RESPONDEK & FAN

ASIA ARBITRATION GUIDE

6th (Extended and Revised) Edition

DR. ANDREAS RESPONDEK
EDITOR

ASIA

ARBITRATION GUIDE

DR. ANDREAS RESPONDEK

(EDITOR)

Status of Information: February 2019

6th Edition 2019

ISBN: 978-981-14-1663-7

RESPONDEK & FAN PTE LTD
1 North Bridge Road #16-03
High Street Centre Singapore 179094
Tel.: +65 6324 0060 Fax: +65 6324 0223
Email: andreas.respondek@rf-arbitration.com Website: www.rf-arbitration.com

NOTICE

The information provided in this Arbitration Guide has been researched with the utmost diligence, however laws and regulations in the Asia Pacific Region are subject to change and we shall not be held liable for any information provided. It is suggested to seek updated detailed legal advice prior to commencing any arbitration proceedings.

TABLE OF CONTENTS

AUTHORS

Introduction	**MR. NEIL KAPLAN, CBE QC SBS**
Bangladesh	**MS. MAHERIN KHAN;** Dr. Kamal Hossain & Associates
Brunei	**PROF. AHMAD JEFRI ABD. RAHMAN** Associate Professor, Universiti Brunei Darussalam (UBD)
Cambodia	**DR. NARYTH H. HEM / MR. KOY NEAM** BNG Legal
China	**MR. RAINER BURKARDT** **MR. JAN-MICHAEL HÄHNEL** Burkardt & Partner Rechtsanwälte
China/Europe	**PROF. DR. ECKART BRÖDERMANN,** LL.M. (Harvard), Maître en Droit (Paris), FCIArb (London) Brödermann Jahn **DR. CHRISTINE HEEG-WEIMANN,** LL.M. (Sydney), KPMG Law
Hong Kong	**MR. STEFAN C. SCHMIERER** Robinsons, Lawyers
India	**MRS. ZIA MODY / MR. ADITYA VIKRAM BHAT** AZB & Partners
Indonesia	**MS. KAREN MILLS / MR. RIZKI KARIM** KarimSyah Law Firm
Japan	**MR. MICHAEL A. MUELLER** Mueller Foreign Law Office
Korea	**MR. HYUNG SOO LEE / MR. JOACHIM NOWAK** **MR. ROBERT W. WACHTER** **MR. JIN-UK JOSEPH KIM** Lee & Ko

Laos	**MR. VIACHESLAV BAKSHEEV** **MR. SOULIGNASACK LIEMPHRACHANH** Arion Legal
Macau	**MR. PEDRO CORTÉS** **MS. MADALENA PERESTRELLO** Rato Ling Lei & Cortés - Advogados
Malaysia	**MR. THAYANANTHAN BASKARAN** Baskaran
Mongolia	**MS. ENKHTSETSEG NERGUI** **MR. MUNKH-ORGIL TUVAANDORJ** Anand Advocates LLP
Myanmar	**MR. JAMES FINCH** **MRS. THIDA AYE** Partner, DFDL Myanmar Limited
Nepal	**MR. ANUP RAJ UPRETI** Pioneer Law Associates
Pakistan	**JUSTICE. S. AHMED SARWANA** Former Judge, High Court of Sindh, (Court of Appeal) Pakistan
Philippines	**MS. RENA RICO-PAMFILO** Ateneo de Manila University School of Law
Singapore	**MR. CHAN LENG SUN, SC** **MR. CALVIN LIANG** Essex Court Chambers Duxton (Singapore Group Practice)
Taiwan	**MR. NATHAN KAISER** JCYS / Eiger
Thailand	**DR. ANDREAS RESPONDEK** **MS. SOMRUETAI WISALAPORN** **MS. SAVITREE KUWANGKHADILOK** Respondek & Fan Ltd

Vietnam

MR. CHRISTIAN BRENDEL
MR. TIM HOLTORF
Brendel & Associates

Amendments for the 6th edition

Each country report has been completely revised and updated and was finalized in February 2019.

INTRODUCTION
MR. NEIL KAPLAN CBE QC SBS

Respondek and Fan are to be congratulated on providing every two years a most useful summary of the arbitration laws of Asian jurisdictions.

The 2019 edition contains a review of 22 jurisdictions. By including Macao it has increased by one the number of jurisdictions covered in the last edition.

Each chapter is written by experts from the relevant jurisdiction who bring to bear their unique experience of their jurisdiction. The chapters are not overlong and give the salient features of the law, practice and institutions of each jurisdiction. Each chapter has identical headings and thus one immediately gets the comparison needed. It is important to note that each chapter has been updated where necessary, so it is important to refer to the most recent edition of this Guide

With the huge increase in the interest in arbitration in Asia which naturally coincides with the increase of economic activity in the region it is essential for practitioners to have a composite one volume guide to all these jurisdictions. This Guide is not meant to rival the ICCA publication which covers all jurisdictions worldwide but is meant to serve the growing number of practitioners in the Asian region itself.

In recent years we have seen arbitration cases in several new jurisdictions. New arbitration laws abound. Centres are being set up in several new jurisdictions. The more established Centres like Hong Kong, Singapore, Malaysia, China and Korea are attracting many cases, and this may well have a "knock on" effect throughout Asia. The ICC has seen a huge growth of cases involving Asian parties as well as those cases seated in Asia. Hong Kong and Singapore have taken the lead by introducing legislation which makes clear that third party funding for arbitration does not contravene rules of public policy that prevent the funding of litigation.

This edition should also be of interest to in-house counsel as well as teachers and students of the subject. Its readable style will I am sure make it "a must have" for all practicing in this field in Asia.

Andreas Respondek, the managing editor and founding senior partner of the firm, is to be congratulated for masterminding all this and for getting together the necessary experts to write the chapters for this hugely useful work which I look forward to placing yet again on my shelf.

Neil Kaplan CBE QC SBS

Dear Reader,

Following the global trend in dispute resolution, arbitration has in recent years become the preferred method of alternative dispute resolution within the Asia-Pacific region, particularly where international commercial transactions are concerned. There is hardly any significant cross-border contract that does not include an arbitration clause.

Parties to international contracts have certain fears and reservations to sue or being sued in a jurisdiction they are not familiar with. Differences in the various laws, language and legal and business culture are perceived as distinctive disadvantages. To those parties arbitration seems preferable as arbitration proceedings tend to be significantly more flexible than in the courts, with proceedings conducted according to familiar and well established arbitration laws that are usually held in a neutral location. Last not least due to the lack of the possibility to appeal against an arbitral award, arbitrations tend to be faster than court proceedings. The confidentiality of the arbitration proceedings that court proceedings do not enjoy is another factor that makes arbitration look attractive. In addition, arbitration offers the disputing parties to choose "their" arbitrators that have specific expertise in the disputed matter, thereby further enhancing a speedy conclusion of the disputed matter.

The goal of this guide is not to provide a scholarly treatise on Asian arbitration but rather to summarize the practical aspects of the rules and regulations applying to arbitration in various Asian countries. This guide is designed to provide arbitration practitioners, companies and their legal advisors with an understanding of the various Asian arbitration regulations and the legal issues related to arbitration in each country. For companies seeking to rely on arbitration clauses when doing business in Asia, it is important to have a good understanding of how the arbitral process works in each country. In addition, it is hoped that this guide will assist companies in selecting arbitration rules and facilitate the drafting of arbitration provisions for their international commercial contracts.

This guide is based on the joint efforts of leading arbitration practitioners in each country. Without their dedicated efforts this guide would not have materialized and I am especially grateful for their participation and excellent contributions. Special thanks go also to my secretary Ms. Avelin Kaur.

Singapore, April 2019
Dr. Andreas Respondek
Chartered Arbitrator (FCIArb)

ABOUT DR. ANDREAS RESPONDEK

(www.rf-arbitration.com)

Andreas started his legal career in the US with two ground-breaking (winning) precedents from the Louisiana Supreme Court[1] in his own name in 1983. He is an American Attorney at Law, a German "Rechtsanwalt" as well as a Chartered Arbitrator (FCIArb).

After heading the Legal Department of an MNC in Europe, he moved to Singapore in 1994 to establish the Asia Pacific Legal Department of a leading international Healthcare Company. Thereafter he led multinational companies in Asia as Managing Director (Thailand; Greater China) and Regional Managing Director Asia Pacific. He established RESPONDEK & FAN in 1998 in Singapore and its counterpart in Bangkok in 2000.

Living and working since more than 20 years in Asia, Andreas focusses on complex international arbitrations. He brings to international arbitrations multi-jurisdictional experience, backed up by fluency in five languages, combined with proven case management skills and experience. He is a member of the panel of many leading arbitration institutions in Asia and beyond and has acted as arbitrator or counsel in many major international proceedings in institutional (including expedited proceedings) and ad hoc arbitrations, under the ICC, SIAC, HKIAC, Swiss Rules, TAI and UNCITRAL Arbitration Rules.

Andreas' contact details are as follows:

Email: Andreas.Respondek@rf-arbitration.com
Office Tel: +65 6324 0060
Cellphone: +65 9751 0757
Office: 1 North Bridge Road
#16-03 High Street Centre
Singapore 179094

1 In re application of Andreas Respondek 434 So.2d 413 (La.1983); 442 So.2d 435 (La.1983) http://law.justia.com/cases/louisiana/supreme-court/1983/83-ob-2169-1.html

STRUCTURE OF EACH COUNTRY REPORT

To make the review of specific questions and issues for each country easier, each country report follows roughly the sequence of the following structure:

1.1 Which laws apply to arbitration in <Country>?

1.2 Is the <Country> arbitration law based on the UNCITRAL Model Law?

1.3 Are there different laws applicable for domestic and international arbitration?

1.4 Has <Country> acceded to the New York Convention?

1.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

1.6 Does the <Country> arbitration law contain substantive requirements for the arbitration procedures to be followed?

1.7 Does a valid arbitration clause bar access to state courts?

1.8 What are the main arbitration institutions in <Country>?

1.9 Addresses of major arbitration institutions in <Country>?

1.10 Arbitration Rules of major arbitration institutions?

1.11 What is/are the Model Clause/s of the arbitration institutions?

1.12 How many arbitrators are usually appointed?

1.13 Is there a right to challenge arbitrators, and if so under which conditions?

1.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

1.15 When and under what conditions can courts intervene in arbitrations?

1.16 Do arbitrators have powers to grant interim or conservatory relief?

1.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- Formal requirements for arbitral awards
- Deadlines for issuing arbitral awards
- Other formal requirements for arbitral awards

1.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in <Country>?

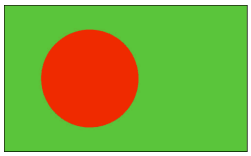
1.19 What procedures exist for enforcement of foreign and domestic awards in <Country>?

1.20 Can a successful party in the arbitration recover its costs?

1.21 Are there any statistics available on arbitration proceedings in <Country>?

1.22 Are there any recent noteworthy developments regarding arbitration in <Country> (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

1. BANGLADESH



BY: **MS. MAHERIN KHAN**

1.1 Which laws apply to arbitration in Bangladesh?

The Arbitration Act 2001 (the "Act" or the "2001 Act") governs domestic and international commercial arbitration in Bangladesh.

The 2001 Act represents a significant improvement over its predecessor, the Arbitration Act, 1940. The improvement of the law relating to international commercial arbitration in Bangladesh by the 2001 Act provides for an efficient and cost-effective venue for dispute resolution in the field of international trade, commerce, and investment.

1.2 Is the Bangladesh Arbitration Law based on the UNCITRAL Model Law?

The Arbitration Act 2001 is based on the UNCITRAL Model Law. However, there are some differences between the provisions of the 2001 Act and the Model Law. These can be summarized as follows:

- Section 11 of the 2001 Act deals with the number of arbitrators and provides that, unless otherwise agreed between the parties, the number shall not be even;

- The Model Law permits the parties to approach a court or authority for the appointment of a third arbitrator or sole arbitrator, as the case may be, in cases where the parties fail to reach an agreement. Under the 2001 Act this power, in the case of the domestic arbitration, is vested with the district judge and, in case of international commercial arbitration, is given to the chief justice or any judge of the Supreme Court designated by him;

Matters that are dealt with by the 2001 Act on which the Model Law is silent are:

- Award of interest by the tribunal (Section 38(6));

- Costs of arbitration (Section 38(7));
- Enforceability of an award in the same manner as if it were a decree of a court under Section 44 in situations where the award is not challenged within the prescribed period or the challenge has been unsuccessful;
- Appeals in respect of certain matters (Section 48);
- Fixing the amount of deposit as an advance for the cost of arbitration (Section 49);
- Non-discharge of arbitration agreement by death of a party (Section 51);
- Rights of a party to an arbitration agreement in relation to insolvency proceedings (Section 52);
- Identification of court having exclusive jurisdiction over the arbitral proceedings (Section 53); and
- Applicability of the Limitation Act 1908 to arbitrations as it applies to proceedings in court and related issues.

1.3 Are there different laws applicable for domestic and international arbitration?

The 2001 Act deals with both domestic and international arbitration. The term 'domestic arbitration' is not defined in the 2001 Act. 'International commercial arbitration' is defined in Section 2(c) of the 2001 Act as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is:

- an individual who is a national of, or habitually resident in, any country other than Bangladesh; or

- a body corporate which is incorporated in any country other than Bangladesh; or

- a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or

- the government of a foreign country.

However, it should be noted that in the context of interim preservatory orders under Section 7A, the courts have held that the provisions of the 2001 Act are not applicable to foreign arbitrations, namely, those where the place of arbitration is outside Bangladesh, except as provided in Section 3(2).

1.4 Has Bangladesh acceded to the New York Convention?

Bangladesh is a party to the New York Convention. The 2001 Act provides for enforcement of foreign arbitral awards in accordance with the New York Convention. The date of accession was 6 May 1992 and the Convention entered into force on 4 August 1992.

Bangladesh is also a party to the ICSID Convention 1965 (Conventions on the Settlement of Investment Dispute between States and Nationals of Other States).

1.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Parties can agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad.

1.6 Does Bangladesh arbitration law contain substantive requirements for the arbitration procedures to be followed?

Procedural law

In general, if the place of arbitration is Bangladesh then the 2001 Act will usually be the procedural law. However, the parties have the freedom to lay down the procedure to be followed by the arbitral tribunal for conducting the proceedings.

In procedural matters the arbitral tribunal is allowed some flexibility and freedom and is not bound to follow the provisions of the Bangladesh Code of Civil Procedure, 1908 or the Bangladesh Evidence Act, 1872. On the question of the determination of rules of procedure, the 2001 Act endorses the fundamental principle of the parties' freedom to choose such rules and, failing such choice by the parties, the arbitral tribunal's freedom as enshrined in the UNCITRAL Model Law. However, like the English Arbitration Act, 1996, the 2001 Act has gone beyond the Model Law prescription on the matter, in that it enumerates objectively certain aspects of procedural and evidential matters, which include:

- time and place of holding the proceedings either in whole or in part;
- language of the proceedings and to supply translation of a document concerned;
- written statement of claim, specimen copy of defence, time of submission, and range of amendment;
- publication of document and presentation thereof;
- the questions asked of the parties and the replies thereto;
- written or oral evidence as to the admissibility, relevance, and weight of any materials;
- power of the arbitral tribunal in examining the issues of fact and of law; and
- submission or presentation of oral or documentary evidence.

The list is not exhaustive and is but a reminder of certain obvious procedural and evidentiary matters serving as a roadmap in the procedural journey of the arbitral tribunal. The provisions of the 2001 Act on matters such as 'place of arbitration', 'statements of claim and defence', and 'hearings and proceedings' are taken verbatim from the UNCITRAL Model Law. Similarly, on other procedural matters such as 'consolidation of proceedings and concurrent hearings', 'legal or other representation', 'power to appoint experts, legal advisors or assessors', and 'powers of the arbitral tribunal in case of default of the parties', the 2001 Act has followed verbatim the provisions of the English Arbitration Act, 1996.

Following Article 19(1) of the UNCITRAL Model Law, the 2001 Act provides in Article 25(1) that 'subject to this Act, the arbitral tribunal shall follow the procedure to be agreed on by all or any of the parties in conducting its proceedings'. Thus, it would seem that parties are allowed to choose a foreign procedural law or international arbitration rules, but any such choice is subject to the provisions of the 2001 Act. The question of when such provisions are 'inconsistent' with the 2001 Act will have to be judged on a case-by-case basis.

Substantive law

The parties have considerable freedom to choose the substantive law of their choice.
Section 36 of the 2001 Act provides that the tribunal will decide the dispute in accordance with the law chosen by the parties. The parties are therefore free to decide the substantive law to be applied to the merits of the dispute. The 2001 Act allows the arbitral tribunal, in the absence of the parties' choice of applicable law, the freedom to apply any rules of law as it objectively deems appropriate in the circumstances of the dispute (Sec. 36(2)).

The 2001 Act further provides that if the law or the legal system of a country is designated by the parties, such designated law is meant to refer directly to the substantive law of that country and not to its conflict of laws rules. Like the UNCITRAL Model Law, the 2001 Act thus expressly avoids the renvoi situation. However, unlike the Model Law, the 2001 Act allows the arbitral tribunal, in the absence of the parties' choice of applicable

substantive law, of the dispute. Thus, in the absence of the parties' choice the arbitral tribunal is no longer required to have recourse to the applicable conflict of laws rules as under the Model Law to determine the applicable substantive law. It should be noted that this prescription reflects the recent trend in many international institutional arbitration rules as well as in some national legislative enactments on international commercial arbitration.

As in the case of the UNCITRAL Model Law, the tribunal is also mandatorily required under the 2001 Act to decide in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction. However, unlike the Model Law, the Act expressly states the purpose of this specific requirement to be the 'ends of justice'.

1.7 Does a valid arbitration clause bar access to state courts?

Where any contractual dispute is covered by an arbitration clause contained in the contract providing for arbitration within Bangladesh, it must be resolved through arbitration.

Court assistance in the form of interim orders is available before and after arbitration proceedings or until enforcement of the award has been initiated. Under section 7A of the 2001 Act the court may provide assistance in respect of the following matters:

- to appoint a guardian for a minor or an insane person to conduct arbitral proceedings on his or her behalf;
- to take interim custody of or sale of or other protective measures in respect of goods or property, which are subject matter of the arbitration agreement;
- to restrain any party from transferring property which is subject to arbitration and to pass an order of injunction on transfer of such property;
- to empower any person to seize, preserve, inspect, photograph, collect specimens of, examine, or take evidence of any goods or property included in arbitration agreement and for that purpose to enter into land or building in possession of any party;

- to issue an interim injunction;
- to appoint a receiver; and
- to take any other interim protective measures which may appear reasonable or appropriate to the court.

1.8 What are the main arbitration institutions in Bangladesh?

There are a number of arbitration institutions in Bangladesh, some of which are mentioned below.

The **Bangladesh Council of Arbitration** (BCA) was established in 2004 under the auspices of the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) as an arbitral body for the resolution of commercial disputes.

In addition, on 9 April 2011, the **Bangladesh International Arbitration Centre** (BIAC) was launched, at the initiative of the International Chamber of Commerce, Bangladesh (ICC-B) in partnership with the Dhaka Chamber of Commerce and Industry (DCCI) and the Metropolitan Chamber of Commerce and Industry (MCCI), Dhaka.

