the dual nature of the U.S. legal system, the FAA overrides or "pre-empts" state laws that conflict with federal arbitration law or undermine its policies. State law generally governs substantive issues, such as the interpretation of an arbitration agreement and its terms. In this regard, U.S. courts will ordinarily honour the parties' contractual choice of law, whether that of a U.S. state or another country.

New York, Florida, and Texas are particularly popular venues for international arbitration. The American Arbitration Association ("AAA") and its international division, the International Center for Dispute Resolution ("ICDR"), are both sited in New York but operate nationally and, in the case of the ICDR, internationally. They administer all types of domestic and international commercial disputes. The International Chamber of Commerce ("ICC") has a New York office with counsel and staff that administer North America-based ICC arbitrations. A number of other organisations, including JAMS and CPR, also administer international arbitrations in the United States. Some states have created organisations to facilitate the administration of arbitration proceedings. For example, the New York International Arbitration Center was established in 2012 to provide access to information on arbitrating in New York and coordinate access to hearing locations. In Manhattan, the New York state court system has assigned a senior judge in its Commercial Division, the Hon. Charles E. Ramos, to hear court cases concerning international arbitration to ensure efficient and consistent adjudication.[4] In public remarks, Justice Ramos has emphasised his intent to apply the pro-arbitration policy set out in the FAA and federal case law, and his decisions since being appointed reflect the pro-arbitration public policy of the FAA and New York state law.

Arbitration agreements

The FAA's primary focus is to regulate how U.S. courts interact with arbitration proceedings.[5] Unlike arbitration laws in some other countries, the FAA does not contain extensive regulations on the necessary components and formalities of arbitration agreements. Instead, subject to the country's pro-arbitration policy, arbitration agreements in the United States are treated like other commercial contracts: courts look to generally applicable principles of contract law to interpret and give effect to arbitration agreements.[6] But both U.S. federal and state courts have developed a body of jurisprudence regarding the scope of arbitration agreements and the division of authority between arbitrators and courts.

Arbitrability

In determining whether a particular dispute is arbitrable, U.S. courts analyse the language of the relevant arbitration provision. Often, arbitration clauses will provide for the arbitration of all disputes "aris[ing] out of" or "relat[ing] to" the contract.[7] Where an agreement uses this type of language, U.S. courts will construe the arbitration provision "as broadly as possible" to allow for arbitration.[8]

Although U.S. courts favour arbitration and seek to read arbitration provisions broadly, parties are free to narrow the scope of arbitrable matters through a carefully crafted arbitration agreement. For instance, in *World Rentals and Sales, LCC v. Volvo Const. Equip. Rents, Inc.*, the court held that disputes involving a company's affiliates were not arbitrable because the arbitration agreement expressly excluded affiliates from the agreement to arbitrate.[9] The courts will also honour narrow arbitration agreements where parties have sought to ensure that only certain types of issues are arbitrable, such as by enumerating or specifying the issues that are subject to arbitration under their agreement.[10]

One area of frequent debate is whether arbitrability is to be decided by the courts or the arbitrators. More recently, the U.S. federal courts have held that arbitrability is for the arbitrators to decide if the parties' arbitration agreement is broad enough to grant the arbitrators this power.[11] Typically, this question is answered by the arbitration rules referred to in the arbitration clause, because such rules are deemed to be part of the parties' arbitration agreement. For example, both the ICC and the AAA's International Dispute Resolution Procedures ("ICDR Rules") grant the arbitrators jurisdiction to decide arbitrability. When it comes to class action arbitrations, the courts take another view, and will typically favour "judicial resolutions of class arbitrability."[12] The courts often must distinguish between whether a party has agreed to arbitrate anything at all (typically a question for the courts) and whether a party has agreed to arbitrate the particular dispute involved (a question for the arbitrators, assuming the parties have granted the arbitrators this jurisdiction). This distinction can be blurred when a non-party to an arbitration agreement seeks to arbitrate with a party to an arbitration agreement. The Federal Court of Appeals for the Second Circuit has held that the arbitrators can be granted jurisdiction to decide this question, because the question is whether the signatory has agreed to arbitrate with this particular non-party.[13] The Federal Court of Appeals for the Ninth Circuit, however, has declined to compel arbitration where the non-party relied solely on conclusory allegations of an agency relationship.[14]

Joinder

U.S. courts, as opposed to arbitrators, typically decide whether a non-party to an arbitration agreement may be compelled to participate in arbitration or whether a non-party to an arbitration agreement may compel someone who has signed an arbitration agreement to

arbitrate with the non-party. The Supreme Court has held that "traditional principles of state law allow a contract to be enforced by or against non-parties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel."[15] General principles of joinder and the consolidation of third parties apply. If the non-party demonstrates through its conduct that it is "assuming the obligation to arbitrate", the non-party can be compelled to arbitrate.[16] Additionally, if the non-party "knowingly seeks the benefits of the contract containing the arbitration clause", the non-party can be estopped from avoiding arbitration.[17]