1.9 Addresses of major arbitration institutions?

Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry:

Federation Bhaban (2nd Floor)
60, Motijheel C/A, Dhaka
Bangladesh
Tel: +88-02-956 01 023
Fax: +88-02-71 760 30
Homepage: www.fbcci-bd.org
E-mail: fbcci@bol-online.com

Bangladesh International Arbitration Centre (BIAC)
69/1 Panthapath
Suvastu Tower (6th floor)

Dhaka-1205
Tel: +88 -02-862-9227 +88 -02-862-9227,
+88-02-967-1491, +88-02-967-1491
Fax: +88-02-862-4351
E-mail: info@biac.org.bd
Web: www.biac.org.bd

1.10 Arbitration Rules of major arbitration institutions?

Rules of Arbitration of the **Bangladesh Council of Arbitration** are available at:
http://www.intracen.org/Rules-of-Arbitration-of-the-Bangladesh-Council-of-Arbitration/

BIAC Arbitration Rules 2011 are available online at: http://www.biac.org.bd/biac-rules

1.11 What is/are the Model Clause/s of the arbitration institutions?

Bangladesh Council for Arbitration (BCA) Model Arbitration Clause:

The Bangladesh Council of Arbitration (BCA) of the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) recommends that parties use one of the following arbitration clauses in their contracts:

a. ***"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Bangladesh Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties." or***

b. ***"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the Bangladesh Council of Arbitration by one or more arbitrators appointed in accordance with the said Rules."***

BIAC Model Arbitration Clause:

"All disputes arising out of or in connection with the present contract shall be finally settled under the fast track Rules of Arbitration of the Bangladesh International Arbitration Centre by one or more arbitrator appointed in accordance with the said Rules. Unless otherwise agreed by the parties, the laws of Bangladesh shall apply and the seat of arbitration shall be Dhaka."

1.12 How many arbitrators are usually appointed?

Chapter IV of the 2001 Act deals with the composition of the Arbitral Tribunal and the number of arbitrators and the appointment of arbitrators.

Parties are free to choose the number of arbitrators under the 2001 Act. In the event that the arbitration agreement is silent the default size of the tribunal is three arbitrators.

In case of an appointment of an even number of arbitrators by the parties, the appointed arbitrators are required to mutually appoint an additional arbitrator to act as a Chairman of the tribunal. If there is no agreement as to the number of arbitrators, one party may request the other party in writing for an appointment of a sole arbitrator which has to be accepted by the other party within 30 days of receipt of the request.

1.13 Is there a right to challenge arbitrators, and if so under which conditions?

The grounds for challenging appointment of an arbitrator are provided for in Section 13 of the Act, which states that such appointment can be set aside if circumstances exist that give rise to justifiable doubts as to the arbitrator's independence or impartiality, or if he or she does not possess the qualifications agreed to by the parties.

Section 14 sets out the challenge procedure. A party is duty bound to put the objection on record. Parties are free to agree on a challenge procedure. In absence of an agreement, the arbitral tribunal can itself decide on the challenge to its independence and impartiality. Any party aggrieved by the

decision of the arbitral tribunal can appeal to the High Court Division. The Act requires the arbitral tribunal to wait until the challenge procedure is finally disposed of and sets a stringent time limit of three months within which the High Court must decide the appeal (section 14(6)). If a challenge to the arbitral proceedings fails, the tribunal continues the proceedings and renders an award.

Section 15 sets out the circumstances which result in the termination of the mandate of the arbitrator. These are: (i) withdrawal from the office by an arbitrator; (ii) death of arbitrator; (iii) agreement of all the parties on the termination of the mandate of the arbitrator; and (iv) inability of the arbitrator to perform his functions. Section 16 provides the procedure for substitution of an arbitrator whose mandate has been terminated.

If an arbitrator has incurred disqualifications referred to above and fails to withdraw himself from his office and all the parties fail to agree on his termination, then on the application by any party, the chief justice or a judge of the Supreme Court (in case of international commercial arbitration) or district judge (for all other arbitrations) may terminate the said arbitrator.

1.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

In respect of legal representation, section 31 of the 2001 Act provides that unless otherwise agreed by the parties, a party to an arbitral proceeding may be represented in the proceedings by the lawyer or other person chosen by him.

1.15 When and under what conditions can courts intervene in arbitrations?

Under the 2001 Act, the involvement of courts has been kept to a minimum level essential for effective operation of the tribunal's work.
The court's power to intervene is restricted as follows; it can:

- refer parties to arbitration where there is an arbitration agreement (Section 10(2));

- appoint arbitrators on parties' failure to approve arbitrators or on failure of the two appointed arbitrators to appoint the third arbitrator (Section 12);

- hear an appeal against the decision of the arbitral tribunal challenging arbitrator (Section 14(4));

- decide on termination of mandate of the arbitrator in the event of his inability to perform his functions or failing to act without undue delay (Section 15(2));

- (in the case of the High Court Division) decide jurisdiction of the arbitral tribunal (Section 20);

- enforce interim measures taken by the arbitral tribunal (Section 21(4));

- issue summons upon the application of the arbitral tribunal (Section 33);

- set aside awards (Section 42);

- enforce a foreign arbitral award (Section 45);

- (in the case of the High Court Division) hear appeals against an order of a district judge and additional district judge (Section 48):

    - refusing to set aside an arbitral tribunal;
    - refusing to enforce an arbitral award under section 44;
    - refusing to recognise or enforce any foreign arbitral award under Section 45;

- resolve dispute as to arbitrator's remuneration or costs (Section 50);

- direct determination of any question in connection with insolvency proceeding by arbitration under certain circumstances (Section 52); and

- (in the case of the Supreme Court) make rules in certain cases (Section 58).

1.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes, under section 7A of the Act, the court may make interim orders in respect of the following matters:

- to appoint a guardian for minors or the insane to conduct arbitral proceedings on their behalf;
- to take interim custody of or sell or take other protective measures in respect of goods or property, which are subject matter of the arbitration agreement;
- to restrain any party from transferring property which is subject to arbitration and to pass an order of injunction on transfer of such property;
- to empower any person to seize, preserve, inspect, take photograph, collect specimen, examine, take evidence of any goods or property included in the arbitration agreement and for that purpose to enter into land or building in possession of any party;
- to issue ad interim injunction;
- to appoint receiver; and
- to take any other interim protective measures that may appear reasonable or appropriate to the court.

The 2001 Act empowers the tribunal to make interim orders upon request of a party, requiring a party to take protective measures regarding the subject matter of the dispute with no provision of appeal against such order, subject to furnishing security as the tribunal may consider appropriate. Before the passing of such an order, notice must be served to the other party.

1.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- ### Formal requirements for arbitral awards

Section 38 of the 2001 Act sets out the form and content of arbitral award and requires, inter alia, the award to be written, signed by the majority of

the members of the arbitral tribunal, contain a valid reason for any omitted signature and state the date and place of arbitration. Signed copies of the arbitral award must be delivered to each party.
An arbitral award need not state any reasons if the parties agree that reasons are not to be given (Section 38(2)). The arbitral award shall state its date and the place of arbitration and the award shall be deemed to have been made at that place (Section 38(3)). Unless otherwise agreed by the parties, if the arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made, interest at such rate as it deems reasonable, on the whole or any part of money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

- ### Deadlines for issuing arbitral awards

There is no deadline for issuing the arbitral award under the 2001 Act.

- ### Other formal requirements for arbitral awards

Under the 2001 Act each arbitration award must contain the date of the award and the place of arbitration. After the arbitral award is made, a copy signed by the arbitrator or arbitrators has to be delivered to each party.

1.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

Section 43 of the Act provides the grounds for setting aside arbitral awards.

The court (within the local limits of whose jurisdiction the arbitral award is finally made and signed) may set aside any arbitral award made in Bangladesh (other than an international commercial arbitration) on the application of a parry within 60 days of receipt of the award.
The High Court Division may set aside any arbitral award made in an international commercial arbitration held in Bangladesh on the application of a parry within 60 days of the receipt of the award.

Section 43 of the 200 1 Act sets out the specific grounds, and states that an arbitral award may be set aside if:

(a) the party making the application furnishes proof that
   (i) a party to the arbitration agreement was under some incapacity;

   (ii) the arbitration agreement is not valid under the law to which the parties have subjected it;

   (iii) 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 due to some reasonable cause to present his case;

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

   (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this [the 2001] Act, or, in the absence of such agreement, was not in accordance with the provisions of the 2001 Act.

(b) The court or the High Court Division, as the case may be, is satisfied that:

   (i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh;

(ii) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;

(iii) the arbitral award is in conflict with the public policy of Bangladesh; or

(iv) the arbitral award was induced or affected by fraud or corruption.

1.19 What procedures exist for enforcement of foreign and domestic awards?

A distinction should be drawn between an award made in Bangladesh and a foreign award.

In the case of an award made in Bangladesh, where the time for making an application to set aside the arbitral award has expired, or such an application has been rejected, the award maybe enforced under the Code of Civil Procedure, in the same manner as if it were a decree of the court within the local limits of whose jurisdiction the arbitral award was made.

Bangladesh is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Chapter X of the Act sets out provisions dealing with recognition and enforcement of foreign arbitral awards. Section 45 of the Act provides that, notwithstanding anything contained in any other law for the time being in force, subject to section 46, a foreign arbitral award shall be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Bangladesh. Section 45(1)(b) also provides that, on an application made by a party to the award, a foreign arbitral award is enforceable by execution by the court under the Code of Civil Procedure, in the same manner as if it were a decree of the court. Application for the execution has to be accompanied by original arbitral award or an authenticated copy of the award, original or authenticated agreement for arbitration and evidence proving that the award is a foreign award.

Grounds for refusing recognition or execution of foreign arbitral awards are set out in Section 46 of the Act and include, among others, incapacity of

any party, invalidity of the arbitration agreement, inadequate notice of arbitration to the party against whom award is invoked, subject matter of the dispute not capable of being settled by arbitration and award being in conflict with public policy of Bangladesh. These are exactly the same as those provided for in article V of the New York Convention. Finally, Section 47 of the Act provides that to fulfil the objects of Chapter 9, the government may make notifications in the Official Gazette declaring a state as a specified state.

1.20 Can a successful party in the arbitration recover its costs?

Under Section 38(7), the Arbitral Tribunal will fix the costs of arbitration unless the parties agreed otherwise. The arbitral tribunal shall specify the following related to costs in an arbitral award: (i) the party entitled to costs (ii) the party who shall pay the costs (iii) the amount of costs or method of determining that amount, and (iv) the manner in which the cost shall be paid.

Under the above provision, arbitration costs include reasonable costs relating to the fees and expenses of the arbitrators and witnesses; legal fees and expenses, any administration fees of the institution supervising the arbitration and any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

1.21 Are there any statistics available on arbitration proceedings in Bangladesh?

There are no readily available statistics on arbitration proceedings in Bangladesh.

1.22 Are there any recent noteworthy developments regarding arbitration in Bangladesh?

In the field of arbitration Bangladesh has begun to respond to the needs of reform and the 2001 Act can be considered as a decisive step in that

direction. Since its enactment, there has been a positive response both from the business community as well as from foreign investors.

At present there is strong support for arbitration in Bangladesh. Arbitration and other alternative dispute resolution mechanisms are being encouraged and preferred as an alternative to court proceedings, which are generally seen to be cumbersome. A specific Bench of the High Court Division of the Supreme Court of Bangladesh deals with matters arising out of the 2001 Act. The Supreme Court of Bangladesh is largely supportive of arbitrations. A recent decision of the High Court Division has stated that the provisions of the 2001 Act requires 'any court in Bangladesh to stay proceedings and refer the parties to arbitration where the proceedings have been initiated in respect of the subject matter of the proceedings' (HRC Shipping Ltd v MVX-Press Manaslu, 12 MLR 2007 (HC) 265.)

Although the 2001 Act is modern, in practice the lower courts in Bangladesh are not yet completely supportive of arbitration. Occasionally international commercial arbitrations are hindered by frivolous litigation and injunctions from the lower courts. Furthermore, the domestic courts are overburdened, which lengthens the process of enforcement of arbitral awards.

Name of Authors:	**MS. MAHERIN KHAN** **Barrister, Senior Associate**
Name of Law Firm:	**Dr. Kamal Hossain & Associates**
Address:	Metropolitan Chamber Building 2nd Floor 122-124 Motijheel CA Dhaka 1000, Bangladesh
Telephone No.:	+ 880-2-955 2946; 956 4954
Fax No.:	+ 880-2-956 4953
Email:	mkhan@khossain.com; maherinkhan@hotmail.com
Website:	www.khossain.com

2. BRUNEI

BY: PROF. AHMAD JEFRI ABD RAHMAN

2.1 Which laws apply to arbitration in Brunei Darussalam?

The Arbitration Order, 2009 ("AO"), regulates domestic arbitrations, and the International Arbitration Order, 2009 ("IAO"), regulates international arbitrations in Brunei Darussalam. Both the AO and the IAO require that the arbitration agreement should be in writing and that they be based on the legal requirement of an arbitration agreement as stipulated in Article 7 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").

2.2 Is the Brunei Darussalam arbitration law based on the UNCITRAL model law?

The IAO adopts and enacts the Model Law in its First Schedule. Section 3(1) of the IAO does stipulate that subject to the modifications made by the IAA, with the exception of Chapter VIII (which provides for Recognition & Enforcement of Awards), the Model Law would have the force of law in Brunei Darussalam.

The New York Convention on Recognition & Enforcement of Foreign Arbitral Awards is set out in the Second Schedule of the IAO. Some of the differences between the Model Law and IAA are as follows:

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

ii. Unlike Article 10 of the Model Law which provides for 3 Arbitrators; Section 10 of the IAO provides that there is to be a single arbitrator.

iii. In addition to the grounds under Article 34(2) of the Model Law, the IAO allows for two additional grounds of challenge under Section 36: where the making of the award was induced or affected by fraud or corruption; or where a breach of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

2.3 Are there different laws applicable for domestic and international arbitration?

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

2.4 Has Brunei Darussalam acceded to the New York Convention?

Brunei Darussalam is a signatory to and has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has made a reservation of reciprocity.

2.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

There are no restrictions for parties to use foreign arbitration institutions in the circumstances stated above.

2.6 Does the Brunei Darussalam arbitration law contain substantive requirements for the arbitration procedures to be followed?

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

2.7 Does a valid arbitration clause bar access to state courts?

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

2.8 What are the main arbitration institutions in Brunei Darussalam?

The Brunei Darussalam Arbitration Centre ("BDAC") was established on 24 December 2014 with the role of promoting the adoption of arbitration and mediation services in resolving commercial issues and disputes as a speedier alternative to court proceedings.

BDAC provides services and administration of arbitration and mediation to meet the needs of domestic and international consumers. BDAC has its own board of directors and is located at the 8th Floor of the Brunei Economic Development Board headquarters on Jalan Kumbang Pasang.

The Chairman of the Brunei Arbitration Centre[2] is the statutory appointing authority under the AO (Section 13(8)) and the IAO (Section 8(2)).

In addition to the establishment of BDAC, the Arbitration Association of Brunei Darussalam ("AABD") is the sole arbitration association in Brunei Darussalam.

Formed in 2004, a part of the AABD's objectives is also to assist Brunei Darussalam in developing and providing advisory and assistance support in the field of arbitration. The AABD assists parties who wish to resolve their disputes by way of arbitration and also arranges places for arbitration hearings, and to ensure that the panel of international arbitrators are kept to a very high standard where there is a wide choice of diversity of leading international arbitrators who are currently mainly non-Brunei nationals. The AABD strongly encourages all of its arbitrators to adopt the latest international arbitration practices and cost controlling techniques.

2.9 Addresses of major arbitration institutions in Brunei Darussalam?

The address for the Brunei Darussalam Arbitration Centre and AABD is at:

Brunei Darussalam Arbitration Centre
Level 8, BEDB Building
Jalan Kumbang Pasang
Bandar Seri Begawan BA 1311
Brunei Darussalam

Arbitration Association of Brunei Darussalam
P.O Box 354
Bandar Seri Begawan BS8670
Brunei Darussalam

Tel: +673 2423871
Fax: +673 2323870

2 See International Arbitration (Amendment) Order, 2016 and Arbitration (Amendment) Order, 2016

2.10 Arbitration Rules of major arbitration institutions?

The Brunei Darussalam Arbitration Centre Rules can be found at BDAC's website at
http://bdac.gov.bn/SiteCollectionDocuments/BDAC_Rules.pdf

In practice, the AABD actively promotes the adoption of the UNCITRAL Model Law and strongly promotes for the usage of the UNCITRAL rules of arbitration.

2.11 What is/are the Model Clause/s of the arbitration institutions?

BDAC's Model Arbitration Clause provides as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with BDAC Arbitration Rules".

2.12 How many arbitrators are usually appointed?

Parties are free to allocate the number of arbitrators and to choose who they wish to have as arbitrator including any special qualifications of the arbitrators they may wish to appoint.

In practice, parties in Brunei Darussalam tend to select lawyers as arbitrators for cases where a sole arbitrator is called for and occasionally non-lawyers as arbitrators in 3-member arbitral tribunals where specialist skills are required.

It is useful to note that Section 10 of the IAO provides that there is to be a single arbitrator which differs from Article 10 of the Model Law.

2.13 Is there a right to challenge arbitrators, and if so under which conditions?

Under both the IAO (at Article 16(3) of Model Law) and the AO (at Section 31(9)), a party wishing to challenge the arbitral tribunal on jurisdiction has to make an appeal to the Brunei High Court within 30 days of receipt of such a decision.

A further appeal to the Brunei Court of Appeal is permitted only with leave of the High Court however, the arbitral tribunal may continue with the arbitration proceedings and may make an award under both the AO and the IAO pending the appeal on the issue of jurisdiction.

Further to the grounds under Article 34(2) of the Model Law, the IAO allows for two additional grounds of challenge under Section 36 namely, where the making of the award was induced or affected by fraud or corruption; or where a breach of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

It should be noted that although the Brunei courts have the power to hear applications of challenge against an arbitrator under the IAO (Article 13(3) of the Model Law) and under the AO (Section 15(4)) and may also remove an arbitrator for failure or impossibility to act under the IAO (Article 14(1) of the Model Law) and under the AO (Section 16), the court will not intervene at the stage of selection of an arbitrator.

2.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no restrictions for persons representing any party in arbitration proceedings. The amendment to the Legal Profession Act in 2016 [3] therefore removes the previous requirement to hold a valid Practicing Certificate under the Legal Professions Act of Brunei Darussalam for the purposes of representing a party in an arbitration.

3 See Legal Profession Act (Amendment) Order, 2016

2.15 When and under what conditions can courts intervene in arbitrations?

The courts in Brunei Darussalam have the power to hear applications of challenge against an arbitrator under the IAO (Article 13(3) of the Model Law) and under the AO (Section 15(4)) and may also remove an arbitrator for failure or impossibility to act under the IAO (Article 14(1) of the Model Law) and under the AO (Section 16).

The court however, does not intervene at the stage of selection of an arbitrator as this is left to the President of the AABD who is the default appointing authority under both the AO and IAO.

In procedural matters, the Brunei courts may make orders requiring a party to comply with a peremptory order made by the tribunal. Unless otherwise agreed by the parties, the courts may exercise powers in support of arbitral proceedings including preservation of evidence and property and may also make orders for inspection, preservation, detention or sampling of property that is the subject of the proceedings.