The same principles apply where a non-party seeks to compel arbitration with a party to an arbitration agreement. For example, in New York, a signatory to an arbitration agreement was bound to arbitrate with a non-party because of the "close relationship between the entities."[18] However, as noted above, the jurisdiction to decide whether a signatory must arbitrate with a non-signatory has more recently been found to lie with the arbitrators rather than the court if the signatory agreed to arbitrate under arbitration rules that contain a broad grant of jurisdiction to the arbitrators.

Another instance in which the joinder of non-parties to an arbitration agreement arises involves corporations that have subsidiaries or affiliated entities. In these instances, courts have applied traditional concepts of corporate law and determined that where a company which has entered into an arbitration agreement exercises complete control over a subsidiary and uses that control to commit wrongdoing, the parent corporation may be compelled to arbitrate in a dispute related to its subsidiary.[19] Additionally, a corporation which is a non-signatory to an arbitration agreement may be able to compel arbitration where its subsidiary is a signatory to the agreement.[20] Similarly, a parent corporation may be required to arbitrate based on an arbitration agreement with a subsidiary.[21]

Separability

Courts in the United States have developed a body of law concerning the separability (or severability) of arbitration clauses contained in contractual agreements. Applying the doctrine of separability, U.S. courts will typically preserve the parties' agreement to arbitrate even where there is a challenge to the validity of the underlying contract containing the arbitration clause. This situation can arise, for example, where a party claims to have been fraudulently induced to sign the contract or argues for other reasons that it was null and void from inception,[22] or where a clause or obligation in that contract is unenforceable or invalid by operation of law.[23] Where, however, a second contract entirely invalidates an earlier contract that had an arbitration clause, a court has declined to enforce the superseded agreement to arbitrate.[24]

Arbitration procedure

The FAA does not contain extensive rules concerning arbitration procedure. Accordingly, in the United States, the contracting parties are free to choose the mechanisms and procedures in their arbitration agreement.[25]

Typically, contracting parties agree to arbitrate under a particular set of arbitration rules administered by a designated arbitration institution, e.g., the ICC or AAA. Each arbitration institution has its own unique set of arbitral procedures.[26]

The AAA administers arbitrations and has different sets of rules that govern various types of disputes, including its ICDR Rules for international cases.[27] Additionally, the AAA has rules governing preliminary hearings and scheduling, selection of arbitrators, evidence, designation of the locale where the arbitration will be held, filing deadlines for written

submissions, and fees. The ICC also has an extensive set of procedural rules, which were most recently amended in January of 2012.[28] These rules govern the joinder of parties, interim relief, hearings, and other case management techniques, which give the arbitrator(s) broad authority over the timing and nature of submissions of written and oral evidence. Other organisations like JAMS and CPR have their own unique rules and procedures.

Significantly, some U.S. states have adopted default arbitration procedures. These procedures apply where the arbitration agreement is otherwise silent regarding procedures, rules, or administration. Arizona, California, and Texas are among the states that have adopted default arbitration rules.[29]

Arbitrators

In the U.S., the parties to an arbitration can determine the number of arbitrators that will decide their dispute and how the arbitrators are selected. Typically the parties regulate this either in their arbitration clause or by selecting a set of rules or an administrative body.[30] For example, the AAA's ICDR Rules provide for the appointment of one arbitrator where the parties have not specified the number of arbitrators in their agreement, unless the AAA administrator "determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case."[31] Alternatively, the parties may agree that arbitrators will be selected by an arbitration institution or court.

Where the arbitration agreement does not contain provisions governing the selection of arbitrators, FAA section 5 provides for the courts to "appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein […]".[32] Further, even where an arbitration agreement contains an arbitrator-selection provision, courts will step in to select an arbitrator where the arbitrator-selection provision itself is "fundamentally unfair".[33] Similarly, if an arbitrator exhibits bias during the arbitration proceedings, a party to the arbitration may challenge the award in a post-arbitration court proceeding.[34]

Interim relief

The FAA is silent on the issue of interim relief. However, parties which have agreed to an arbitration in the U.S. may seek an injunction from a U.S. state or federal court. Some U.S. states have statutes that specifically address interim relief in aid of arbitration. For example, New York state's procedural law permits parties to seek an injunction and other provisional relief in aid of an arbitration where "the award to which the applicant may be entitled may be rendered ineffectual", if interim relief is not granted.[35]

Texas and Florida have also adopted laws concerning interim relief in aid of arbitration, enabling parties to get an injunction in relation to arbitration proceedings.[36]