2.16 Do arbitrators have powers to grant interim or conservatory relief?

An arbitral tribunal may award interim relief and is not required to seek the assistance of the courts to order interim relief. Any orders or directions made by an arbitral tribunal in the course of an arbitration shall, by leave of the court be enforceable in the same manner as if they were orders made by the court and, where leave is so given, judgment may be entered in terms of the order or direction.

The IAO and the AO provide for the powers to the arbitral tribunal to make orders or give directions to any party for:

a) security for costs;

b) discovery of documents and interrogatories;

c) preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

d) giving of evidence by affidavit;

e) samples to be taken from any property which is or forms part of the subject-matter of the dispute; and

f) the preservation and interim custody of any evidence for the purpose of the proceedings.

In addition to the above, Brunei Darussalam has adopted the recommendations of the UNCITRAL in 2006 and has stipulated in the IAO powers for the arbitral tribunal to give interim measures to:

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

b) prevent a party from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings itself;

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

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

2.17 Arbitral Awards: (i) contents; (ii) deadlines; (iii) other requirements?

- ### Formal requirements for arbitral awards

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

a) the award must be in writing;

b) the award must be signed by all the arbitrators (where there is more than one arbitrator) or by the majority of the arbitrators,

unless the reason for omission of signature of any arbitrator is stated);

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

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

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

- ### Deadlines for issuing arbitral awards

Parties are free to stipulate the time within which an award is to be made by the arbitrator(s).

Under Section 36(1) of the AO, an extension of time may be applied for. The court will not make such an order unless it is satisfied that substantial injustice would otherwise be done and unless all available tribunal processes for the application of extension of time have been exhausted.

- ### Other formal requirements for arbitral awards

The requirements for arbitral awards are as set out in the IAO at Article of the 31 Model Law and in the AO at Section 38.

2.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Brunei Darussalam?

There is no right of an appeal against an award made in an international arbitration under the IAO. However, a party may apply to set aside an award on the limited grounds provided under Article 34 of the Model Law and under the two additional grounds under Section 36 of the IAO on the grounds that the award was induced or affected by fraud or corruption or

that breach of the rules of natural justice has occurred in connection with the making of the award.

For domestic arbitration under the AO, a party may appeal against an award on a question of law (Section 49). Section 49(3) of the AO provides that an appeal shall only be brought (a) with the agreement of all the other parties to the proceedings, or (b) with the leave of the court.

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

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

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

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

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

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

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

There are provisions under the AO that allow for the parties to agree to exclude the jurisdiction of the court to hear an appeal against awards. Additionally, an express agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the Brunei court in the AO.

Parties are not free to agree to exclude the jurisdiction of the court to hear an application to set aside an award(s) and parties have no power to agree

to expand the scope of appeal of an arbitral award beyond the grounds available in the AO.

2.19 What procedures exist for enforcement of foreign and domestic awards in Brunei Darussalam?

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

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

2.20 Can a successful party in the arbitration recover its costs in Brunei Darussalam?

A successful party in an arbitration will generally be awarded costs and expenses in the award at the discretion of the arbitral tribunal. The general practice of awarding shifting fees will be at the discretion of the arbitral tribunal.

2.21 Are there any statistics available on arbitration proceedings in Brunei Darussalam?

These are not currently available.

2.22 Are there any recent noteworthy developments regarding arbitration in Brunei Darussalam (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

Brunei Darussalam recognises arbitration as a valuable alternative dispute resolution mechanism, particularly for government contracts. In this context, efforts are underway in the setting up of an arbitration institution (see No. 2.8 above) which will provide a platform for the holding of arbitrations in Brunei Darussalam and also serve to train and develop local capabilities in the area of arbitration and other methods of dispute resolution.

Name of Author:	**PROF. AHMAD JEFRI ABD RAHMAN**
Name of Organization:	Ministry of Finance and Economy
Brief Profile:	Ahmad Jefri is Principal Counsel at the Ministry of Finance and Economy. He served as Adjunct Associate Professor at the UBD School of Business and Economics until 2018 where he taught Business Law, Corporate Law and Alternative Dispute Resolution. With 21 years of legal practice in the private and public sectors, he has held positions at the Attorney General Chambers, Brunei Darussalam including Head of Litigation and Dispute Resolution Unit in the Civil Division where he was actively involved in arbitration and litigation as government counsel. Ahmad Jefri also contributed to the drafting of Brunei Darussalam's legislation for domestic and international arbitration.
Telephone No.:	+673 238 3573
Fax No.:	+673 238 3531
Email:	jefri.rahman@mofe.gov.bn
Website:	http://www.ubd.edu.bn/

3. CAMBODIA

BY: DR. NARYTH H. HEM
MR. KOY NEAM

3.1 Which laws apply to arbitration in Cambodia?

There are two arbitral forums in Cambodia such as labor and commercial arbitrations. Collective labor disputes are governed principally by the Labor Law of 1997. Under this law, the Arbitration Council was created to resolve labor disputes. The awards of the labor arbitration are not binding unless the parties choose them to be binding or do not object to the awards after eight days of the date of issuance of the awards.

In July 2001 Cambodia adopted the *"Law on the Approval and Implementation of the United Nation Conventions on Recognition and Enforcement of Foreign Arbitral Awards"* and in March 2006 the *"Law on Commercial Arbitration"*[4]. In addition, on August 12, 2009, the *"Sub-Decree No 124 on the Organization and Functioning of the National Commercial Arbitration Center"* was adopted by the Royal Government of Cambodia. This Sub-Decree establishes the National Commercial Arbitration Centre (NCAC)[5] and provides for mechanisms as to how the Centre will regulate private arbitration and the procedure for the admission of arbitrators. The NCAC, which is an independent institution, was officially opened in 2013. The key roles of the NAC are to recruit and train arbitrators and arbitrate commercial disputes. Since its official launching, the Center has accepted three cases.

The NCAC adopted the "*Arbitration Rules of the National Arbitration Center of Kingdom of Cambodia*" in July 2014[6]. This was an important step for the NCAC to become a fully functioning arbitral institution. In principle, the Cambodian Code of Civil Procedure does not apply to arbitration. However, when an arbitral award comes into effect, a party can apply with the relevant court of first instance for the execution of the awards in

4 http://www.wipo.int/wipolex/en/text.jsp?file_id=180958
5 http://www.ncac.org.kh/
6 http://www.ncac.org.kh/?page=detail&menu1=216&menu2=389&ctype=article&id=389&lg=en

accordance with the provisions of the Code of Civil Procedure. As for foreign arbitral awards, a party can apply to the Court of Appeals for the recognition of the award before submitting it to the court of first instance for execution.

3.2 Is Cambodia's arbitration law based on the UNCITRAL Model Law?

The Law on Commercial Arbitration 2006 is based on the UNCITRAL Model Law. Although most of the provisions of the Law on Commercial Arbitration are in pari materia with the UNCITRAL Model Law, Cambodian legislators adapted certain provisions to the Cambodian context and international business requirements.

3.3 Are there different laws applicable for domestic and international arbitration?

The Law on Commercial Arbitration applies to both domestic and international arbitration. The Labor Law is applicable only for domestic arbitration resulting from labor disputes.

3.4 Has Cambodia acceded to the New York Convention?

Yes, Cambodia is a party to the United Nations Convention of Recognition and Enforcement of Foreign Arbitral Awards in 1958, which came into force in Cambodia in 2001 by the adoption of the *"Law on the Ratification and the Implementation of the UN Recognition and Enforcement of Foreign Arbitral Awards"*.

3.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

The provisions of the Law on Commercial Arbitration do not restrict the parties' choice of arbitration institutions. Hence parties have free reign to

contract and select an arbitration institution of their choice, including foreign arbitration institutions. The place of the arbitration is based on the terms of the arbitration agreement.

3.6 Does the Cambodian Arbitration Law contain substantive requirements for the arbitration procedures to be followed?

Yes, the Law on Commercial Arbitration contains detailed substantive requirements for the procedures to be followed during arbitration that generally reflect the UNCITRAL requirements. See Chapters 4, 5, 6, 7, and 8 of the Law on Commercial Arbitration (2006) and Chapters 2, 3 and 4 of the NCAC Rules (2014).

3.7 Does a valid arbitration clause bar access to state courts?

Yes. When an action is brought to the court in a matter that is subject to an arbitration agreement and when a party requests it to refer the case to the arbitration before its first statement on the substance of the dispute, then the court must refer the case to the arbitral tribunal. When an action is brought before the court while the arbitral proceedings begin or continue, then the court must refer that case to the arbitral tribunal pending the outcome of the arbitration. See Article 8 of the Law on Commercial Arbitration (2006).

3.8 What are the main arbitration institutions in Cambodia?

In Cambodia, there are two arbitration institutions: "The Arbitration Council" for labor disputes and the "National Commercial Arbitration Center" for commercial disputes.

3.9 Addresses of major arbitration institutions in Cambodia?

Arbitration Council
No.72, Street 592 (Conner of St.327),
Sangkat Boeung Kak II, Khan Tuol Kork
Phnom Penh, Cambodia. PO Box. 1180
Tel: +855 23 881 814/815
Email: info@arbitrationcouncil.org
Website: http://www.arbitrationcouncil.org

NCAC General Secretariat:
Building 65-67-69, St. 136, Sangkat Phsar Kandal I, Khan Daun Penh, Phnom Penh, Kingdom of Cambodia.
Tel: +855 23 213 262 | +855 12 44 00 22
Email: info@ncac.org.kh
Website: http://www.ncac.org.kh

3.10 Arbitration Rules of major arbitration institutions?

The **National Commercial Arbitration Center** released their arbitration rules on 11 July 2014. They can be found online at: http://ncac.org.kh/items/Abitration_Rules_%28NCAC%29_Adopted_Jul_2014_E.pdf

The Labor Arbitration Council's rules can be found online at: http://www.arbitrationcouncil.org/en/

3.11 What is/are the Model Clause/s of the arbitration institutions?

The model clause of the National Commercial Arbitration Center is:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, performance or termination, shall be referred to and finally resolved by arbitration in the Kingdom of Cambodia in accordance with the Arbitration Rules of the National Commercial Arbitration Center (NCAC) being

in force at the time of commencement of arbitration and by reference in this clause the NCAC Rules are deemed to be incorporated as part of this contract.

The Tribunal shall consist of _____* arbitrator(s). *State an odd number.

The language of the arbitration shall be _____.

Applicable Law
This contract is governed by the laws of _____*. * State the country or jurisdiction."[7]

As for labor disputes, there is no arbitration clause. Parties in disputes must go through a conciliation process, conducted by the officials of the Ministry of Labor and Vocational Training. If the conciliation fails, the case will be referred automatically to the Arbitration Council, where parties appoint the arbitrators of their own and the appointed arbitrators choose a third one.

3.12 How many arbitrators are usually appointed?

In labor arbitrations, there are three arbitrators chosen from the lists of employees' organization-appointed, employers' organization-appointed and government-appointed arbitrators. In commercial arbitration, the parties are free to decide the number of arbitrators, so long as it is an odd number. In the absence of an agreement on the number of arbitrators, the default rule would set the number at three. See Article 18 of the Law on Commercial Arbitration (2006) and Rules 9 and 10 of the NCAC (2014).

3.13 Is there a right to challenge arbitrators, and if so under which conditions?

7 http://www.ncac.org.kh/www.ncac.org.kh/index7327.html?page=detail&menu1=295&ctype=article&id=295&lg=en&menu1=217&menu2=228&lg=en

Yes there is a right to challenge arbitrators. This right is enshrined in Art. 20 of the Law on Commercial Arbitration (2006). According to this article, an arbitrator may be challenged only if circumstances give rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties. See also Rule 13.1 of the NCAC (2014).

3.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no restrictions as to the parties' representation in arbitration proceedings. None of the provisions of the Law on Commercial Arbitration (2006) and the Sub-Decree No.124 restrict the parties' representation in arbitration proceedings. In addition, Art. 26 of the Law on Commercial Arbitration (2006) and Rule 3 of the NCAC (2014) allow the parties to freely choose their representatives.

3.15 When and under what conditions can courts intervene in arbitrations?

In labor arbitration, a party in a collective dispute can submit the case to the court only after the issuance of the award and if it objects to that award. A party can file an application to the court to avoid the recognition and enforcement of a final and binding award by providing the grounds that (a) the party was not properly involved in the selection of the arbitrators or was not given proper notice of the arbitral proceedings or was unfairly prevented from making a full presentation of its case, (b) there was non-compliance with the procedures indicated in the Labor Law or the Prakas (ministerial act) establishing the Arbitration Council in connection with the making of the award, or (c) the Arbitration Council rendered an award which went beyond the power given to it by the Labor Law and the Prakas establishing the Arbitration Council.[8]

8 Article 47 of the Prakas on the Arbitration Council, available at http://www.arbitrationcouncil.org/en/resources/labour-law-and-regulations/prakas

In commercial arbitration, once the case is submitted to the arbitral tribunal, the court may not intervene in it except for some matters when parties' dispute centers on the procedure of the appointments of arbitrators and jurisdiction of the arbitral tribunal. See Articles 5 and 6 of the Law on Commercial Arbitration. A party can request the court to set aside the arbitral award on the grounds of incapacity of a party to the arbitration agreement, notice of appointment of an arbitrator or of the arbitral proceedings was not properly given, opportunity to present the case was not properly given to a party, awards are not dealt within the terms of the arbitration agreement, the composition of tribunal is not in accordance with the agreement of the parties. See Articles 42 and 44 of the Law on Commercial Arbitration (2006).

3.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes, arbitrators have powers to grant interim or conservatory relief unless otherwise agreed by the parties. See Article 9 of the Commercial Arbitration Law (2006) and Rule 28.2 of the NCAC (2014); Article 34 of the Prakas on the Arbitration Council.

3.17 What are the formal requirements for an Arbitral Award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

Arbitral awards must be in writing and signed by the arbitrators, reasoned, allocating costs of the arbitration among the parties. See Article 39 (1) of the Law on Commercial Arbitration (2006) and Rule 34.3 NCAC (2014).

For a labor award, it must contain (a) the names of the three arbitrators, (b) the name, domicile and seat or actual residence of the parties, (c) a summary of the procedure, (d) a description of the claim and a description of the counterclaim (if any), (e) the reasons for the decisions given in the award with, where applicable, reference to relevant provisions in the Labor Law, its implementing regulations or collective bargaining agreements or

individual labor contracts, (f) the decisions of the arbitration panel, and (g) date on which the award is made and signatures of all arbitrators.

- **Deadlines for issuing arbitral awards**

In labor arbitrations, the award must be issued within 15 days of the date of receiving the case except that in practice, the parties agree to delay the issuance of the award.

There are no deadlines for issuing commercial arbitral awards stated in the law.

In the case of a commercial dispute being referred to the NCAC, the award must be scrutinized and approved by the General Secretariat as to its form (Rule 34.5). The tribunal must submit the award to the NCAC 45 days after the proceeding was declared closed (Rule 35.1).

- **Other formal requirements for arbitral awards**

The award shall state the reasons upon which it is based; it shall allocate among the parties the costs of arbitration, including the fees of the arbitrators and incidental expenses; may state the recovery by the prevailing party of reasonable counsel fees upon agreement of the parties or by the judgment of the arbitrators; the award shall further state the date of the award and the place of arbitration; and copies of the award shall be signed by the arbitrator(s) and delivered to each party.
See Article 39 of the Commercial Arbitration Law (2006) and Rules 34 and 18.3 of the NCAC rules (2014).

3.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Cambodia?

In labor arbitration, a party can object to the award without giving any reason.

In commercial arbitrations, an arbitral award can be set aside by the Appeals Court and again appealable to the Supreme Court. See 3.15 above for the grounds for setting aside. The Cambodian Appeals Court may not

recognize the foreign award if it is against public policy or the subject matter of the dispute is not capable of settlement by arbitration under the law of Cambodia. If the foreign award is not recognized by the Appeals Court, a party can appeal against that decision to the Supreme Court, which has the final jurisdiction over this matter.

3.19 What procedures exist for enforcement of foreign and domestic awards in Cambodia?

An arbitral award is binding and can be executed in the country in which it is made. For the execution and recognition of an arbitration award, the party must submit a motion to the respective court along with supporting documentation, such as the duly authenticated original arbitration award or duly certified copy, or the original arbitration agreement or a duly certified copy. Moreover, a motion seeking execution of a domestic arbitration award shall fall within the jurisdiction of the Court of First Instance. However, the Court of Appeal shall have jurisdiction over a motion seeking execution of a foreign arbitration award (Chapter 8 Section 3 of the Commercial Arbitration Law (2006)). See also Rule 37 of the NCAC (2014) on the binding effect of the award.[9]

3.20 Can a successful party in the arbitration recover its costs in Cambodia?

If the parties have so agreed, or the arbitrator(s) deem it appropriate, the award may also provide for recovery by the prevailing party of reasonable counsel fees. See Article 39 (3) of the Commercial Arbitration Law (2006) and Rule 41.3 of the NCAC (2014).

9 In March 2014, for the first time, the Supreme Court of Cambodia confirmed a decision of the Cambodian Court of Appeal, which had ruled in favour of the recognition and enforcement of an arbitral award issued by the Korean Commercial Arbitration Board (KCAB) of Seoul, South Korea.

3.21 Are there any statistics available on arbitration proceedings in Cambodia?

So far, statistics are available only for labor related disputes. Since the inception of the Arbitration Council to the present (December 31, 2018), 2765 cases of collective disputes have been submitted to the Council, with 59 cases in 2018.

The NCAC has only accepted thirteen cases since its official launching in 2013.

3.22 Are there any recent noteworthy developments regarding arbitration in Cambodia (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

There are no significant developments of laws, arbitration institutions or court judgments affecting arbitration except the increased interest of the business and industry on referring their commercial disputes to the NCAC.

Name of Author:	**DR. NARYTH H. HEM** **MR. KOY NEAM**
Name of Law Firm:	**BNG Legal**, Phnom Penh, Cambodia
Brief Profile:	BNG Legal is a leading Cambodian law firm providing comprehensive legal services to foreign and local clients. BNG Legal combines international standards with local expertise.
Telephone No.:	+ 855 23 217 510 / 212 740
Fax No.:	+ 855 23 212 840
Email:	hhn@bnglegal.com
Website:	www.bnglegal.com

4. CHINA

BY: MR. RAINER BURKARDT
MR. JAN-MICHAEL HÄHNEL

4.1 Which laws apply to arbitration in China?

The basic law applying to arbitration is the Arbitration Law of the People's Republic of China ("Arbitration Law") which came into force in 1995 and has been revised several times, latest on August 27, 2009. Next to the Arbitration Law there are several supporting regulations for the implementation of the Arbitration Law as well as decisions and judicial interpretations by the Supreme People´s Court, which are treated like legislation in practice.

The Arbitration Law does not apply to the Hong Kong Special Administrative Region ("Hong Kong"), Macau Special Administrative Region ("Macau") and Taiwan. However Arbitral awards of Hong Kong and Macau arbitration institutions are enforceable in China (In this section China refers to the People´s Republic of China, excluding Hong Kong, Macau and Taiwan) and vice versa based on an agreement, which is considered as a judicial interpretation issued by the Supreme Court of the People´s Republic of China in China.

4.2 Is the Chinese arbitration law based on the UNCITRAL Model law?

No.

4.3 Are there different laws applicable for domestic and international arbitration?

Generally, the Arbitration Law applies to domestic as well as foreign-related arbitrations but distinguishes between domestic arbitration and foreign-related arbitration. In the past, only CIETAC was permitted to handle

foreign-related arbitrations. For maritime disputes the China Maritime Arbitration Commission is competent. Arbitration commissions (please note that in China arbitration institutions generally are referred to as "commission") established or re-established in accordance with the Arbitration Law may handle foreign-related arbitration.

In addition to the Arbitration Law there are special regulations regarding the challenging and denial of enforcement of foreign-related arbitral awards (Nos 4.18 and 4.19 below).

The definition of the term "foreign-related" is under dispute though. The Supreme Court released an interpretation[10] that a civil case is "foreign-related" in case:

- Either party of a civil relationship is a foreign citizen, foreign legal person, or other organization or stateless person.
- Where the subject matter of the relation is located outside the territory of China.
- Where the legal facts that trigger, change or terminate the civil relation take place outside the territory of China.
- Where the "regular residence" of either party is located outside the territory of the China.
- Other circumstances that may be determined as foreign-related civil relations.

Please find the recent developments at No. 4.22.

4.4 Has China acceded to the New York Convention?

China adopted the New York Convention in 1987, with the reservation of reciprocity and limits the application of the New York Convention to commercial cases, subject to the definition of Chinese laws.

10 Article 1, Fa Shi, 2012 No 24, Interpretation of the Supreme People´s Court on Certain Issues Concerning the Application of the "Law of the PRC on the Application of Laws to Foreign-Related Civil Relations"(I);

4.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Parties are only permitted to agree on foreign arbitration institutions and / or an arbitration seat outside China if the case is foreign-related. For the definition of "foreign-related", please refer to No 4.3 above and for recent developments, please refer to No 4.22 below.

Please note that foreign-invested enterprises located in China generally are considered as "domestic" for the purpose of establishing whether a case is foreign-related. In contrast thereto companies located in Hong Kong, Macau and Taiwan are considered as "foreign".

As exception thereto the Supreme Court released an opinion[11] that in case both parties are wholly foreign owned and located in a free trade zone ("FTZ") the parties have the right to agree on foreign arbitration.

In case one party to the arbitration agreement is foreign invested and located in a FTZ, an agreement for arbitration outside China may be considered valid. The court will however still determine, whether the dispute is foreign related and may hold an agreement between two domestic parties for foreign arbitration as invalid.

Whether the elements defining a foreign-related civil relationship, as outlined by the Supreme Court, are given, is subject to the discretion of the Chinese court. Especially, in case the "foreign-relation" depends on the location of the subject matter or the legal facts that trigger, change or terminate the civil relation, there is often a risk that a Chinese court may consider such facts as non-defining or minor and deny a foreign relation.

In any case, to exclude any risks, two domestic parties should refrain from agreeing on a foreign arbitration institution, a foreign seat of arbitration and applying foreign substantive law.

---

11 "Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Development of Free Trade Zones" Fa Fa [2016] No. 34

4.6 Does the Chinese arbitration law contain substantive requirements for the arbitration procedures to be followed?

Yes. In general, the Arbitration Law requires an arbitration agreement in writing containing:

- a declaration of intention to apply for arbitration;
- matters for arbitration; and
- a designated arbitration commission.

For further details, please refer to No 4.19 below.

According to the Arbitration Law to initiate arbitration, the claiming party shall submit a written application for arbitration, which shall specify the name, gender, age, occupation, employer and residence of each party or the name and registered address of legal persons or other organizations as well as the names and positions of their legal representatives or chief responsible persons, the claim and the case facts and reasons which it is based upon and the evidence, the source of the evidence as well as the names and address of witnesses.

In practice the respective rules of the arbitration commission specify the requirements for the arbitration procedure to be followed.

4.7 Does a valid arbitration clause bar access to state courts?

Yes. According to the Arbitration Law a valid arbitration clause limits the access to state courts. However, if a party files a lawsuit in a state court and if the state court accepts such lawsuit and the other party does not object to such a legal proceeding at a state court based on the arbitration clause at the first hearing, the parties are deemed to have terminated their arbitration agreement.

Further a state court may declare the arbitration clause void, in case the clause does not clearly state the following:

- Intent to apply for arbitration;
- Subject matters;
- A specific arbitration commission.

4.8 What are the main arbitration institutions in China?

The most important arbitration commission is the "China International Economic and Trade Arbitration Commission" ("CIETAC"). Other important commissions are the "Shanghai International Economic and Trade Arbitration Commission / Shanghai International Arbitration Center" ("SHIAC") and the Shenzhen Court of International Arbitration ("SCIA"), which developed from sub-commissions of the CIETAC, due to internal disputes. Also, the "Beijing Arbitration Commission / Beijing International Arbitration Center" ("BAC") is well known.

By now the SCIA and the SHIAC are well established. However, to avoid ambiguities regarding the appointment of arbitration commissions (refer No 4.18 and 4.19 below), the arbitration clause should clearly state, whether the CIETAC in Shanghai respectively in Shenzhen shall be the designated commission or the SHIAC or the SCIA shall be the competent arbitration commission.

4.9 Addresses of major arbitration institutions in China?

China International Economic and Trade Arbitration Commission (CIETAC)
6/F,CCOIC Building, 2 Huapichang Hutong, Xicheng District, Beijing P.C. 100035
Tel : +86 -10-82217788, 64646688
Fax : +86-10-82217766, 64643500
Email: info@cietac.org
Website: http://www.cietac.org

South China International Economic and Trade Arbitration Commission (Shenzhen Court of International Arbitration)
41/F, West Square of Shenzhen Stock Exchange, 2012 of Shennan Blvd., Futian District, Shenzhen 518026, P.R. China
Tel: +86-755-83501700
Fax: +86-755-82468573
E-mail: info@scia.com.cn
Website: www.scia.com.cn

Shanghai International Economic and Trade Arbitration Commission / Shanghai international Arbitration Center
Address: 7-8F, Jin Ling Mansion, 28 Jin Ling Road (W), Shanghai 200021, P.R.CHINA
Tel: +86 21 6387 5588
Fax: +86 21 6387 7070
Website: www.shiac.org
E-mail: info@shiac.org

Beijing Arbitration Commission & Beijing International Arbitration Center
Address:
16/F, China Merchants Tower, No.118 Jian Guo Road, Chaoyang District, Beijing 100022, China
Post Code:100022
Tel: +86-10 6566-9856
Fax: +86-10 6566-8078
Email: bjac@bjac.org.cn
Website: http://www.bjac.org.cn/english/

4.10 Arbitration Rules of major arbitration institutions?

CIETAC arbitration rules:
http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en

SHIAC Rules 2015
http://www.shiac.org/SHIAC/arbitrate_rules_detail_E.aspx?id=12

SHIAC Free Trade Zone Rules 2015
http://www.shiac.org/SHIAC/arbitrate_rules_detail_E.aspx?id=14

BAC Arbitration Rules:
http://www.bjac.org.cn/english/page/zc/guifan.html (CH/EN)
http://www.bjac.org.cn/english/page/data_dl/zcgz_en.pdf (EN, .pdf)

4.11 What is/are the Model Clause/s of the arbitration institutions?

CIETAC:

Model Arbitration Clause (1)
"Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties."

Model Arbitration Clause (2)
"Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC)_____Sub-Commission (Arbitration Center) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties."

SHIAC:

Model Arbitration Clause
"Any dispute arising from or in connection with this Contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for arbitration."

Model Arbitration Clause for FTZ

"Any dispute arising from or in connection with this Contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for arbitration. The arbitration shall be held in The China (Shanghai) Pilot Free Trade Zone Court of Arbitration."

4.12 How many arbitrators are usually appointed?

According to the Arbitration Law the number of arbitrators shall either be one or three.

Usually the tribunal shall be composed of three arbitrators (e.g. SHIAC and CIETAC), unless otherwise agreed upon by the parties.

However, most arbitration rules contain exceptions, in which only one arbitrator shall be appointed, unless the parties agreed otherwise. E.g. for summary procedures, which at CIETAC applies in case the amount in dispute is less than RMB 5,000,000.- (approx. USD 720,000.-) and at SHIAC in case the amount in dispute is less than RMB 1,000,000.- (approx.. USD145,000.-).

4.13 Is there a right to challenge arbitrators, and if so under which conditions?

According to the Arbitration Law[12] an arbitrator shall withdraw voluntarily or otherwise the parties have the right to challenge the arbitrator under one of the following conditions:

- The arbitrator is a party, a close relative of a party or a representative in the case;
- The arbitrator has a personal interest in the case;

12 Art. 34 Arbitration Law of the PRC

- The arbitrator has another relationship with a party or the parties' representative, which may affect the impartiality;
- The arbitrator has privately met with a party or representative or accepted an invitation to an entertaining event or a gift from a party or representative.

Parties shall challenge arbitrators with an explanation for the challenge before the first hearing. If the fact the challenge is based upon only became known after the first hearing, the arbitrator may be challenged within fifteen days from the date the fact is known, but not later than the end of the last hearing according to the rules of SHIAC and CIETAC.

The chairman of the commission decides whether to replace the arbitrator. In case the chairman of the commission is the arbitrator, the commission shall decide.

4.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

Generally, any person with a power of attorney may represent a party in arbitration proceedings. However according to Chinese law, only lawyers registered in China are permitted to consult in Chinese law. Therefore, in case the substantive law is Chinese law, the counter party often disputes the competence of non-Chinese lawyers to represent the party, which may cause delays in the proceeding.

4.15 When and under what conditions can courts intervene in arbitrations?

Generally Chinese courts only intervene, if for any reason the arbitration clause is void (See No. 4.18 and No. 4.19 below).

4.16 Do arbitrators have powers to grant interim or conservatory relief?

Arbitrators have the power to grant interim or conservatory relief, if allowed by the rules of the respective arbitration commission. (See also No 4.22 – new developments). Generally, the tribunal or emergency arbitrator will release the interim relief, which will subsequently be enforced by a Chinese court according to the Chinese procedural law.

Also, upon application by a party before the arbitration proceedings or the arbitration institution, the competent state court may grant interim or conservatory measures.

4.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

According to the Arbitration Law, an award shall specify the claim, the facts of the dispute, the reasons for the decisions, the results of the award, the allocation of arbitration fees and the date of the award.

The award shall be signed by the arbitrators and chopped by the commission, whereas arbitrators with dissenting opinions may decide not to sign the award.

There are additional formal requirements or modifications to requirements, depending on the arbitration commission.

According to the CIETAC Arbitration Rules the facts of the dispute and the reasons on which the award is based may not be stated in the award if the parties have so agreed, or if the award is made in accordance with the terms of a settlement agreement between the parties.

Further the seal of the CIETAC shall be chopped on the award. The SHIAC has similar rules.

The Arbitration Law does not state a deadline to issue an award, however CIETAC and SHIAC rules both state that the award shall be rendered within six months from the constitution the arbitration tribunal. Upon request of the tribunal the time limit may be extended by the commission.

4.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

According to the Arbitration Law, an arbitral award shall be final and binding. Therefore, arbitral awards cannot be appealed.

However, in case of domestic arbitral awards a party may challenge the award for the same reasons for denying enforcement (See No 4.19 below).

Reasons which have not been successful during a state court trial to set aside the award shall not be brought forward again during enforcement.

If the court considers an arbitration clause or the arbitration agreement invalid, void or non-executable, before issuing a verdict to set aside the award, the court shall confirm with the responsible Higher People's Court and in case the Higher People´s Court agrees, the Supreme People's Court shall examination the opinions of the lower courts.

In case of domestic awards, the Higher People´s Court shall only confirm with the Supreme People´s Court in case the parties to the arbitration agreement have their habitual residence in different provincial administrative regions or the award shall be revoked or not enforced based on public interest[13] (see also No 4.22).

The party applying for setting aside the award shall apply within six months upon receiving the award.

Also, third parties are eligible to apply for denial of enforcement, in case the parties to the arbitration case have maliciously applied for arbitration or engaged in a "fictional" arbitration and the interests of such third party are concerned (see also No 4.22).
Furthermore, the third party´s interests shall be lawful and truthful, there must have been a relationship to the facts of the case and the interests of the third party would be damaged by enforcing the award.

13 Supreme People´s Court, Fa Shi [2017] No 21;

The third party shall apply against enforcement within 30 days from the date the third party knew or should have known about the People's Court having taken measures to enforce the award[14].

4.19 What procedures exist for enforcement of foreign and domestic awards?

For the enforcement the Chinese law distinguishes between domestic awards – awards issued in the territory of China -, foreign-related awards, meaning awards issued in the territory of mainland China, which are foreign-related and foreign awards, meaning awards, which are issued outside the territory of mainland China.

A domestic arbitral award shall be enforced according to the Arbitration Law and the Civil Procedure Law. The competent state court for enforcement is the court at the location of the counter party.

The court shall deny the enforcement of a domestic arbitral award, in case a party can prove that:

- the parties did not conclude an arbitration clause / agreement;
- the matters dealt with by the award fall outside the scope of the arbitration agreement or are matters which the arbitral organ has no power to arbitrate
- the composition of the arbitration tribunal or the procedure for arbitration contradicts the procedure prescribed by the law;
- the main evidence is falsified;
- the other parties conceal evidence from the arbitral organ, which was sufficient to affect the impartiality of the arbitral award; or
- the arbitrators have committed embezzlement, accepted bribes or done malpractice for personal benefits or corrupted the law in the arbitration of the case.

14 Supreme People´s Court, Fa Shi [2018] No 5 Art 9 and 18;

In case the domestic arbitral award is foreign-related, the court shall deny the enforcement of such foreign-related arbitral award in case a party provides evidence that:

- the parties did not conclude an arbitration clause / agreement;
- the party against whom the application for enforcement is made was not given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or was unable to present his case due to causes for which the party is not responsible;
- the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or
- the matters dealt with by the award fall outside the scope of the arbitration agreement or the arbitral organ was not empowered to arbitrate;
- the enforcement of the award is against the social and public interest.

For the enforcement of a foreign arbitral award under the New York Convention, the Intermediate People's Court at the location of the assets which are subject to enforcement or the domicile of the counterparty shall be competent.

The requirements for the enforcement of a foreign arbitral award under the New York Convention are:

- a written application;
- the original arbitral award or a certified copy thereof;
- the original arbitration agreement or a certified copy thereof;
- a translation of the agreement or the award, if made in a foreign language.

Foreign awards, which are not subject to the New York Convention, may only be recognized and enforced based on the reason of a bilateral agreement or reciprocity principle.

In case a state court considers refusing the enforcement of an arbitral award by a "domestic" foreign-related arbitration tribunal or a foreign award based on the reasons as stated above or based on the reasons as stated in the New York Convention, the state court shall consult the Higher People's

Court for examination before refusing the enforcement. If the Higher People's Court agrees to refuse enforcement of the arbitral award, the Supreme People's Court shall examine the opinion. Only after the Supreme People's Court gives its reply, the ruling of non-enforcement or refusal of recognition and enforcement of a foreign award shall be made.

Due to the interpretation of the New York Convention by Chinese courts there have been problems regarding the enforcement of awards by tribunals formed under non-Chinese arbitration Institutions, which have been rendered within the territory of mainland China.

State courts considered the New York Convention applicable, only in case of awards rendered outside the territory of mainland China.

As according to this interpretation, the New York Convention does not apply to arbitral awards issued by tribunals under non-Chinese arbitration institutions within the territory of mainland China, such non-Chinese arbitration institutions under which the tribunal which rendered the award was formed, shall be subject to the Arbitration Law.

Due to this interpretation in the past several arbitral awards issued by tribunals under non-Chinese arbitration institutions within the territory of China were set aside or enforcement was denied (also see latest development below No 4.22).

Recently a change in jurisprudence seems to materialize, as arbitration awards by commissions subject to the ICC were occasionally enforced. Nonetheless the dispute is not resolved and in practice there is a risk in case a Non-Chinese arbitration institution with the place of arbitration proceedings located in the territory of China is chosen that an award of such tribunal will not be enforced by Chinese state courts.

Moreover, in practice enforcing foreign arbitral awards or awards applying foreign law is considerably more complicated than enforcing an award rendered by a tribunal subject to the rules of a Chinese arbitration commission seated in China with Chinese law as substantive law, despite the fact that state courts have a smaller leeway in denying enforcement of foreign or foreign-related arbitral awards. In addition, in practice enforcing

awards of less known arbitration commissions has appeared to be rather complex.

4.20 Can a successful party in the arbitration recover its costs?

Several arbitration rules allow the arbitrator respectively the tribunal to decide on the allocation of expenses and costs of the parties, like for instance attorney fees.

The CIETAC Rules for example permit the tribunal to decide that the losing party shall compensate the prevailing party for the expenses reasonably incurred by it pursuing in the case. However, the arbitration tribunal shall take into consideration various factors e.g. the outcome and complexity of the case, the workload of the prevailing party and/or its representative(s), the amount in dispute, etc.

Therefore, in practice a tribunal generally will award reasonable costs.

However, in practice it is common to add into the agreement that the losing party shall bear the arbitration costs, unless otherwise decided by the tribunal.

4.21 Are there any statistics available on arbitration proceedings in China?

Yes. Most of the arbitration commissions track and publish their statistics:

CIETAC:
http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en

SHIAC:
http://www.shiac.org/SHIAC/aboutus_E.aspx?page=5

4.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration

institutions, significant court judgments affecting arbitration etc.)?

- **Choice of arbitration seat outside China between "domestic" companies**

As discussed above in No 4.5 according to Chinese laws it is only legally feasible to agree on a location of arbitration outside China as well as a non-Chinese arbitration institution in case of foreign-relations.

In case of two foreign invested enterprises, the foreign relation in the past often has been denied due to the argument that the parties, even though they are foreign invested, are still domestic parties as they are registered in China.

Recently in the case of Ningbo Xinhui vs. Meikang[15] International as well as Shanghai Golden Landmark vs. Siemens International Trade[16] the Beijing No. 4 Intermediate People´s Court as well as the Shanghai No. 1 Intermediate People´s Court held the arbitration agreement with a foreign commission and a seat outside China as valid.

Both courts rendered their decisions in relation to the Shanghai Free Trade Zone. According to the verdicts goods which were pending clearance at the free trade zone are similar to foreign goods and goods, which are processed within the Shanghai Free Trade Zone have the characteristics of an international sale of goods. However, it was remarkable that the Shanghai No. 1 Intermediate court, instead of considering the parties as domestic parties, considered the investors and the beneficiaries of the parties as foreign and therefore argued in favor of an existing foreign-relation. The Supreme People´s Court confirmed these considerations.

15 Beijing No 4 Intermediate People´s Court 2015, (2015) si zhong min (shang) te zi No. 00152 Ningbo Xinhui ./. Meikang international

16 Shanghai No 1 Intermediate Court, (2013) Hu yi zhong min ren (wai zhong) zi No. 2, Shanghai Golden Landmark Co., Ltd. v. Siemens International Trade Co., Ltd.

It is not clear yet however, whether other courts will follow such argumentation and if the same considerations would be made outside of a free trade zone.

Nonetheless, especially the decision of the Shanghai No. 1 Intermediate Court indicates a significant change in the approach of Chinese courts regarding the analyses of foreign relation, as the court did not restrict its argument to the legal nature of the parties, but considered other factors as well.