If the parties have opted to arbitrate under the rules of an arbitration institution, the institution's interim relief procedures govern. The ICDR Rules leave the parties free to seek interim relief from the courts in appropriate cases.[37] In the ICC, a special emergency arbitrator may be appointed to matters requiring urgent attention.[38] The arbitrator may order "any interim or conservatory measure it deems appropriate".[39] Under the ICC Rules Article 29(2), parties must abide by all orders issued by an emergency arbitrator. Similarly, the ICDR adopted emergency arbitral relief procedures pursuant to Article 6 of its International Dispute Resolution Procedures.[40] Article 6 provides for the appointment of an emergency arbitrator to rule on applications for interim relief. It should be noted that in the case of judicial injunctions, the courts have an array of mechanisms, including contempt of court,

to compel enforcement. By contrast, there are questions as to how to enforce an injunction issued by an arbitrator.

Arbitration award

The FAA does not require an arbitration award to take a particular form. A number of states, including New York, Texas, and Florida, require that the award must be in writing and signed by the arbitrators.[41] Florida and Texas require a reasoned decision, unless the parties agree otherwise.[42] This is similar to the requirements imposed on arbitrators by the ICC and ICDR Rules.[43] In general, however, parties can agree to the form any award must take. In New York, for example, the courts have vacated an award where the arbitrators failed to draft the award in the agreed-upon form.[44]

The FAA and state laws do not generally impose limitations or constraints on the types of relief the arbitrators are permitted to award, provided the award does not violate public policy. The parties themselves may, however, circumscribe the relief available in their agreement to arbitrate. For example, the parties can limit the types of damages the arbitrators can award. Limitations on the ability to award punitive or consequential damages are common and generally enforceable. Equally, the parties can agree that the arbitrators cannot award legal fees to the prevailing party. If the parties do not specifically agree on the types of relief available, an arbitrator can grant any form of relief that is rationally related to the purpose of the original agreement, taking into account the applicable laws.[45] Arbitrators may also award pre- and post-award interest, in accordance with the rules of the arbitration and the applicable state or federal laws.[46]

Unlike the rule that prevails in many other jurisdictions, in the U.S. legal system, parties to a lawsuit are generally required to bear their respective legal fees regardless of who wins.[47] This contrasts with the practice in international arbitration, where arbitrators are typically free to award attorneys' fees and arbitration costs to the winning party. The FAA is silent as to fee and cost allocation, but courts interpreting the FAA have held that it does not prohibit an award of fees and costs.[48] State arbitration laws in New York, Florida, and Texas do not explicitly preclude arbitrators from awarding fees and costs.[49] The courts in these states have been willing to allow arbitrators to award attorneys' fees and costs, particularly if the parties' agreement provides for such recovery or if the parties have otherwise demonstrated the intent to do so, such as when both parties request costs and fees in their pleadings[50] or if the arbitral rules chosen by the parties permit their recovery.[51]

Challenge of the arbitration award

Because of the strong federal policy favouring arbitration, it is difficult to succeed in challenging an arbitration award in the United States. Public policy and judicial precedent impose severe limits on the courts' ability to review arbitration awards, and parties cannot agree to expand the scope of that review.[52]

A party which seeks to challenge an international arbitration award in a U.S. court must file a proceeding within three months after the award is filed or delivered.[53] The court must have both personal jurisdiction over the parties and subject matter jurisdiction over the case. Personal jurisdiction is acquired if the responding party[54] is located in the jurisdiction where the court sits or has agreed to arbitrate in the jurisdiction.[55] If the responding party is located outside the state, the challenging party must establish personal jurisdiction through the activities and contacts of the responding party in the forum state. The guidelines for doing so will be found in the applicable state and federal laws on personal jurisdiction.[56]

Because the FAA does not confer original federal court subject matter jurisdiction for an action to vacate an award governed by the New York or Panama Conventions (as opposed to actions to enforce arbitration agreements or confirm awards), a party that seeks to vacate an award in federal court must establish an independent basis for federal court subject matter jurisdiction.[57] The two sources of federal subject matter jurisdiction are 28 U.S.C. § 1331 and 28 U.S.C. § 1332, which respectively grant federal courts the power to hear cases "arising under" federal laws or involving complete diversity among the parties.[58] Some courts have held that 9 U.S.C. § 205 provides a basis for federal jurisdiction.[59] As a practical matter, such cases are generally heard in federal court because the typical response to an application to vacate is an application by the respondent to confirm the award. The federal courts do have original jurisdiction over an application to confirm, and hence over the related application to vacate.

Section 11 of the FAA provides the grounds upon which a court can modify an arbitration award. These grounds are:

1. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
2. Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
3. Where the award is imperfect in matter of form not affecting the merits of the controversy.