The Supreme Court issued an opinion[17] supporting that at least wholly foreign owned companies located in an FTZ shall be permitted to choose a foreign arbitration commission.
In case the companies are foreign invested and located in an FTZ, the decision whether an agreement for foreign arbitration is valid is in the discretion of the competent court.

- ## Enforcement of arbitral awards under ICC rules

As already mentioned in No 4.19 the enforcement of awards by tribunals subject to non-Chinese arbitration institutions made in the territory of China has been under dispute in the past and mostly the ICC has been standing in the center of such disputes.

Next to the question whether a tribunal constituted under foreign arbitration institutions may issue awards on Chinese territory and whether such awards are enforceable based on the New York Convention, the former ICC standard arbitration clause was referring to *"shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce"*.

Chinese courts held such arbitration clause to be invalid due to the argument that no arbitration commission was chosen (please refer to No 4.18 and 4.19).

17 Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Development of Free Trade Zones" Fa Fa [2016] No. 34

To avoid such decisions, the ICC modified the wording of its clause now reading:

"… be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce". The Supreme People´s Court already indicated that the new clause might be accepted, whereas it was still left open, whether awards of tribunals subject to a non-Chinese arbitration institution within the territory of China may be enforced.

However, the Taizhou intermediate court[18] made clear that a decision made about the invalidity of an arbitration clause shall not be revised. In a recent decision the court refused to enforce an award issued by a tribunal subject to ICC rules seated in Hong Kong, based on the social and public interest of China. The award by the tribunal subject to ICC rules in Hong Kong was based on an arbitration clause, which has already been declared invalid by a Chinese court under a different subject. The validity of the clause should however not have been subject to the decision of the Taizhou court as awards from Hong Kong should be enforced based on the Supreme Court's Arrangement for the Enforcement of Arbitral Awards as concluded between Mainland and Hong Kong SAR (refer No 4.1 above). The Taizhou Intermediate Court declared that since the clause had been held to be invalid already, enforcing such award would interfere with the judicial sovereignty of China. It is not clear however, if a state court would uphold the same decision in case of enforcement through the New York Convention.

In general, the acceptance of ICC awards increased, and several awards issued by tribunals subject to ICC rules outside of the territory of China were enforced[19].

18 Taizhou Intermediate People´s Court 2015, Tai Zhong Shang Zhong Shen Zi, Taizhou Haopu Investment Co., Ltd. ./. Wicor Holding AG

19 Jiaxing Intermediate People's Court 2017, (2017) Zhe 04 she wai ren No. 1, Valmet. Inc../. Zhejiang Purico Speciality Paper Co., Ltd.

- **The first interim arbitration order by an emergency arbitrator located in China subject to a Chinese arbitration commission was enforced in Hong Kong.**

In the respective case[20] the claimant needed to prevent the respondent from moving assets, which were located in Hong Kong.
The parties had agreed to arbitration subject to the BAC rules, which rules allow the appointment of an emergency arbitrator.

The claimant filed for asset and evidence preservation.

Subsequently to a hearing the arbitrator granted an emergency arbitrator order to freeze the assets. The order was handed to the Hong Kong High Court, which subsequently - subject to Hong Kong rules and regulations - enforced the order.

This was to our knowledge the first emergency arbitrator proceeding in China as well as the first enforcement of such interim award in Hong Kong by an emergency arbitrator in China subject to a Chinese arbitration commission.

On 02. April 2019 Hong Kong's Secretary for Justice and the Vice-president of the Supreme People's Court signed an "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region" ("Arrangement"). Under this Arrangement, parties to arbitral proceedings of certain arbitration institutions in Hong Kong can make an application for interim measures to the China Mainland courts, including property preservation, evidence preservation and conduct preservation, in support of the arbitral proceedings.

The Arrangement is considered a judicial interpretation by the Supreme Court and providing Chinese courts with a base for accepting applications for interim measures. The Arrangement has not been implemented yet. A commencement date will be announced at a later point of time.

20 http://www.bjac.org.cn/news/view?id=3273 (last visited on February 12, 2019)

Name of Author:	**MR. RAINER BURKARDT** **MR JAN-MICHAEL HÄHNEL**
Name of Law Firm:	**Burkardt & Partner Rechtsanwälte**
Brief Profile:	We are a PRC law firm with German management advising medium-sized enterprises as well as business groups and international industrial companies predominantly from Germany, Switzerland and Austria on their investments in the People's Republic of China.
Telephone No.:	+86 21 6321 0088
Fax No.:	+86 21 6321 1100
Email:	info@bktlegal.com
Website:	www.bktlegal.com

5. THE CHINESE EUROPEAN ARBITRATION CENTRE – HAMBURG

BY: Prof. Dr. Eckart Brödermann, LL.M. (Harvard), Maître en Droit (Paris), FCIArb (London), Brödermann Jahn
Dr. Christine Heeg-Weimann, LL.M. (Sydney), KPMG Law

5.1 Introduction to the Chinese European Arbitration Centre

The Chinese European Arbitration Centre (CEAC) provides tailor made arbitration solutions for contracts with an Asia, and in particular China element, especially if at least one of the parties comes from Europe, Africa, North or South America. Accordingly, cases in the past ten years since its foundation in 2008 have involved parties from Canada, Israel, various European jurisdictions, Hong Kong and mainland China. The key advantage of CEAC is of a legal-cultural nature. From a comparative legal perspective, agreeing on CEAC and a seat of arbitration in Hamburg (even if the place of the hearings can take place anywhere else outside mainland China, to ensure safe enforcement under the New York Convention), agreeing on a CEAC arbitration clause has considerable advantages in the following scenario: If the parties (or their ultimate owners) are domiciled in civil law jurisdictions like China, Korea or Thailand on one side and any of the continental European jurisdictions, or many African or South American jurisdictions on the other side, it is consistent, from a comparative law perspective, to ensure that the arbitration takes place in such civil law environment. This permits to use the one uniting point between the otherwise opposing contracting parties as a starting point for the dispute resolution. China and Germany, the home seat of CEAC, are civil law countries. The contract laws, the civil procedure law and the arbitration laws as well as the private international law in both jurisdictions have a lot in common. The CISG provides identical international contract law. The

UNIDROIT Principles of International Commercial Contracts (4th edition 2016), explicitly offered by the CEAC choice of law clause to consider, provides a bridge with internationally accepted contract rules – officially translated in 15 languages -, which each party can read in its native language. Possibly even more important is the mindset which civil law arbitration brings along. Inherently, a civil law arbitration requires from the arbitrators to encourage dispute resolution by settlement, even during the course of the arbitration proceeding. Furthermore, contract parties from China and continental European jurisdictions are accustomed to rules of evidence which exclude, for example, in principle discovery in any common law style. The concept of truth is procedural (where each party has to prove its own case) and thereby very much distinct form e.g. a US style of dispute resolution where each party would expect that both parties put all cards on the table. These differences do not imply any kind of judgement which system functions better. The long history of both traditions in dispute resolution demonstrates that both systems do function. Yet, in terms of cost control and risk minimization, it saves time and efforts if the dispute resolution regime by arbitration is kept within the same spirit under which a civil law contract was signed by civil law parties. CEAC was designed, after substantial discussions with Chinese colleagues (e.g. at the China Council for the Promotion of International Trade – CCPIT – or the China International Economic and Trade Arbitration Commission (CIETAC)) – to offer such a civil law forum for dispute resolution. That is the reason why opting for CEAC may often be more suitable than agreeing on dispute resolution in a common law jurisdiction under those circumstances.

It is therefore highly recommended to always consider the concrete circumstances. In case of a dispute between a US party and a Hong Kong party, arbitration under the ICDR rules or the HKIAC rules may be the better option or the seat of a CEAC arbitration could be transferred to Hong Kong in such circumstances. If civil law is involved on both sides, CEAC with the seat of arbitration in Hamburg, Germany may be the better option.

5.2 CEAC Model Arbitration Clause and Model Choice of Law Clause

In order both to simplify discussions of the contracting parties about the applicable law, the rules for the arbitral proceedings and the place of arbitration, for example, as well as to remind the parties of important issues that should be dealt with in international commercial arbitration, CEAC provides both a Model Arbitration Clause and a Model Choice of Law Clause. Both clauses are already available in various languages (English, German and Mandarin). *See* www.ceac-arbitration.com under CEAC Model clauses. The **Model Arbitration Clause** in which the parties can decide on the formalities of the arbitral process states as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by institutional arbitration administered by the Chinese European Arbitration Centre (CEAC) in Hamburg (Germany) in accordance with the CEAC Hamburg Arbitration Rules."

This basic clause can be supplemented by a number of options which the CEAC Rules propose. They correspond to a number of practical issues which are useful to determine at the moment of the conclusion of an arbitration agreement. The provisions in lit. a) through g) (below) are intended as a service element to remind the parties of important issues to be dealt with related to arbitration proceedings. This is of vital importance as China related contracts involving smaller and medium sized companies often lack professional legal advice and input. The options read:

a) **"*The number of arbitrators shall be ___ ((i) one or (ii) three or unless the amount in dispute is less than € ___ [e.g. 100.000 €] in which case the matter shall be decided by a sole arbitrator).***

b) ***Regardless of the seat of arbitration, the arbitral tribunal is free to hold hearings in _____ (town and country).***

c) ***The language(s) to be used in the arbitral proceedings shall be _____.***

d) ***Documents also may be submitted in _____ (language).***

e) ***The arbitration shall be confidential.***

f) ***The parties agree that also the mere existence of an arbitral proceeding shall be kept confidential except to the extent disclosure is required by law, regulation or an order of a competent court.***

g) ***The arbitral tribunal shall apply the CEAC Hamburg Arbitration Rules as in force at the moment of the commencement of the arbitration unless one of the parties requests the tribunal, within 4 weeks as of the constitution of the arbitral tribunal, to operate according to the CEAC Hamburg Arbitration Rules as in force at the conclusion of this contract."***

Furthermore, the parties can use the **Model Choice of Law Clause** to agree on the substantive law that shall apply. It reads:

"The Arbitration Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. The parties may wish to consider the use of this model clause with the following option by marking one of the following boxes:

The contract shall be governed by

a) the law of the jurisdiction of _____ [country to be inserted], or

b) the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law, or

c) the UNIDROIT Principles of International Commercial Contracts supplemented by the otherwise applicable law.

In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

In the event, that none of the parties succeeds or wishes to insist on its own law, the model clause offers the reference to well-known international neutral legal rules. The CISG (offered at lit. b) is part of Chinese law and of more than 70 other laws around the globe. Thus, for example, the international law of sales in China, Germany, Italy, New York and Russia is identical (except for national reservations which the model clause excludes to provide for an international neutral ground).

The UNIDROIT Principles (offered at lit. c) are also well known worldwide. They provide an excellent neutral ground and have inspired not only the Chinese legislator but also numerous other legislators including Germany. The 4th edition 2016 offers robust default rules on all major issues of contract law from formation of contract (e.g. agency, conditions, multi-party scenarios) and rules on assignment and prescription. It is even possible to agree on the UNIDROIT Principles alone and to delete the reference to any national law in lit. c). This was actually done by the parties in a 2017 CEAC arbitration. A Chinese party had filed a CEAC arbitration claim against a German party on the basis of the CISG and Chinese law. To avoid the efforts of arguing Chinese law, the Respondent proposed to switch to the UNIDROIT Principles as the applicable neutral regime. The Chinese Claimant did accept that proposal whereby it must be noted that, since 1999, there is a substantial similarity between Chinese contractual law and the UNIDROIT Principles. In that case, in the end, after full preparation of the case in the briefs, the parties settled their case during the first hearing on the basis of terms which were also submitted to the UNIDROIT Principles.

Both model clauses can be found at www.ceac-arbitration.com under CEAC Download Centre.

5.3 How many Arbitrators are usually appointed?

Pursuant to Art. 7 para. 1 of the CEAC Arbitration Rules, the parties can freely determine the number of arbitrators. If the parties have not agreed on a sole arbitrator within 30 days after receipt of the notice of arbitration by the respondent, three arbitrators shall be appointed unless special

circumstances of the case exist which make appointment of a sole arbitrator more appropriate (Art. 7 para. 2 CEAC Rules).

The way of appointment varies depending on the number of arbitrators. If three arbitrators have to be appointed, a general rule is that each party shall appoint one arbitrator and the two party-appointed arbitrators shall appoint the presiding arbitrator (Art. 9 para. 1 CEAC Rules). If the party appointed arbitrators cannot agree on the presiding arbitrator (or if the parties cannot agree on a sole arbitrator) the Appointing Authority shall decide (Art. 8 and 9 para. 3 CEAC Rules).

The Appointing Authority of the CEAC is divided in chambers, whereas each chamber is responsible for countries whose names begin with certain letters of the alphabet to preserve its neutrality. The Appointing Authority is always a neutral body to decide on the arbitrator to be appointed as its chambers shall always consist of three members, one from China, one from Europe and one from other parts of the world beyond China and Europe. This leads to a division of power between China, Europe and the other parts of the world with the consequence that there is always one neutral member coming from a different region than the parties concerned. The Appointing Authority is committed to observe a high level of transparency. Thus, as a matter of policy, it cannot appoint arbitrators who serve on the Advisory Board of CEAC. In practice, the Appointing Authority usually acts via telephone conferences which are being prepared by CEAC management and internal debate between the members of the Appointing Authority which is in charge.

Pursuant to § 1025 ZPO (German Civil Procedure Code) – which corresponds to Art. 1 of the UNCITRAL Model Law on International Commercial Arbitration – the award is considered to be a German award if the place of the arbitral proceedings is in Germany. Therefore, German Civil Procedural Law applies. For this reason, a rough comparison to the UNCITRAL based German Civil Procedural Law will be given at the end of each question.
In German Civil Procedural Law, the parties can also agree on the numbers of arbitrators as well as the rules of appointment (§§ 1034, 1035 ZPO). If they have not done so, three arbitrators shall be appointed by the arbitral tribunal.

5.4 Is there a Right to challenge Arbitrators, and if so under which Conditions?

Generally, each arbitrator giving any reason to doubt his impartiality or independence can be challenged, Art. 11 - 13 CEAC Arbitration Rules. For any reason that occurs after the appointment or of which the party which has appointed the arbitrator becomes aware after the appointment has been made, the arbitrator can be challenged by the respective party (Art. 12 para. 2 CEAC Rules). All other parties, the appointed arbitrator and the other members of the arbitral tribunal shall be notified by a written statement including the reasons for the challenge (Art. 13 para. 2 CEAC Rules).

If within 15 days from the notice of challenge the other parties, however, do not agree to the challenge and if the challenged arbitrator does not withdraw, the CEAC Appointing Authority shall decide (Art. 13 para. 4 CEAC Rules). In case of confirmation of the challenge, a new arbitrator will be appointed according to the general rules (e.g. a party whose party appointed arbitrator was successfully challenged can appoint a new arbitrator, Art. 14 para. 1 CEAC Rules).

This procedure also complies with German Civil Procedural Law.

5.5 Are there any Restrictions as to the Parties' Representation in Arbitration Proceedings?

Pursuant to Art. 5 of the CEAC Arbitration Rules, the parties may be represented or assisted by persons of their choice. There is neither a requirement that the representing party is a lawyer nor that foreign lawyers as representing persons have to be joined by a local counsel. The names and addresses of such persons, however, must be communicated to all parties, the arbitral tribunal and the Chinese European Arbitration Centre; such communication must specify whether the appointment is being made for purposes of representation or assistance. The German Civil Procedural Law, however, does not provide any rules concerning the representation of the parties in arbitration proceedings.

5.6 Do Arbitrators have Powers to grant Interim or Conservatory Relief?

In addition to making the final award, the arbitral tribunal is entitled to grant interim measures, Art. 26 CEAC Arbitration Rules. At the request of any party, the arbitral tribunal may take any interim measures it deems appropriate in respect of the subject matter of the dispute, including measures in order to maintain or restore the status quo pending determination of the dispute, in order to prevent current or imminent harm or prejudice to the arbitral process itself, for the preservation of assets out of which a subsequent award may be satisfied or in order to preserve relevant and material evidence (Art. 26 para. 2 CEAC Rules). The arbitral tribunal is entitled to require security for the costs of such measures (Art. 26 para. 6 CEAC Rules). A party requesting an interim measure may be held liable for any costs or damages caused by the measure if the arbitral tribunal later determines that the measure should not have been granted according to the circumstances then prevailing. Such costs and damages may be awarded to the other party at any point during the arbitral proceedings (Art. 26 para. 8 CEAC Rules).

A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement (Art. 26 para. 9 CEAC Rules).

The German Civil Procedure Code also provides for interim relief in § 1041 ZPO – which corresponds to Art. 17 of the UNCITRAL Model Law on International Commercial Arbitration. According to this provision, the arbitral tribunal may take any measures to secure any claims. Therefore, it can ask each party for any security in connection with such interim measures. The right to be heard, however, has to be observed.

5.7 What are the formal Requirements for an Arbitral Award (Form; Contents; Deadlines; other Requirements)?

- **Formal Requirements for Arbitral Awards**

The arbitral tribunal may make separate awards on different issues at different times (Art. 34 para. 1 CEAC Rules). Pursuant to Article 34 para. 2

CEAC Rules, an award shall be made in writing and shall be final and binding on the parties who shall carry it out without delay. The award shall contain the reasons upon which the award is based unless the parties have agreed that no reasons shall be given (Art. 34 para. 3 CEC Rules). The award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made (Art. 34 para. 4 CEAC Rules). The award may be made public only with the consent of both parties or where and to the extent required by mandatory rules of law (Art. 34 para. 5 CEAC Rules). Copies of the award signed by the arbitrators shall be communicated to the parties and to CEAC by the arbitral tribunal (Art. 34 para. 6 CEAC Rules).

However, if the parties agree on a settlement of the dispute before the award is made, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms (Art. 36 para. 1 CEAC Rules).

Also, according to § 1054 of the German Civil Procedure Code (ZPO) – which corresponds to Art. 31 of the UNCITRAL Model Law on International Commercial Arbitration – the award has to be in a written form signed by the arbitrator(s). Unless otherwise agreed by the parties, the arbitral award shall state reasons. Furthermore, it has to indicate when and where the award was made. A registration of the award is not required by German law.

- ## Deadlines for issuing Arbitral Awards

Unless otherwise agreed upon by the parties, according to Art. 31a CEAC Arbitration Rules the time limit within which the arbitral tribunal shall render its final award is nine months. This time limit runs from the date of constitution of the arbitration tribunal. However, the management of CEAC may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides this to be necessary.

- ## Other Formal Requirements for Arbitral Awards

There are no other additional formal requirements for the arbitral awards.

5.8 On what conditions can Arbitral Awards be (i) appealed or (ii) rescinded?

The CEAC Rules itself do not provide any rules for an appeal or rescission of the arbitral award. The arbitration process at CEAC is a single-level arbitration procedure.

According to German Civil Procedural Law an award can be rescinded, for example,

- if it is not possible to dispute this issue in an arbitral proceeding,
- if the recognition and enforcement of the arbitral award would violate the *ordre public*,
- if the constitution of the arbitral tribunal or the arbitral proceeding violated German Civil Procedural Law (which is based on the UNCITRAL Model Law on International Commercial Arbitration), or
- if the petitioner claims that he had not been properly informed about the appointment of an arbitrator or the arbitral proceeding (§ 1059 ZPO).

An arbitral award cannot be appealed.