A party which seeks to vacate an award in its entirety faces serious obstacles. Section 10 of the FAA strictly limits the grounds upon which a court may vacate an award. Those grounds are:[60]

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehaviour by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[61]

With respect to corruption, fraud or undue means a party must "(1) establish the existence of the alleged fraud or undue means by clear and convincing evidence, (2) demonstrate due diligence in attempting to discover the fraud before entry of the award, and (3) demonstrate that the fraud was material to the arbitrators' decision".[62] At least one court has held that the party must provide evidence of intentional malfeasance by the other party to successfully vacate an award on the grounds of corruption, fraud, or undue means.[63]

Courts have vacated awards for partiality or corruption where a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration".[64] There is no requirement to prove actual bias; partiality can "be inferred from objective facts inconsistent with impartiality".[65] For example, an arbitrator's failure to disclose certain relationships or interests may suggest bias, but non-material or insubstantial relationships will not satisfy the evident partiality standard.[66]

An arbitration award can be vacated for arbitrator misconduct where a court finds that an arbitrator was guilty of misconduct that compromises the "fundamental fairness" of the arbitral proceeding.[67] Examples of misconduct rising to this level include when an

arbitrator has refused "to hear evidence pertinent and material to the controversy",[68] or held the proceeding during a time one party specified he was unavailable,[69] or refused to grant an adjournment to accommodate the schedule of a key witness.[70] *Vacatur* on this ground is only permitted when "the arbitrator's exclusion of evidence prejudices one of the parties".[71]

Vacatur of an award because the arbitrators exceeded their powers[72] is perhaps the most difficult of the four grounds because courts have "consistently accorded the narrowest of readings" to this provision of the FAA.[73] The U.S. Supreme Court has held that exceeding powers occurs "only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice […]".[74] Thus, a court will not analyse the correctness of the arbitrator's decision on a particular issue; the court is limited to determining the scope of the arbitrator's powers.[75]

In addition to the FAA's four grounds for *vacatur*, some U.S. courts have held that an arbitration award can be vacated if it is in "manifest disregard" of the law. In the 2008 case *Hall St. Associates*, however, the U.S. Supreme Court held that FAA section 10(a) provides the exclusive grounds for vacating an arbitration award.[76] After *Hall St. Associates*, there is still some debate in the federal courts as to the continuing viability of the manifest disregard doctrine. Some courts have reasoned that manifest disregard constitutes exceeding the arbitrators' authority and thus remains a viable ground to set aside an award. Regardless, successful *vacatur* on this ground is, in practice, extraordinarily difficult to obtain. An appeals court recently described manifest disregard as a "last resort" doctrine.[77] A party seeking to vacate an arbitration award for manifest disregard must show: (1) that the law that was allegedly ignored was clear; (2) that the arbitrators did in fact err in their application of the law; and (3) that the arbitrators knew of the law's existence and its applicability to the issues before them.[78] Since the birth of the manifest disregard doctrine in 1960, no international arbitration awards have been vacated on this ground.[79]

Overall, the courts in the United States have demonstrated hostility to challenges to awards and may even sanction the challenging party in an appropriate case.[80]

Enforcement of the arbitration award

U.S. courts play an active role in enforcing international arbitration awards. The courts regularly and consistently issue judgments confirming such awards. Following the arbitrator's issuance of an award, a party can file a motion or petition to confirm the award in federal[81] or state court.[82] The petition to confirm must include the arbitration agreement and the award. The party seeking confirmation can also support the petition with any necessary affidavits, briefs, or other documents. A party must move to confirm an award within three years from the entry of the award.[83] Once a judgment confirming the award has been issued, the winning party can enforce that judgment using the various enforcement procedures available in every state. These procedures include freezing assets of the judgment debtor, if a monetary award is involved.

To confirm an award, a court must have personal or quasi *in rem* jurisdiction over the parties.[84] In addition to jurisdiction over the parties, the court must also have subject matter jurisdiction to enforce an award. The U.S. federal courts have original subject matter jurisdiction over proceedings to confirm international arbitration awards pursuant to the FAA. This means a proceeding to confirm an international award can be brought in federal court or, if it is brought in state court, the respondent can remove the case to federal court.[85]

Provided the jurisdictional requirements are met, once a party properly submits a motion to confirm an award, a party which resists enforcement has the burden of proving it has a defence to enforcement.[86] Confirmation of an award is generally a summary process unless the opposing party resists confirmation of an award and proves that one of the seven defences provided by the FAA applies. These defences are:

1. the parties to the agreement […] were […] under some incapacity, or the agreement is not valid under the law;
2. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;
3. the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitrate;
4. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
5. the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;
6. the subject matter of the difference is not capable of settlement by arbitration; or
7. the recognition or enforcement of the award would be contrary to the public policy of the country in which enforcement or recognition is sought.[87]

A party that opposes the confirmation of an award rendered outside the United States is restricted to the seven grounds detailed above, and its burden is a heavy one.[88] Where an award is rendered inside the U.S., the domestic provisions of the FAA apply.[89] A party that opposes the confirmation of an award rendered inside the U.S. can thus seek to vacate or modify the award under FAA sections 10 and 11, as discussed above. Recently, the Court of Appeals for the Second Circuit has gone so far as to confirm an award despite it having been set aside in the seat of arbitration, Mexico.[90] The Second Circuit's decision discussed the competing principles of comity owed to a foreign court's ruling and that of a U.S. court's discretion to confirm arbitral awards. The court ultimately ruled in favour of a U.S. court's discretion based largely on exceptional circumstances, *i.e.* Mexico's introduction of retroactive legislation that barred claimants from recovery.

Because of the public policy favouring arbitration, particularly international arbitration,[91] U.S. courts "must confirm an award unless it is vacated, modified, or corrected".[92]

Investment arbitration

As a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, the United States is a member of the International Centre for Settlement of Investment Disputes ("ICSID").[93] The United States is also a leading signatory of the North American Free Trade Agreement ("NAFTA") and is committed to "protect[ing] cross-border investors and facilitat[ing] the settlement of investment disputes".[94] The United States enjoys observer status to the Energy Charter Conference, but is not a signatory to the Energy Charter Treaty.[95]

Finally, the United States is a party to dozens of bilateral investment treaties ("BITs") and multi-party investment treaties ("MITs"). Each BIT is structured on the basis of a standard model, which is periodically updated by the U.S. Department of State and the Office of the United States Trade Representative ("USTR"). The current version was completed in 2012.[96] A full list of each BIT currently in effect is maintained by the Department of State.[97]

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* * *

Endnotes

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, June 10, 1958.
2. Inter-American Convention on International Commercial Arbitration of 1975, OAS/SER. A20 (SEPEF), 14 I.L.M. 336 (1975), January 30, 1975.
3. *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).
4. For statutory reasons explained below, most legal actions concerning international arbitration are heard in the federal, not state, courts.
5. 9 U.S.C. § 1.
6. *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).
7. *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 75 (2d Cir. 1997); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 848 (2d Cir. 1987) (requiring arbitration where the arbitration clause contained "relating to" language); *Sedco v. Petroleos Mexicanos Mexican Nat'l Oil*, 767 F.2d 1140, 1145 (5th Cir.1985) (requiring arbitration where "arising out of" language was used).
8. *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19 (2d Cir.1995).
9. *World Rentals and Sales, LLC v. Volvo Const. Equip. Rents, Inc.*, 517 F.3d 1240, 1246 (11th Cir. 2008).
10. *See, e.g.*, *Negrin v. Kalina*, 2010 WL 2816809, at *5-6 (S.D.N.Y. July 15, 2010) (finding that where an arbitration clause limited covered disputes to disputes over profit distributions or non-compliance with bylaws, claims for breach of fiduciary duty, unjust enrichment, tortious interference with contract, fraud, and conversion were not covered by the arbitration clause and thus could be litigated in court); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 3784938, at *3 (N.D. Cal. Jul. 18, 2013) (finding that where an arbitration clause limited covered disputes to disputes concerning "the terms of this Agreement," antitrust claims related to price determination were not covered by the Agreement's arbitration clause, even where the agreement stated that prices would be set forth in one party's pricing guidelines).
11. *See, e.g.*, *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (holding that where parties adopt rules that empower the arbitrators to decide arbitrability, "the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator").
12. *See Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 758 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 40 (2016).
13. *See Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 211 (2d Cir. 2005) (considering the relationship between the parties and the arbitration clause at issue); *see also Ross v. Am. Express Co.,* 547 F.3d 137, 144 (2d Cir. 2008) (noting that signatories failing to avoid arbitration against a non-party generally "had some sort of *corporate* relationship to the signature party").
14. *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1214 (9th Cir. 2016).
15. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).

16. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995).
17. *Everett v. Paul Davis Restoration*, 771 F.3d 380, 383 (11th Cir. 2014) (internal quotations omitted).
18. *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995).
19. *See Variable Annuity Life Ins. Co. (VALIC) v. Dull*, 2009 WL 3064750, at *4 (S.D. Fla. Sept. 22, 2009).
20. *Barton Enterprises, Inc., v. Cardinal Health, Inc.*, 2010 WL 2132744, at *4 (E.D. Mo. May 27, 2010).
21. *Apple v. Byd Co. Ltd.*, No. 3:15-cv-04985-RS (N.D. Cal. Mar. 2, 2016).
22. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (holding that "an arbitration provision is severable from the remainder of the contract").
23. *Beletsis v. Credit Suisse First Boston, Corp*., 2002 WL 2031610, at *6 (S.D.N.Y. Sept. 4, 2002).
24. *Casa del Caffe Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1214 (9th Cir. 2016).
25. Dept. of Commerce, *International Arbitration, Ad Hoc Arbitration* (Mar. 2005) (stating that parties engaging in *ad hoc* arbitration may choose the rules under which their arbitration will be carried out).
26. Except when using arbitration rules, such as the UNCITRAL Rules, that are not associated with an arbitral institution, parties should agree to use the rules of the organisation they designate to administer the case.
27. *See* American Arbitration Association, *ICDR, International Dispute Resolution Procedures* (Jun. 1, 2009) ("ICDR Rules").
28. ICC Rules of Arbitration (Jan. 1, 2012) ("ICC Rules").
29. *See, e.g.*, Ariz. Rev. Stat. §§ 12-1501-1518 (2015); Tex. Civ. Prac. & Rem §§ 171.041-171.055 (2014); Cal. Code. Civ. Proc. §§ 1280-1284.3 (2014).
30. The parties are well-advised not to stipulate a particular arbitrator in their clause. Doing so can create problems of enforceability if the arbitrator is unavailable or unwilling to hear the case when the dispute arises. The parties should also agree that the case will be decided by an uneven number of arbitrators so as to avoid deadlock.
31. *See, e.g.*, ICDR Rules Art. 5.
32. FAA §5: 9 USC § 5 (2012).
33. *Nishimura v. Gentry Homes, Ltd.*, 338 P.3d 524, 534-35 (Haw. 2014) (finding an arbitration-selection provision fundamentally unfair where one party exercised exclusive control over the pool of potential arbitrators from which the arbitrator would be selected).
34. *Id.* at 532; *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d [MISSING], 981 (2d Cir. 1996) (finding that where the defendants challenged the selected arbitrator based on bias, the defendants would not be able to present credible evidence of bias where the case had not yet gone to arbitration).
35. NY CPLR § 7502(c); *see, e.g.*, *Rockwood Pigments NA, Inc. v. Elementis Chromium LP*, 2 N.Y.S.3d 94, 96-97 (N.Y. App. Div. 2015) (finding relief appropriate).
36. Tex. Civ. Prac. & Rem. Code § 172.175 (2013); Fla. Stat. § 684.0028 (2014).
37. *See, e.g.*, ICDR Rules Art. 6 (6).
38. ICC Rules, Art. 29. ICC Rules Art. 29 and Appendix V, however, require that the parties "opt out" of their emergency procedures.
39. ICC Rules Art. 28.1.
40. ICDR Rules Art. 37.

41. NY CPLR § 7507; Fla. Stat. Ann. § 684.0042; Tex. Civ. Prac. & Rem. Code Ann. § 172.141.
42. Fla. Stat. Ann. § 684.0042; Tex. Civ. Prac. & Rem. Code Ann. § 172.141.
43. *See* ICC Rules Art. 31; *see also* ICDR Rules Art. 30.
44. *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011) ("An arbitrator may also exceed her authority by failing to provide an award in the form required by an arbitration agreement."); *Am. Centennial Ins. Co. v. Global Int'l Reinsurance Co., Ltd.*, 2012 WL 2821936 (S.D.N.Y. July 9, 2012) (same).
45. *See Am. Laser Vision v. The Laser Vision Inst., L.L.C.*, 487 F.3d 255, 258–59 (5th Cir. 2007), *abrogated on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994); *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1219 (5th Cir. 1990) ("[A]rbitrators have traditionally enjoyed broad leeway to fashion remedies.").
46. Tex. Civ. Prac. & Redm. Code § 172.144 (permitting an award of interest); AAA Commercial Rules Art. R-43(d)(i) (permitting an award of interest).
47. The parties are free to agree to a different rule in their contract. Moreover, certain statutes provide for an award of legal fees to the prevailing party for claims based on the statute.
48. *Painewebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996); *Turnberry Assocs. v. Serv. Station Aid, Inc.*, 651 So. 2d 1173, 1175 (Fla. 1995) ("Absent a clear directive from the legislature, we see no reason why the parties may not also voluntarily agree to allow the collateral issue of attorney's fees to be decided in the same forum as the main dispute."); *see also Stone & Webster, Inc. v. Triplefine Int'l Corp.*, 118 Fed. App'x 546, 550 (2d Cir. 2004); *IBK Enters., Inc. v. One Key, LLC*, 19 Misc.3d 1131(A), at *5 (Sup. Ct. N.Y. County 2008); *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 145, 149 (Fla. 1st DCA 2000) (emphasis added).
49. *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982); Fla. Stat. Ann. § 682.11 ("Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."); Tex. Civ. Prac. & Rem. Code Ann. § 172.145(b). In an unpublished decision the Fifth Circuit has held that this statute authorises an arbitrator to award costs and legal fees in an international arbitration seated in Texas. *Saipem America v. Wellington Underwriting Agencies Ltd.*, 2009 WL 1616122, at *3 (5th Cir. June 9, 2009).
50. *See, e.g.*, *Synergy Gas Co. v. Sasso*, 853 F.2d 59, 64 (2d Cir. 1988).
51. *Shaw Grp., Inc. v. Triplefine Int'l Corp.*, 2003 WL 22077332, at *2 (S.D.N.Y. Sept. 8, 2003), *aff'd* 322 F.3d 115 (2d. Cir. 2003) (confirming an arbitrator's award of attorneys' fees because the contract provided for arbitration under the ICC Rules, which authorised award legal of fees to the prevailing party); *IBK Enters., Inc. v. One Key, LLC*, 19 Misc.3d 1131(A), at *5 (Sup. Ct. N.Y. County May 13, 2008) (declining to vacate an award where the parties had incorporated the American Arbitration Association's Construction Arbitration Rules ("AAA Construction Rules") into their contract, and such rules expressly empowered the arbitrator to awarded attorneys' fees); *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 145, 149 (Fla. 1st DCA 2000) (directing trial court to reinstate an arbitrator's award of attorneys' fees on the grounds that the arbitrator was authorised to award such fees by virtue of the parties'

NASD submission agreement − which committed to arbitration "the present matter in controversy, as set forth in the attached statement of claim, answers *and all related counterclaims and/or third party claims which may be asserted*") (emphasis added).

52. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008); *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co*., 668 F.3d 60, 71 (2d Cir. 2012) (internal quotations omitted).
53. FAA § 13.
54. The moving party cannot predicate jurisdiction on its own presence in the state.
55. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982) (noting that "lower federal courts have found such consent [to personal jurisdiction] implicit in agreements to arbitrate"); *Reed & Martin, Inc. v. Westinghouse Electric Corp.*, 439 F.2d 1268, 1276-77 (2d Cir.1971); *Harch Hyperbarics, Inc. v. Martinucci*, 2010 WL 3398884, at *5 (E.D. La. Aug. 20, 2010); *Bozo v. Bozo*, 2012 U.S. Dist. LEXIS 175412, at *2 (S.D. Fla. Nov. 21, 2012).
56. *See generally* 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1069 (3d ed. 2010).
57. *Int'l Ship. Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 391 n.5 (2d Cir. 1989) (affirming the district court's holding that a motion to vacate a Convention award did not have subject matter jurisdiction); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc*., 126 F.3d 15, 23 (2d Cir. 1997); *Banco De Santander Central Hispano, S.A. v. Consalvi Int'l Inc.*, 425 F. Supp. 2d 421, 425 n.2 (S.D.N.Y. 2006) (collecting cases showing that district courts do not have original jurisdiction over motions to vacate arbitral awards under the New York Convention); *see also Baltin v. Alaron Trading Corp*., 128 F.3d 1466, 1469 (11th Cir. 1997) ("FAA sections 10 and 11, which allow courts to vacate, modify, or correct arbitration awards, do not confer federal subject matter jurisdiction."); *Smith v. Rush Retail Ctrs., Inc.*, 360 F.3d 504, 506 (5th Cir. 2004) (FAA section 10 does not confer federal subject matter jurisdiction); Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 26 (2d Cir. 2000) (same); *see, e.g.*, *Ingaseosas Int'l Co. v. Aconcagua Investing Ltd.*, No. 09-23078-CIV, 2011 WL 500042, at *3-4 (S.D. Fla. Feb. 10, 2011) (dismissing motion to vacate arbitration award after finding court had not been granted subject matter jurisdiction under the New York Convention).
58. 28 U.S.C. § 1331; 28 U.S.C. § 1332.
59. *Besier v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002); *Banco De Santander Central Hispano, S.A. v. Consalvi Int'l Inc.*, 425 F. Supp. 2d 421, 433 (S.D.N.Y. 2006).
60. *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 578 (2008).
61. FAA § 10(a)(1)-(4).
62. *Houston Gen. Ins. Co. v. Certain Underwriters at Lloyd's London*, 2003 WL 22480058, at *1 (S.D.N.Y. Oct. 31, 2003) (citation omitted).
63. *Natl. Cas. Co. v. First State Ins. Grp.*, 430 F.3d 492, 499 (1st Cir. 2005).
64. *Morelite Const. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 84 (2d Cir. 1984).
65. *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co*., 668 F.3d 60, 72 (2d Cir. 2012).
66. *Id*.
67. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985) (an arbitrator "must give each of the parties to the dispute an adequate opportunity to present its evidence and argument").