5.9 Can a Successful Party in the Arbitration recover its Costs?

Pursuant to Art. 42 CEAC Rules, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. The costs of legal representation and assistance of the successful party generally have to be claimed during the arbitral proceeding to be recoverable.

Unless otherwise agreed by the parties, the arbitral tribunal shall decide what proportion of the costs each party shall bear as far as German Civil Procedural Law is applicable (§ 1057 ZPO). It shall consider the circumstances of each individual case, especially regarding the outcome of the process.

5.10 Further Information about the Chinese European Arbitration Centre

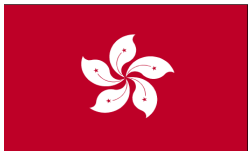
Further information about the Chinese European Arbitration Centre can be obtained under www.ceac-arbitration.com.
The Chinese European Arbitration Centre can be reached under:

Chinese European Arbitration Centre
Adolphsplatz 1
D-20457 Hamburg / Germany
Phone: +49-40-6686 4085
Fax: +49-40-36138-533
Email: contact@ceac-arbitration.com
Website: www.ceac-arbitration.com

The Managing Directors are Dr. Dominik Ziegenhahn and Dr. Ma Lin.

Further information on the supporting associations of CEAC, the Chinese European Arbitration Association (CEAA) and the Chinese European Legal Association (CELA), can be found under www.ceac-arbitration.com.

Name of Authors:	**PROF. DR. ECKART BRÖDERMANN** **LL.M. (Harvard), Maître en Droit (Paris V), FCIArb (London)** **Brödermann Jahn** **DR. CHRISTINE HEEG-WEIMANN, LL.M.** **(Sydney) KPMG LAW**
Name of Law Firms:	**BRÖDERMANN JAHN RA GmbH** **KPMG Law**
Brief Profile:	The Chinese European Arbitration Centre (CEAC) is a global arbitration institution founded in 2008 specialized in disputes dealing with Asia and especially China-related matters. Prof. Dr. Eckart Brödermann is one of the initiators and the former Managing Director of the Chinese European Arbitration Centre. Dr. Christine Heeg-Weimann is the former CEAC Secretary General has been involved in CEAC activities since its foundation.
Telephone No.:	+49 (0)40 66 86 40-85
Fax No.:	+49 (0)40 66 86 40-699
Email:	eckart.broedermann@german-law.com; cheeg@kpmg-law.com
Websites:	www.german-law.com, www.kpmg-law.com, www.ceac-arbitration.com



6. HONG KONG

BY: MR. STEFAN C. SCHMIERER

6.1 Which laws apply to arbitration in Hong Kong?

The Arbitration Ordinance (Cap. 609) (hereinafter "AO") came into effect on 1 June 2011 to replace the old Arbitration ordinance (Cap. 341) in governing arbitration in Hong Kong. The enactment of Cap. 609 caused an essential consequence on the law and procedure in Hong Kong arbitration practice. In addition, the Arbitration (Amendment) Bill 2016 which was passed on 14 June 2017 made amendments to the Arbitration Ordinance (Cap. 609) recognising that disputes regarding intellectual property rights can be resolved through arbitration, expanding Hong Kong's jurisdiction in arbitration to intellectual property rights. The current AO unified the domestic and international arbitration regimes into one that is mainly governed by the UNCITRAL Model Law. Given that it was the current AO that gave effect to the unification of both regimes, any arbitrations that began prior to the enactment of the current AO, i.e. 1 June 2011, still follow the old AO which makes a distinction between domestic and international arbitrations.

The combination of codified arbitration legislation and the common law embedded in the Hong Kong legal system means that cases which are arbitration related and decided by the Hong Kong courts should also be considered besides the AO.

The High Court Ordinance (Cap. 4) and the Rules of High Court (Cap. 4A) also stipulate rules in handling proceedings commenced at the High Court that interface with the relevant outside courtroom arbitration.

6.2 Is the Hong Kong Arbitration Law based on the UNCITRAL Model Law?

Yes. With respect to international arbitration, the UNCITRAL Model Law (hereinafter "Model Law") has been in effect in Hong Kong since 1990, and

with the introduction of the new AO in 2011, the Model Law applies also to domestic arbitrations.

The Model Law has been regulating international arbitrations in Hong Kong for almost three decades since 1990. The exclusivity of the Model Law regulating international arbitrations has been abolished, so since the new AO came into force in 2011, the same law applies basically to domestic and international arbitration.

From the AO's text it is apparent that articles from the Model Law were directly transferred into the AO. This is also reflected in Section 4 AO which states that the incorporated articles of the Model Law shall have the same effect as domestic Hong Kong laws.

To clarify this further and to give easy access to the Model Law, the entire Model Law was added to the AO as Schedule 1. Provisions that are not applicable under the AO are underlined. Certain Sections of the AO refer to the Model Law, but then declare that the Model Law shall be modified in certain parts or certain parts of an Article of the Model Law should not be applicable. The most important differences between the Model Law and the AO are:

- The Ordinance does not state a default number of arbitrators but leaves this to the HKIAC (Section 23 (3) AO);
- According to Article 18 Model Law, the parties shall have the full opportunity to present their cases, whereas this is limited to "reasonable opportunity" in the AO.
- Confidentiality provisions can be found the Section 18 AO, but not in the Model Law.
- The sections about an emergency arbitrator in Hong Kong are not reflected in the Model Law, and is due to the HKIAC rules, which deal with emergency arbitrators.
- Under Section 33 AO, an arbitrator may also act as mediator, if all parties agree.

- The recoverable costs can be limited in Hong Kong under Section 57 AO.

Further, the AO took over the specifications in the Model Law for instance Article 6 Model Law. The allocation of duties under this Article can be found in Section 13 AO, which allocates the duties and responsibilities between the Hong Kong courts and the HKIAC.

6.3 Are there different laws applicable for domestic and international arbitration?

Prior to the enactment of the AO, domestic and international arbitration were covered by different regimes. The domestic arbitration was governed by the old AO (Cap. 341) whereas international arbitration was governed by the Model Law.

However, the enactment of the AO in June 2011 consolidated both the domestic and international arbitration by the operation of provisions that mirror largely the Model Law as well as adopting parts of the Model Law.

Schedule 2 AO contains provisions that were previously only applicable to domestic arbitration. The stipulations in the Schedule are only applicable if the parties agreed to opt in to these provisions or the arbitration is a domestic arbitration and if the arbitration agreement became effective before or after 6 years after the entry of the new AO. Since the new AO became effective on 01 June 2011, Schedule 2 will become less and less important and applicable, as long as the parties do not opt in.

6.4 Has Hong Kong acceded to the New York Convention?

Yes. Hong Kong is a member state of the New York Convention (hereinafter "Convention"), which make arbitral awards from over 150 countries enforceable in Hong Kong. Hong Kong became a member of the Convention in 1977 already, when the UK joined the Convention. After the hand-over of Hong Kong to the PRC, the PRC declared the Convention to be extended to

Hong Kong, however, within the scope of the PRC's reservations towards the Convention.

Since the PRC is not another country towards Hong Kong (even though the jurisdictions are separated), an arbitral award from mainland China would not be enforceable in Hong Kong under the Convention, and vice versa. To counter this problem, Hong Kong and mainland China entered into a separate agreement (*Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*), under which arbitral awards between the two jurisdictions are enforceable in the other's territory.

Even though an arbitral award is not from one of the Convention's member states, a party could still apply to the Hong Kong courts and seek leave to enforce this award in Hong Kong. Since Hong Kong is known for its arbitration friendly regime, it can be assumed that the chances to get leave granted are quite high.

6.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

There are no limitations whatsoever on which arbitration institutions the parties can agree, regardless of whether both parties are domiciled in Hong Kong or only one party is domiciled in Hong Kong or both parties are domiciled outside Hong Kong, but have business operations in Hong Kong.

The parties can freely choose the country in which the arbitration should take place, the arbitration institution itself and the rules of arbitration.

6.6 Does the Hong Kong Arbitration Law contain substantive requirements for the arbitration procedures to be followed?

The AO gives only general guidance as how to proceed during arbitration proceedings. Basically, the parties are free to decide which procedural rules to follow. Even though it is likely that the parties that agree to an arbitration

before the HKIAC and adopt the HKIAC rules as their procedural rules, the parties may still decide on other rules, such as ICC Rules or others.

It is still quite popular that parties arrange their own ad hoc proceedings, but it becomes more and more common to agree on a certain arbitration institution which should handle the arbitration. If an arbitration institution has been decided upon, but the parties failed to decide on the procedural rules, then it is up to the arbitral tribunal to decide which rules to follow. However, the arbitral tribunal does usually adopt the rules of the institution under which it has been appointed and follows these rules.

The AO itself gives guidelines, for instance in Section 3 (1), which states that the proceedings shall be fair and speedy, and that the proceedings shall not violate any public interest (Section 3 (2) (a).

Further guidance can be found in Section 46 AO, which states that:

- The parties shall be treated equally (Section 46 (2) AO,
- The arbitral tribunal shall be independent, act fairly and impartially (Section 46 (3) (a), (b) AO, and
- The arbitral tribunal shall avoid unnecessary delay or expenses (Section 46 (3) (c) AO).

However, Section 46 (3) (c) AO also expresses that the decision of how to handle the arbitration rests with the arbitral tribunal as long as the safeguards of the AO are obeyed.

6.7 Does a valid arbitration clause bar access to state courts?

A valid arbitration clause does generally bar the access to the ordinary courts, in accordance with Section 20 (1) AO, which incorporates Article 8 of the Model Law. In case one party is starting legal action at the ordinary courts in Hong Kong despite an arbitration agreement, then the other must, latest during the first statement of substance apply to the court to stay the court proceedings due to the arbitration clause. It is then the courts' obligation to check the arbitration clause and decide whether this constitutes a valid arbitration clause.

If the court finds the arbitration clause invalid, the court will continue the action before the court. However, if the court finds the arbitration clause to be valid, it is required to stay the court action and refer the parties to arbitration (Section 20 (5) AO.

6.8 What are the main arbitration institutions in Hong Kong?

The main arbitration institution is the Hong Kong International Arbitration Centre ("HKIAC"). The HKIAC is an independent, non-profit making company limited by guarantee, which is well respected by the Hong Kong Government. The AO allocates certain duties and responsibilities to the HKIAC, which shows the importance that the HKIAC plays in Hong Kong arbitration proceedings and the importance that the Hong Kong government puts into arbitration in Hong Kong.

The HKIAC Secretariat, led by the Secretary-General, manages HKIAC's day to day dispute resolution activities, including administering proceedings, keeping a list of arbitrators, providing and organising the facilities, and other support required by arbitration proceedings in Hong Kong.

The Executive Committee is the principal body responsible for the overall activities of the HKIAC. Under the Executive Committee are further sub-committees, to which certain tasks are distributed. Furthermore, the HKIAC has several specialised sub divisions, such as the Asian Domain Name Dispute Resolution Centre, the Mediation Council, and the Maritime Arbitration Group.

Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place, Central
Hong Kong S.A.R.
Telephone: +852 2525 2381
Fax: + 852 2524 2171
Email: adr@hkiac.org
Website : www.hkiac.org

Besides the HKIAC, Hong Kong is since 2008 home to the ICC Secretariat of the International Court of Arbitration of the ICC. The Hong Kong ICC office does not only take care and administer arbitration under the ICC in Hong Kong but covers the entire Asian region.

Secretariat of the International Court of Arbitration of the International Chamber of Commerce
Asia Office
Suite 2, 12/F, Fairmont House
8 Cotton Tree Drive, Central
Hong Kong S.A.R.
Telephone: +852 3607 5600
Fax: +852 2523 1619
Email: ica8@iccwbo.org
Website: www.iccwbo.org

Since 2012, CIETAC is operating an office in Hong Kong, which is the first CIETAC representation outside of Mainland China:

China International Economic and Trade Arbitration Commission
Hong Kong Arbitration Centre
4705 Far East Finance Centre
16 Harcourt Road, Admiralty
Hong Kong S.A.R.

Tel: +852 2529 8066
Fax: +852 2529 8266
Email: hk@cietac.org
Website: www.cietachk.org

6.9 Addresses of major arbitration institutions in Hong Kong?

Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place, Central

Hong Kong S.A.R.

Telephone: +852 2525 2381
Fax: +852 2524 2171
Email: adr@hkiac.org
Website: www.hkiac.org

Secretariat of the International Court of Arbitration of the International Chamber of Commerce
Asia Office
Suite 2, 12/F, Fairmont House
8 Cotton Tree Drive, Central
Hong Kong S.A.R.
Telephone: +852 3607 5600
Fax: +852 2523 1619
Email: ica8@iccwbo.org
Website: www.iccwbo.org

6.10 Arbitration Rules of major arbitration institutions?

The only Hong Kong specific arbitration rules are the HKIAC Rules. The arbitration rules of the other two institutions named above (ICC and CIETAC) follow the general adopted ICC and CIETAG arbitration rules so that the focus here should be on the HKIAC rules.

The newest version of the HKIAC Rules came into effect on 01. November 2018 and are applicable for all arbitral proceedings that commenced after this date and which refer to these rules. The rules are based on the UNCITRAL Arbitration Rules in order to provide easy access and understanding of the rules.

The major focus of the 2018 revision emphasized the introduction of the use of new technology, the new third funding possibility in Hong Kong, and making the arbitral process overall more efficient.

To provide an easy to handle online system which can be used by the parties for communication and exchange of documents, several new provisions in Article 3 HKIAC Rules contain the possibility to upload documents to a secure repository. Such repository can be either provided by the HKIAC, or the parties can agree to use their own system. Once a document is uploaded, it is deemed to be received by the other party once it is uploaded. This regulation

can save significant time in view of the fact that in most international arbitration parties are located in different jurisdictions.

Another new provision that was introduced to increase the efficiency of the arbitration proceedings can be found in Article 13.1 HKIAC Rules which gives the arbitral tribunal the freedom to adopt measures, including "effective use of technology" to speed up the process, as long as such measures are fair for both parties and both parties have a reasonable opportunity to present their case.

With the introduction of third-party funding for arbitration proceedings arose the need to adopt the HKIAC rules to these new developments. Articles 34.4, 44 and 45 (3) (e) HKIAC Rules were introduced, whereas Article 44 HKIAC Rules is completely new and only deals with third party funding. The other two sub-articles needed to be introduced to amend the confidentiality and costs provisions to the new regime.

Articles 29 and 30 HKIAC Rules were introduced for the sake of efficiency. Both articles provide for that claims arising out of several contracts can be combined into one arbitration proceeding and that two already running arbitration proceedings can be combined in one proceeding, subject to several preconditions.

After the introduction of emergency arbitrators into the AO, the HKIAC Rules needed to be adopted, which was done by including Article 23.1 and Schedule 4 HKIAC Rules.

The HKIAC Rules can be found on the following website: www.hkiac.org.

6.11 What is/are the Model Clause/s of the arbitration institutions in Hong Kong?

The model clause for administered arbitration under the HKIAC Rules is as follows:

"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be

referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

In addition, can be added:

The law of this arbitration clause shall be ... (Hong Kong law).

This should be included especially in cases where the law of the arbitration venue is different to the substantive law governing the dispute. The law of the arbitration does generally cover the arbitration clause, and matters, such as formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause. There were cases in the past in which the parties could not agree on the law of the arbitration itself. Many parties, and even experienced practitioners, are under the impression that the applicable substantive law that covers a dispute also covers automatically the arbitration. This is not a problem when the substantive law is the same law as the law in which the arbitration is situated, but it might lead to difficulties when the arbitral tribunal would like to apply the arbitration laws of its seat whereas the applicable substantive law of the dispute is different.

The seat of arbitration shall be ... (Hong Kong).

The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)."

6.12 How many arbitrators are usually appointed?

There is no legal requirement as to the number of arbitrators to be appointed. It is up to the parties to the dispute to determine the number of arbitrators to be involved in their arbitration agreement. Usually parties to an arbitration agreement state in the arbitration clause to appoint one or three arbitrators. The reason for appointing odd numbers of arbitrator(s) is to prevent deadlock.

6.13 Is there a right to challenge arbitrators, and if so under which conditions?

Section 26 AO cites Article 13 of the Model Law regarding the procedure for challenging an arbitrator. In practice, parties to an arbitration proceeding are unrestricted in setting their own challenge procedure.

According to Section 26(2) AO, if parties failed to agree on the challenge procedure, any party who wishes to challenge an arbitrator should deliver a written statement to the arbitral tribunal within 15 days after having knowledge of the composition of the arbitral tribunal or if there are circumstances that give rise to justifiable doubts as to the impartiality or independence of the arbitrator, or if the arbitrator does not have the requisite qualification agreed by the parties.

Article 13(3) of the Model Law states that, regardless of whether the parties have agreed on a challenge procedure, if a challenge to the arbitral tribunal was not successful, the challenging party could appeal the arbitral tribunal's decision to the court or other authority within 30 days from receiving the arbitral tribunal's rejection of the challenge. However, any decision made on the challenge by the court or other authority is final and not open to appeal.

Section 26(2) 4 AO provides that the High Court may refuse to grant leave to enforce any award made by the arbitral tribunal during the period when a request to challenge the arbitrator is pending before the High Court.

In regard to the challenged arbitrator, he is entitled under Article 13(2) of the Model Law to withdraw from office as an arbitrator if he thinks fit. The withdrawal of the arbitrator will lead to a termination of the challenged arbitrator's mandate. In addition to the withdrawal of arbitrator, Section 26(4) 4 AO further stipulates instances in which the mandate of a challenged arbitrator will be terminated, these include:

i. The parties agreeing to the challenge;

ii. The arbitral tribunal upholds the challenge and no request is made for the Court to decide on the challenge; or

iii. The Court upholding the challenge upon receiving request.

It is to be noted that if the Court upholds the challenge, the award made by the arbitral tribunal may be set aside as per Section 26(5) AO.

6.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no limitations to the parties' representation in arbitration proceedings in Hong Kong. Article 13.6 4 HKIAC Rules explicitly state that the parties can choose whichever person shall represent them. This is supported by Section 63 AO, which declares certain limitations in the Hong Kong Legal Practitioners Ordinance for not applicable in arbitration proceedings.

With this, not only Hong Kong solicitors and barristers can provide legal advice in Hong Kong, but lawyers from any other jurisdiction can do so as well in Hong Kong. This shows Hong Kong's international and pro arbitration attitude and is further supported by the Hong Kong immigration rules, which state that under certain circumstances arbitrators that act in Hong Kong do not apply for an employment visa but can work under a general visitor's visa.

6.15 When and under what conditions can courts intervene in arbitrations?

One of the core principles for Hong Kong arbitration is that courts should intervene in the arbitration as little as possible. This is reflected by Section 12 AO, which cites Article 5 of the Model Law, and which states that the courts should only intervene where proper authority is convened to them by applicable law. Even though litigation is pending at a Hong Kong court, either party may, as stated in Section 20 AO, request the court to submit the dispute to arbitration, if the court finds that a valid and binding arbitration agreement exists. In such cases, the court action will be stayed.

This has been done in Hong Kong by Section 13 AO, which provides that certain functions under the Ordinance are to be performed by the courts, and others are to be performed by the HKIAC. This section is quite remarkable, because the law confers functions to a non-judicial authority body, which is not directly controlled by the government.

Functions that are allocated to the HKIAC under the Ordinance are, amongst others, is the duty to decide on the numbers of arbitrators, Sections 23 (3), 24 AO, if not yet done by the parties, or the power to appoint mediators, Section 32 (1) AO.

On the other side, functions that are allocated to Hong Kong courts can be found in Sections 26 and 26 AO and deal with challenging arbitrators in cases where such challenge was unsuccessful at the level of the arbitral tribunal and to remove an arbitrator if the arbitrator is not able to perform his functions properly. Furthermore, the courts have the power to set aside arbitration awards, Section 81 AO, even though Hong Kong courts are reluctant to intervene by setting aside awards, and the court may order interim measures as stated in Section 21 AO. If necessary, the arbitral tribunal may request the courts to support and assist in taking evidence, Section 55 (1) AO, including summoning a person to provide evidence or a witness statement (Section 55 (2) AO.

Section 20 AO, in line with Article 8 of the Model Law clearly sets forth that no court action will be taken, or a pending court action will be stayed, if a valid arbitration agreement between the parties exist (Section 20 (5)).

6.16 Do arbitrators have powers to grant interim or conservatory relief?

Section 35 AO incorporates Article 17 of the Model Law, which clearly states that the arbitral tribunal has the power to grant interim measures, unless the parties opted out of this possibility, what would be a quite unusual decision. Section 35 defines an interim measure as any temporary measure, which can be in the form of an award, an injunction or any other form as deemed fit by the arbitral award 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 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.

Whereas Section 35 AO deals more generally with interim measures and what they are, Section 36 AO provides further guidance under which circumstances the arbitral tribunal can order interim measures. According to this Section, an interim measure can only be granted, if the arbitral tribunal is satisfied by the applying party that harm is likely to result for that party if the interim measure is not granted and this harm outweighs the harm that is likely to result by the interim measure to the other party. Furthermore, the applying party must have the reasonable possibility to succeed on the merits of the main claim. Whereas the first precondition is relatively hard to achieve, especially if the applying party is seeking for an order to do or omit something rather than just preserving the status quo, the later precondition is easier to satisfy, since a 51% chance to succeed on the merits of the main claim is mostly sufficient.

An interim order has, as stated in Section 61 AO, the same effect as an order or direction from a Hong Kong court, once leave is granted. This means that if a party wants to enforce an interim measure by an arbitral tribunal, either made in Hong Kong or outside Hong Kong, it needs to apply for leave from the court. Leave will be granted (Section 61 (2)) if the party that wishes to enforce the measure can demonstrate that the order or direction is a type of order that is similar to an order or direction that can be made in an arbitration in Hong Kong. Therefore, interim measures ordered by local Hong Kong arbitral tribunals will most likely always be granted to leave, and orders from outside of Hong Kong need to satisfy the requirements of Section 61 (2) AO.

If an interim measure is not an order or direction but an award, then the enforcement is covered by Section 84 AO. To enforce an award in Hong Kong, regardless whether the award is made in Hong Kong or outside Hong Kong, leave is required from a Hong Kong court.

Lastly, and added to the new AO, Sections 22A and 22B AO deal with the enforcement of interim relief granted by an emergency arbitrator. However, given the nature of emergency arbitrators, Section 22B (2) AO provides a

narrower approach under which circumstances an interim relief enforcement may be granted leave.

6.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

Section 67 AO gives effect to Article 31 of the Model Law in stating the formalities and content of arbitral awards. The award must be in written form and signed by the arbitrator(s). If more than one arbitrator is present in the arbitral proceedings, obtaining signatures from the majority will suffice in giving effect to the award, provided that the reasons for eliminating other signatures is stated.

Unless the parties agreed otherwise or the award was made on agreed terms as per Article 30 of the Model Law, the award must also state the reasons for which it is based.

Moreover, the time and place at which the arbitration proceedings took place should also be stated in the award. The award would then be deemed to be made at that place.

- **Deadlines for issuing arbitral awards**

According to Section 72 AO, the award may be made at any time decided by the arbitral tribunal unless the parties agreed to a time for making an award. If parties have set a time limit for the award to be made, any party could apply to the High Court to extend the time limit.

In principle, the AO and the HKIAC Rules do not stipulate a time limit for making an award. The arbitrator is at liberty to make an award anytime. However, the arbitrator may be removed by the court if the award was not made in a timely manner. On the other side, the new HKIAC Rules contain in Article 31.2 a deadline of three months after the closure of the proceedings, but this can be extended by parties' agreement or by the HKIAC. The arbitral tribunal is nevertheless required to inform the parties about the anticipated date of delivering the award.

- **Other formal requirements for arbitral awards**

There are also additional basic common law requirements for the award, such that it has to be final in relation to the issues dealt with, that it has to be consistent, clear and unambiguous, that it must resolve a substantive, rather than a procedural issue, and that is must be capable of being enforced by a court.

In addition to the formal requirements set out in the AO, there are also other requirements for arbitral awards. For instance, all issues addressed in the arbitration proceedings should be dealt with, stating the arbitrator's decision in understandable and definitive terms. It is significant for arbitrators to be dealt with carefully as it is final once it is published, meaning that the arbitrator is not entitled to alter his decision after the publication of the award.

Nothing in the applicable laws or rules in Hong Kong require the arbitral tribunal to provide dissenting opinions from arbitrators, unless provided otherwise in the arbitration agreement. However, it is good practice to do so anyways so that the parties have a clearer understanding of how the decision was made.

6.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

Section 73 (1) AO clearly states that, unless otherwise agreed between the parties, an arbitration award is final and binding upon the parties. As exception to this, Section 73 (2) provides the right to challenge an award under limited circumstances.

Foremost, Section 73 (2) AO refers to Section 81 AO, giving effect to Article 34 of the Model Law, which stipulates that an award may be challenged under the following exhaustive, grounds:

- One of the parties was under some incapacity;
- The arbitration agreement is invalid under the laws to which it is subject to;

- The applying party was not able to represent itself in the proceedings or was not given proper notice of the appointment of an arbitrator or the arbitral proceedings;
- The award contains and deals with disputes or decisions that were not subject to the submission to arbitration, if the decisions and matters submitted to the arbitration cannot be severed from the matters that were not subject to such submission;
- The composition of the arbitral tribunal or the arbitration procedure was not in composition to which the parties agreed;
- The award cannot be settled by arbitration under Hong Kong laws, or
- The award violates public policy in Hong Kong.

Any challenge of an award must be made within 3 months after the award was received by the applying party.

Section 81 (2) AO provides three exemptions to Section 81 (1) AO, and widens the court's right to set aside an arbitral award:

- This section refers to Section 26 (5) AO, which states that the court has the right to set aside an arbitration award, if an arbitrator was challenged and such challenge was upheld by the court;
- Furthermore, a court may set aside an award if serious irregularity did affect the proceedings, Section 4, Schedule 2 AO. This section then lists several grounds that may establish serious irregularity.
- Section 5 Schedule 2 AO gives the right to appeal an award under limited circumstances, i.e. either if all parties agree to appeal or if leave for appeal is granted by the court.

Please note that the latter two points in Schedule 2 are only applicable, if the parties expressly opted in and agreed to include Schedule 2 into the arbitration agreement, or if the arbitration is a domestic Hong Kong arbitration only.

6.19 What procedures exist for enforcement of foreign and domestic awards?

As stated in Section 84 (1) AO, an arbitration award is generally enforceable in Hong Kong. However, both, foreign and Hong Kong awards require leave from the court, and, if leave is granted, the court may then enter judgment in terms of the award (Section 84 (2) AO). This means that arbitration awards are enforceable in Hong Kong even though outside the scope of the Convention. With this, even arbitration awards that were rendered in countries that are not member states to the Convention can be enforceable in Hong Kong, however, the court has more grounds to refuse the enforcement of an award outside the Convention.

Hong Kong became a member of the Convention on 21 January 1977, when the UK extended the application to its then territory. After the hand-over of Hong Kong to China in 1997, it was necessary that China extended the application of the Convention to its new Special Administrative Region, which it did in 1997, so that Hong Kong was and remains a member state of the Convention. However, the return of Hong Kong to Mainland China created a problem between Hong Kong and China, because once Hong Kong became part of China, the Convention was not applicable anymore to arbitration awards between Hong Kong and China.

This made it necessary that Hong Kong and China entered into a separate bilateral agreement for the enforcement of arbitration awards between them (the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong*) in June 1999. The agreement is basically mirroring the Convention, but with the exemption that if enforcement of the award is pending in China, then it cannot be enforced at the same time in Hong Kong, Section 93 AO. This limitation shall ensure that an award is not enforced in Hong Kong and China, because it is common for many natural and judicial persons to have assets in both jurisdictions.

As stated above, awards can be enforced by the AO by virtue of Section 84 AO, including all local and foreign awards. In addition, awards rendered in a member state of the Convention can be enforced by virtue of Section 87 AO, and Mainland awards can be enforced in the same way under Section 92 AO. For both, Convention awards and Mainland China awards, exist two different ways: either the award can be enforced by applying for leave at the Hong Kong

court so that the court enters judgment in terms of the award, or, more complicated, the award can be used to start a Common Law action. This would start a whole new court proceeding in Hong Kong and the burden of proof would rest with the plaintiff, so that it is recommendable to apply for leave to enforce the award, instead.

The reasons, based on which the court can refuse the enforcement of an award are basically the same for all the types of awards (New York Convention Awards, Mainland China awards, and awards under the AO, and are stated above in para 5.18.)

6.20 Can a successful party in the arbitration recover its costs?

Yes, recovery of costs does follow the general rules. According to Section 74 (1) AO, the arbitral tribunal has the power to issue an order in respect to costs in its award. This includes the costs for arbitrators, for the arbitral tribunal, and any costs of the arbitration institution. However, in order to avoid excessive fees, the arbitral tribunal has the duty to only grant costs that are reasonable, Section 74 (7)(a) AO, but on the other side, the decision what the arbitral tribunal considers as reasonable rests with the arbitral tribunal itself. Section 74 (7) (b) continues in stating that the recoverable costs do not only include the costs during the proceedings but also costs that were incurred before the proceedings.

Section 74 (6) AO expressly states that when deciding about the costs, the arbitral tribunal does not need to follow the scales and practices adopted by the Hong Kong courts. This leads usually to higher recoverable costs in arbitration than in litigation, because even though the recoverable costs in litigation were raised in 2018, they are still far behind the usual fees that local Hong Kong solicitors charge, not to mention the fees of experienced international arbitrators.

To have a better cost control for the arbitration, the arbitral tribunal may limit, in accordance with Section 57 (1) AO the total amount of costs that shall be recoverable. This is a useful guide to the parties to not excessively spend on legal costs during the arbitration, since it might be the case that even in case of obtaining a favourable award, a certain part of the costs may not be recoverable.

When deciding about the costs, the arbitral tribunal may issue interim awards (usually during lengthy proceedings or for injunctions) or decide about a split of the costs between the parties, usually following the main award.

It is also noteworthy that the arbitral tribunal can require the claimant to pay security of costs, Section 56 AO.

The above is also reflected in the HKIAC Rules in Article 34. As in the AO, Article 34 HKIAC Rules clearly states that the recoverable fees must be reasonable and may limit the total amount of recoverable costs (Article 34.2 HKIAC Rules).

New in the HKIAC Rules is Article 34.4 that now explicitly states that when making a cost order, the arbitral tribunal may take into consideration any third-party funding arrangement. This new Article is based on the fact that it is now possible in Hong Kong to rely on third party funding of arbitration.

When challenging an arbitration award before Hong Kong courts, it is important that Hong Kong courts usually grant costs on indemnity basis to the non-successful party that is trying to challenge the award. The reasoning is to foster arbitration and show the general stand of Hong Kong courts that arbitration awards shall be considered as final.

6.21 Are there any statistics available on arbitration proceedings in Hong Kong?

The HKIAC reported handling a total of 532 cases in 2017, representing a 15.7% increase in the number of cases handled by HKIAC compared to 2016. Among the 532 new cases, 297 were arbitrations, 15 were mediations and the rest were disputes regarding domain names.

In the 297 newly filed arbitration cases at the HKIAC, 73.1% were international, meaning that more than one party to the dispute was not from Hong Kong. Regardless of most of the arbitration being international, all the arbitrations began in 2017 were seated in Hong Kong[21]. The choice of having

21 http://www.hkiac.org/about-us/statistics

all the arbitration being seated in Hong Kong reflects the fact that Hong Kong is a world class arbitration forum that enjoys judicial independence.

Having said that 73.1% of the arbitration cases handled by the HKIAC in 2017 were international, parties in these 217 international arbitrations came from 39 different jurisdictions with the top 9 jurisdictions being Mainland China, Singapore, British Virgin Islands, Cayman Islands, the United States, South Korea, Thailand, Macau and the United Kingdom.

6.22 Are there any recent noteworthy developments regarding arbitration in Hong Kong (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

On 14 June 2017, the Hong Kong Legislative Council passed two bills that clarify the scope and nature of arbitration services in Hong Kong: *the Arbitration (Amendment) Bill 2016 (on arbitrability of intellectual property disputes)* and the *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*). The amended arbitration law is set to further boost the popularity of arbitration and mediation in Hong Kong, as a means to resolve commercial and other disputes.

Until recently, any financial support for arbitration via third parties was considered a criminal offence in Hong Kong of maintenance and champerty. In order to make Hong Kong a more attractive location for arbitration, the Hong Kong government followed other international arbitration places and abolished the criminal offense for arbitration. However, it should be kept in mind that third party funding is still prohibited in litigation proceedings in Hong Kong. Key take away points of the new regime are:

- Parties can agree on a written funding agreement, under which the third party provides support for the arbitration and in response receives a financial benefit, depending on the outcome of the proceedings.

- The funding can be monetary support, as well as other financial support (guarantees, etc.).

- The definition of arbitration refers to the arbitral proceedings itself, as well as other related court hearings, emergency arbitrator proceedings, and mediation.

- The third party can be any third party without interest in the arbitration, including law firms and lawyers.

- The funded party must inform the arbitration institution and each party about the funding.

Further, the HKIAC published its 2018 HKIAC Rules, which took effect on 01 November 2018. The new rules introduce amendments relevant to the use of technology, third party funding, multi-party and multi-contract arbitrations, the early determination of disputes, alternative means of dispute resolution, emergency arbitrator proceedings, and time limits for the delivery of awards. Key take away points are:

- Parties may agree to deliver documents using a secured online repository via upload. The parties may agree on their own repository or one provided by the HKIAC.

- Disclosure of third-party funding (see above).

- The scope for single arbitration under multiple contracts was broadened so that several arbitration agreements can be combined in one proceeding.

- Via the new early determination procedure, an arbitral tribunal is now empowered to identify points of law that are manifestly without merits and may issue an interim award.

- A party may seek the appointment of an emergency arbitrator before the commencement of the main arbitration, if a notice of arbitration was submitted to the HKIAC.

- An award should be delivered within 3 months after the closure of the proceedings, but this might be extended.

Name of author:	**MR. STEFAN C. SCHMIERER** **Solicitor, Hong Kong** **Attorney-at-Law, Germany**
Name of law firm:	**Robinsons, Lawyers**
Brief profile:	Established in 2013, Robinsons, Lawyers is a local Hong Kong based law firm with international focus consisting of partners and consultants who have a vast amount of experiences in complex international transactions regarding both private and public listed companies and governmental authorities combined with in-depth knowledge of the Asian and European markets. Since its inception, Robinsons has established a reputation for vigorous advocacy in complex litigation and arbitration matters, successful representation of clients before governmental agencies and related bodies, and creative and practical advice in guiding business transactions.
Telephone No:	+852 2180 9788
Fax No:	+852 2180 9781
E-mail	sschmierer@robinsonslawyers.com
Website	www.robinsonslawyers.com

7. INDIA

BY: MRS. ZIA MODY
MR. ADITYA VIKRAM BHAT

7.1 Which laws apply to arbitration in India?

The Arbitration and Conciliation Act, 1966 ("Arbitration Act") is the primary legislation which governs arbitration in India. The Arbitration Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015, which came into effect on October 23, 2015 ("Amendment Act"). Principles from the Indian Contract Act, 1872 may be applied to the construction of an arbitration agreement and provisions of the Code of Civil Procedure, 1908 govern the enforcement of arbitral awards and applications to court in support of arbitral proceedings, in addition to the Arbitration Act. Various High Courts have notified rules governing the conduct of judicial proceedings in support of arbitration like Bombay High Court Rules Relating to the Arbitration & Conciliation Act, 1996. The rules of arbitration institutions will apply to arbitration proceedings, where institutional arbitration is adopted like the Mumbai Centre for International Arbitration ("MCIA") Rules, 2016 or Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018.

7.2 Is the Indian Arbitration and Conciliation Act based on the UNCITRAL Model Law?

Yes, The Arbitration Act is based largely on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980, (together, "Model Law"), but deviates from the Model Law in certain aspects.

7.3 Are there different laws applicable for domestic and international arbitration?

Currently, India has a consolidated legislation i.e. the Arbitration Act, under which Part I applies to arbitrations seated in India, and Part II relates to the enforcement of certain foreign awards, such as awards under Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention"), 1958 and the Convention on the Execution of Foreign Awards, 1923 ("Geneva Convention"). Pursuant to the Amendment Act, certain provisions of Part I of the Arbitration Act such as seeking interim relief from courts, assistance of court in taking evidence, also apply to arbitrations seated outside of India, unless the arbitration agreement specifically excludes such an application.

7.4 Has India acceded to the New York Convention?

India signed the New York Convention on June 10, 1958 and ratified it on July 13, 1960 subjecting its applicability to the following conditions:

(i) Only awards made in the territory of another contracting state that are also notified as reciprocating territories by India would be recognised and enforced;

(ii) Only differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law would be considered arbitrable.

7.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

The Arbitration Act provides that parties may contractually agree on the procedure for arbitration and does not stipulate restrictions on the choice of arbitration institutions even if both parties are domiciled in the country or one party is domiciled in the country and the other party abroad. Therefore, parties may choose to agree on a foreign arbitration institution.

However, in the absence of clarity in the Arbitration Act and due to conflicting judicial pronouncements, it is unclear whether two domestic parties could agree on foreign seated arbitration i.e. where both the judicial seat of the arbitration and the procedure governing the arbitration derogate from Indian law.

7.6 Does the Indian arbitration law contain substantive requirements for the arbitration procedures to be followed?

There are no substantive requirements for the procedure to be followed under the Arbitration Act. The Arbitration Act permits the parties to agree on the procedure to be followed by the arbitral tribunal. In the event that parties are unable to agree on the procedure to be followed, then the arbitral tribunal may decide the procedure. Proceedings conducted by arbitration institutions will be governed by the procedure laid down in the institutional rules.

7.7 Does a valid arbitration clause bar access to state courts?

An arbitration clause does not operate as an absolute bar on the courts of India. If a dispute in a matter covered by a valid arbitration clause is brought to court, the court is required to refer that to arbitration, if an application to that effect is made by the defendant not later than the date of submitting the first statement on the substance of the dispute to the court. The precondition is therefore an application before the court seeking reference to arbitration

In addition, parties may be able to approach the courts (i) for appointment (Section 11) and removal (Section 13 & 14) of arbitrators, (ii) seeking interim relief pending arbitration (Section 9), (iii) seeking to set aside awards (Section 34) and (iv) enforcement of awards (Section 36).

The jurisdiction of Indian courts is different in cases where the arbitration is seated in India and where it is seated abroad.