68. FAA § 10(a)(3); *Fairchild v. Alcoa, Inc.*, 510 F. Supp. 2d 280, 287 (S.D.N.Y. 2007) ("That provision applies to cases where an arbitrator, to the prejudice of one of the parties, rejects consideration of relevant evidence essential to the adjudication of a fundamental issue in dispute, and the party would otherwise be deprived of sufficient opportunity to present proof of a claim or defense.").
69. *Tube & Steel Corp. of Am. v. Chicago Carbon Steel Prods.*, 319 F. Supp. 1302, 1304 (S.D.N.Y. 1970).
70. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).
71. *Rai v. Barclays Capital, Inc.*, 739 F. Supp. 2d 364, 372 (S.D.N.Y. 2010).
72. FAA § 10(a)(4).
73. *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 220 (2d Cir. 2002) (citation omitted).
74. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 671 (2010).
75. *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 220 (2d Cir.2002) (citation omitted).
76. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).
77. *Sotheby's Int'l Realty Inc. v. Relocation Grp. LLC*, 588 Fed. Appx. 64, 65 (2d Cir. 2015) (internal citation omitted).
78. *Id.* at 65-66.
79. *See The "Manifest Disregard of Law" Doctrine and International Arbitration in New York,* Report by the Committee on International Commercial Disputes of the New York City Bar Association (August 2012) at 6.
80. *DigiTelCom, Ltd. v. Tele2 Sverige AB*, 2012 WL 3065345, at *7-8 (S.D.N.Y. July 25, 2012) (issuing sanctions against law firm and requiring reimbursement of attorneys' fees for frivolous motion to vacate arbitral award); *Ingram v. Glast, Phillips & Murray*, 196 F. App'x 232, 233 (5th Cir. 2006) (upholding sanctions of attorneys' fees, costs, and expenses against attorneys for their bad-faith conduct, which included the pursuit of post-arbitration litigation "knowing that it was a 'complete sham'"); *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 914 (11th Cir. 2006), *abrogated on other grounds by Frazier v. Citifinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010) (expressing future intention to issue sanctions for frivolous petitions to vacate arbitral award).
81. FAA § 6.
82. NY CPLR § 7510.
83. FAA § 207.
84. *See First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 750-51 (5th Cir. 2012); *Frontera Resources Azerbaijan Corp. v. State Oil Company of the Azerbaijan Republic,* 582 F.3d 393, 397 (2d Cir. 2009); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303–05 (11th Cir. 2000).
85. FAA § 207 (incorporated by FAA § 302 so as to apply to Panama Convention awards).
86. *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc*., 403 F.3d 85, 90 (2d Cir. 2005).
87. New York Convention Art. V; *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).
88. *Gulf Petro Trading Co., Inc. v. Nigerian Nat. Petroleum Corp*., 512 F.3d 742, 747 (5th Cir. 2008).
89. *Commercial Risk Reinsurance Co. Ltd. v. Security Ins. Co. of Hartford*, 526 F. Supp. 2d 424, 427 (S.D.N.Y. 2007) ("However, because the arbitration occurred in the United States, the Award as to the Commercial Risk Bermuda company is also governed by the

FAA provisions applicable to domestic arbitration awards.") (citing *Zeiler v. Deitsc*, 500 F.3d 157, 164 (2d Cir. 2007)).

90. *Corporación Mexicana De Mantenimiento Integral v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016), *petition for cert. pending*, No. 16-956 (filed Jan. 30, 2017). Pemex-Exploración Y Producción has asked the Supreme Court to review the Second Circuit's decision.
91. *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 629-631 (1985)); *see, e.g.*, *Crescendo Maritime Co. v. Bank of Commc'ns Co.*, 2016 WL 750351, at *10 (S.D.N.Y. Feb. 22, 2016) (confirming foreign arbitral award).
92. *Hall Street Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 577 (2008) (internal citations and quotations omitted).
93. *See* ICSID, *Database of ICSID Member States*, available at: https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab=UtoZ&rdo=BOTH.
94. *See* U.S. Department of State, NAFTA Investor-State Arbitrations, available at: http://www.state.gov/s/l/c3439.htm.
95. *See* Energy Charter Conference, *Members and Observers*, available at: http://www.energycharter.org/who-we-are/members-observers/.
96. Available at: http://www.state.gov/e/eb/ifd/bit/index.htm.
97. Available at: http://www.state.gov/e/eb/ifd/bit/117402.htm.

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