7.8 What are the main arbitration institutions in India?

Arbitration institutions such as the Mumbai Centre for International Arbitration ("MCIA"), and institutions attached to various High Courts such as Delhi International Arbitration Centre ("DIAC") in Delhi, Karnataka, Punjab and Haryana, to name a few. Apart from these, there are arbitration institutions run by the Chambers of Commerce in different states such as the Bombay Chambers of Commerce and Madras Chambers of Commerce. The Singapore International Arbitration Centre has also opened an offshore office in Mumbai given the increasing number of commercial arbitrations in India, although this office does not directly administer any India related arbitrations.

7.9 Addresses of major arbitration institutions in India?

Mumbai Centre for International Arbitration (MCIA)
20th Floor, Express Towers,
Nariman Point,
Mumbai - 400021 (India)
Tel: +91-022-61058888
Website: www.mcia.org.in

Delhi Centre for International Arbitration (DCIA)
Delhi High Court Campus
Shershah Road
New Delhi – 110503
Tel: +91-11-23386492, 23386493
E-mail: delhiarbitrationcentre@gmail.com
Website: www.dacdelhi.org

7.10 Arbitration Rules of major arbitration institutions?

The above-mentioned arbitration institutions have a specific set of rules which is available on their websites, as provided above.

7.11 What is/are the Model Clause/s of the major arbitration institutions?

The model clauses of the arbitration institutions are available on their respective websites. For MCIA, the following clause has been suggested as a model clause[22]:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules"), which rules are deemed to be incorporated by reference in this clause.
The seat of the arbitration shall be_____ .
The Tribunal shall consist of [one/three] arbitrators).
The language of the arbitration shall be _____ .
The law governing this arbitration agreement shall be
The law governing the contract shall be _____."

The Delhi Centre for International Arbitration recommends the following arbitration clause in the contracts[23]:

"All dispute and differences arising out of or in connection with or relating to the present agreement shall be settled under the Rules of Delhi International Arbitration Centre by one or more arbitrators appointed in accordance with its Rules.

Note: Parties may consider adding the following:

(a) The number of arbitrator(s) shall be _____.
(b) The language of the arbitration proceedings shall be _____.
(c) Specific qualifications of the arbitrator(s) including language, technical qualifications and experience, if any.
(d) The place of arbitration shall be the Delhi International Arbitration Centre at Delhi.

22 http://mcia.org.in/mcia-rules/model-clauses/
23 http://www.dacdelhi.org/topics.aspx?mid=60

7.12 How many arbitrators are usually appointed?

Under Section 10 of the Arbitration Act, the parties may choose to determine the number of arbitrators. However, such number must be an odd number. In the absence of any agreement between the parties on the number of arbitrators, a sole arbitrator is appointed.

7.13 Is there a right to challenge arbitrators, and if so under which conditions?

An arbitrator may be challenged on the following grounds:

(i) if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(ii) if he does not possess the qualifications agreed to by the parties.

The grounds which given rise to the above circumstances have been mentioned in the Fifth Schedule of the Arbitration Act. A separate procedure for challenging the arbitrator(s) is provided for in Section 13 of the Arbitration Act.

7.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Arbitration Act does not impose any restrictions on the representation of parties during proceedings. However, the specific rules of the respective arbitration institution may prescribe certain restrictions.

7.15 When and under what conditions can courts intervene in arbitrations?

For arbitrations under the Arbitration Act, a court may not intervene in an arbitration proceeding except on application by either of the parties under the following circumstances:

(i) application for dispute to be referred to arbitration under Section 8 for domestic arbitrations and Section 45 for international arbitrations;

(ii) application for interim measures under Section 9, for international arbitrations as well, subject to any agreement to the contrary;

(iii) application for court to appoint arbitrator under Section 11;

(iv) application challenging the appointment of an arbitrator under Section 13;

(v) application to determine the termination of mandate of an arbitrator and appointment of a substitute arbitrator under Section 14;

(vi) application for assistance in taking evidence under Section 27;

(vii) application to set aside an arbitral award under Section 34;

(viii) enforcement of the award under Section 36;

(ix) appeals from certain orders of the court under Section 37;

(x) application to order the tribunal to deliver the award to the applicant on payment to the court under Section 39;

(xi) application for jurisdiction under Section 42;

(xii) extension of time period under Section 43;

In relation to arbitrations seated outside India, apart from points (i) (ii) and (vi) above, a court in India may intervene in relation to the enforcement of such foreign award delivered outside India under Sections 48 and 57.

7.16 Do arbitrators have powers to grant interim or conservatory relief?

Under Section 17 of the Arbitration Act, the arbitral tribunal may, at the request of a party, grant interim relief in respect of the subject matter of the

dispute or require a party to furnish appropriate security for the relief granted.

Furthermore, the rules of certain arbitration institutions also allow an arbitral tribunal to grant interim relief. For instance, under the MCIA Rules, 2016 Article 15.1 allows an arbitral tribunal to "*at the request of a party, issue an order granting and injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief or provide appropriate security in connection with the relief sought.*"

7.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- ### Forms and Contents

The form and contents of an arbitral award have been set out under Section 31 of the Arbitration Act. The following are the key requirements under the above provision:

- An arbitral award has to be in writing and must be signed by the members of the arbitral tribunal.

- The arbitral award must state the reasons upon which it is based, unless:
  - the parties have agreed that no reasons are to be given, or
  - the award is an arbitral award on agreed terms in the form of a settlement under Section 30.

- The arbitral award must provide the date and the place of arbitration.

- In the event that the arbitral award contemplates the payment of money, the award must include the sum, the rate of interest as considered reasonable by the tribunal and the duration for the interest to be paid.

- Section 31 A inserted by the Amendment Act has introduced a regime for costs. The arbitral tribunal will determine which party is entitled to costs and the amount of costs and the manner in which the costs are to be paid. The general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party.

• Deadlines for issuing arbitral awards

The Arbitration and Conciliation (Amendment) Act, 2015 stipulates that the arbitral tribunal is to render its award within twelve months from when the matter was referred to the tribunal. The arbitral tribunal is deemed to be in reference on that date on which the arbitrator, or all the arbitrators, have received notice of their appointment to the case. There can be a further extension of a maximum period of six months with the consent of both the parties. If the tribunal is in requirement of more than eighteen months for issuing an award, then it may apply for such an extension to the Court having jurisdiction. However, the Court is likely to grant such extension only when sufficient cause has been shown and the arbitrators may be penalized for the delay, with a proportionate reduction of their fees, if the same can be attributable to them.

• Other formal requirements for arbitral awards

An arbitral award may be required to be stamped in accordance with applicable stamping statutes.

(a) Stamp Duties requirements

The Arbitration Act is silent on the stamping and registration of an award. However, stamping of the arbitral award is required as per the requirements of the Indian Stamp Act 1899 or the relevant state stamp duty statutes, as may be applicable. Documents which are required to be stamped will not be admissible in evidence "for any purpose" if it is not duly stamped. In addition, penalties may also be levied. The rates at which stamp duty is levied may vary across states. Recently, the Supreme Court of India in *Shriram EPC Ltd v Rioglass Solar SA* held that an award under Item 12 of Schedule I of Stamp Act, 1899 will not include 'foreign award' and

therefore a foreign award is not liable to incur stamp duty for its enforcement in India.

(b) Registration requirements

While the Arbitration Act is silent on registration requirements, pursuant to the Registration Act 1908, awards that purport to impact immovable property, must be registered. Failure to register a document that is mandatorily registered under the statute renders it unenforceable. The registration fee varies depending on the state in which the award is sought to be enforced.

7.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

There are no appeals against arbitral awards. However, Section 34 of the Arbitration Act permits a party to make an application to a court to challenge an arbitral award under the following circumstances:

(i) if a party was under some incapacity;

(ii) the arbitration agreement is not valid under law;

(iii) the party making the application was not given proper notice as required;

(iv) the arbitral award deals with a dispute not contemplated in the submission; or

(v) the composition of the tribunal was not in accordance with the agreement of the parties.

Section 34 also permits a court to set aside an arbitral award if the court finds that the subject matter is not capable of settlement by arbitration or if the arbitral award is in conflict with the public policy of India.

Domestic awards may also be set aside if found to be vitiated by patent illegality appearing on the face of the award, provided that the award

cannot be set aside on the ground that there was an erroneous application of the law or there is a requirement for re-appreciation of evidence.

Similarly, Section 48 states that the enforcement of a foreign award may be refused under the following conditions:

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

(ii) the party against whom the award is invoked was not given proper notice as required;

(iii) the award deals with a difference not contemplated by the submission to arbitration;

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;

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

(vi) the subject matter of the dispute is not capable of being settled under the laws of India;

(vii) if the enforcement of the award would be contrary to the public policy of India.

In order to harmonise various decisions of the courts, the Amendment Act has clarified that an award is in conflict of public policy if the making of the award was induced or affected by fraud or corruption, is in contravention of the fundamental policy of Indian Law or in conflict with the basic notions of morality or justice. However, the court shall not review the merits of the dispute in order to examine whether the award is contrary to the fundamental policy of Indian Law.

7.19 What procedures exist for enforcement of foreign and domestic awards?

i. Enforcement of Domestic Awards

Under Section 36 of the Arbitration Act, once an award is final or an application to set aside the arbitration award has been rejected, then such an award shall be executed under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court.

ii. Enforcement of Foreign Awards

If the court is satisfied that the foreign award is enforceable, it will be deemed to be a decree of the court. The party applying for the enforcement of the foreign award must produce the following: (a) the original award or authentic copy; (b) original arbitration agreement or authentic copy; (c) evidence necessary to prove that it is a foreign award. Further, if the award is in a foreign language, the party must produce a copy of the award that has been translated into English that is also certified by the diplomatic or consular agent of such country.

The Supreme Court in M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd, held that under the Arbitration Act a foreign award is already stamped as the decree. It observed that, *"In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/ decree again*."

7.20 Can a successful party in the arbitration recover its costs?

The Amendment Act has introduced Section 31 A which is a regime of costs. While the arbitrators will determine whether costs are payable by one party to another, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The tribunal may make a contrary award by recording its reasons in writing.

Any agreement which has the effect that one of the parties has to pay the whole or part of the costs of the arbitration in any event shall only be valid if such agreement is made after the dispute in question has arisen.

Each arbitration institution will also have separate rules governing costs. For instance, under the MCIA Rules, Rule 32.6 of the MCIA Rules defines "*costs of the arbitration*" to include: "*(a) The Tribunal's fees and expenses and the Emergency Arbitrator's fees and expenses, where applicable; (b) the MCIA's administrative fees and expenses; and (c) the costs of expert advice and of other assistance reasonably required by the Tribunal.*" Rules 32 and 33, *inter alia*, provide for detailed rules on fixing the aforementioned "*costs of the arbitration*", including directing parties to make advance payments of such costs. The Registrar of the MCIA has the ultimate power to determine the costs and their payment, including directing payment of advance on the costs. Rule 29, *inter alia*, however, allows for the arbitral tribunal to make orders on apportionment of costs between the parties.

7.21 Are there any statistics available on arbitration proceedings in the country?

A 2013 PWC study found that 47% of Indian companies that had chosen arbitration as their preferred method of dispute resolution chose *ad hoc* proceedings.[24]

India has an estimated 31 million cases pending in various courts. As of 31.12.2015 there were 59,272 cases pending in the Supreme Court of India, around 3.8 million cases are pending in the High Courts and around 27 million pending before the subordinate judiciary. 26% of cases, more than 8.5 million, are more than 5 years old.[25]

24 pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf

25 Strengthening Arbitration and its Enforcement in India – Resolve in India, NITI Ayog

7.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

A. Proposed Legislative Changes to The Arbitration Act:

The government introduced new amendments via The Arbitration and Conciliation (Amendment) Bill, 2018 (the Amendment Bill) on July 18, 2018 which is yet to be passed by the Rajya Sabha. The highlights of the Amendment Bill are as follows:

a) The Amendment clarifies that the amendments to the Act that were introduced with effect from 23 October 2015 are prospective, i.e., the amended Act will only apply to arbitrations and court proceedings relating to arbitrations, if the arbitration itself was commenced after 23 October 2015.

b) Any request for appointment of arbitrator (s) is required to be disposed within thirty days from the date of service of notice on the opposite party. Parties can approach designated arbitration institutions for the appointment of arbitrators. For international commercial arbitrations, the appointments will be made by institutions designated by the Supreme Court of India. For domestic arbitrations, appointments will be made by the institution designated by a High Court. In the event there are no designated arbitral institutions available, the Chief Justice of the concerned High Court will maintain a panel of arbitrators to perform the functions of the arbitral institutions.

c) The Amendment Bill proposes the establishment of a statutory authority called the '*Arbitration Council of India*' ("the ACI"). The ACI will, *inter alia*, identify and grade qualifying arbitration institutions to be considered for designation, by High Courts or the Supreme Court for appointment of arbitrators.

d) The Amendment Bill 2018 now requires that the statement of claim and statement of defence are filed within six months of the arbitral tribunal's

appointment. The arbitration award must be passed by the arbitral tribunal within twelve months from the date of completion of pleadings. The timeline for passing an award, prescribed by the Act cannot be extended in the case of international commercial arbitrations.

e) The Amendment Bill 2018 provides for the training of arbitrators in India to equip them with skills to handle complex commercial arbitration.
f) An express confidentiality provision to govern arbitration proceedings is proposed. An express provision on immunity of arbitrators is also proposed.

g) Applications challenging an award would require to be decided only on the basis of the record of the arbitral tribunal, and not on extraneous evidence.

2. Recently, The Lok Sabha passed the New Delhi International Arbitration Centre Bill, 2018, which aims to establish the New Delhi International Arbitration Centre to conduct arbitration. The bill is yet to be passed by the Rajya Sabha. The Bill also aims to declare the NDIAC as an institution of national importance and promote the development of alternate dispute resolution in India.

B. Recent Supreme Court Decisions in relation to Arbitration

In *Board of Control for Cricket in India v. Kochi Cricket Private Limited*, the Supreme Court held that the amended provisions of the Arbitration Act would apply to pending applications for setting aside all arbitral awards filed before October 23, 2015. The judgment debtor would now need to specifically seek a stay of the arbitration award or prepare to pay the award notwithstanding the pending challenge. The decision is another step towards ensuring speedy disposal of matters since stays on arbitral awards as noted by the Supreme Court itself would sometimes be in effect for a few years before being adjudicated.

In *K. Kishan v. Vijay Nirman Company*, Civil Appeal No. 21824 of 2017, The Supreme Court of India held that Corporate Insolvency Resolution

Proceedings (CIRP) under the Insolvency and Bankruptcy Code, 2016 cannot be initiated against an operational debtor when an arbitral award, which has been passed in favour of the creditor is still being adjudicated upon under Section 34 of the Arbitration Act, as the pendency of such proceedings amount to a dispute under the Insolvency and Bankruptcy Code, 2016.

In *Emaar MGF Land Limitd v. Aftab Singh*, The Supreme Court of India held the arbitration clause cannot ouster the jurisdiction of the consumer courts. If a statue provides a special remedy to the party who is also under an arbitration agreement, the aggrieved party has an option to opt the special remedy provided under the statute i.e. the consumer courts under the Consumer Protection Act, 1986 or initiate arbitration. However, a party cannot after initiating an arbitration proceeding, apply for a special remedy.

In *Union of India v. Hardy Exploration and Production (India) INC*, the Supreme Court held that in the absence of additional conditions in the contract the term "place" or "venue" of arbitration used in an arbitration agreement can be read as "seat".

In *S.P Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh and Others*, the Supreme Court held that any challenge to the arbitrator appointed should be raised before the arbitrator in the Arbitration Act in the first instance and only thereafter can be raised at the time of setting aside of the arbitral award under section 34 of the Arbitration Act.

In *Simplex Infrastructure Ltd. V Union of India*, the Supreme Court held that the three months timeline for filing of an application to set aside an arbitration award cannot be extended except for a further period of thirty days on showing sufficient cause.

Name of Authors:	**MRS. ZIA MODY** **MR. ADITYA VIKRAM BHAT**
Name of Law Firm:	**AZB & Partners**
Brief Profile:	Zia Mody is the Founder and Managing Partner of AZB & Partners and one of India's foremost corporate attorneys. Apart from being Vice President and a Member of the London Court of International Arbitration, Zia has been nominated to the International Who's Who of Commercial Arbitration. Aditya Vikram Baht is a Partner at AZB & Partners, Bangalore. He has advised on international investment and commercial disputes and has also been nominated to the International Who's Who of Commercial Arbitration.
Telephone Nos.:	AZB & Partners (Mumbai): +91 22 6639 6880 AZB & Partners (Bangalore): +91 80 4240 0500
Fax Nos.:	AZB & Partners (Mumbai): +91 22 6639 6888 AZB & Partners (Bangalore): +91 80 2221 3947
Email:	zia.mody@azbpartners.com aditya.bhat@azbpartners.com

8. INDONESIA

BY: MS. KAREN MILLS
MR. RIZKI KARIM

8.1 Which laws apply to arbitration in Indonesia?

Arbitration has long been recognized and applied as a formal means of dispute resolution in Indonesia. Arbitration was introduced since the Dutch colonial era in Indonesia by the enactment of the *Reglement op de Rechtsreglement (RV)* [26], *Het Herziene Indonesich Reglement (HIR)* [27] and *Rechtsreglement Buitengewesten (RBg)* [28] and for more than 150 years all arbitrations in Indonesia were governed under these laws. There was no specific law which governed arbitration in Indonesia, until in late 1999 Indonesia promulgated Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution that superseded the former Dutch laws.

8.2 Is the Indonesian arbitration law based on the UNCITRAL Model Law?

Arbitration in Indonesia is governed under Law No. 30 of 1999 ("The Arbitration Law") on Arbitration and Alternative Dispute Resolution. Although there are more similarities than differences, the Indonesian Arbitration Law is not based upon the UNCITRAL Model Law.

8.3 Are there different laws applicable for national and international arbitration?

Unlike such jurisdictions as Malaysia and Singapore, Indonesia only has one law which governs both domestic and international arbitration. As with the prior legislation under the RV, as referred to above, the Arbitration Law

26 Article 615 – 651, Reglement op de Rechtsreglement (RV)
27 Article 377, Herzien Inlandsch Reglement (H.I.R)
28 Article 705, Rechtsreglement Buitengewesten (RBg)

makes it clear that all arbitrations held within Indonesia are considered "domestic", and all those held outside of this archipelago are characterized as "international" arbitrations, regardless of the nationality of the parties, location of the subject of the dispute, governing law, etc. Thus, there is and need be only the one Arbitration Law, which applies to all arbitrations held within Indonesia and to enforcement in Indonesia of any international award as well.

8.4 Has Indonesia acceded to the New York Convention?

Indonesia ratified the New York Convention in 1981 with the issuance of Presidential Decree No. 34 of 1981.[29] However it was not until 1990 that the Supreme Court issued Supreme Court Regulation No. 1 of 1990 to facilitate the enforcement of international arbitration awards. Enforcement of foreign awards was problematic in the interim. In its Regulation No. 1 the Supreme Court reserved to itself the authority to issue execution orders. This proved to cause considerable delay and thus the new 1999 Arbitration Law designated the District Court of Central Jakarta as the court authorized to issue execution orders, except where the state is a party, in which case such order must be issued by the Supreme Court. Most of the other problems encountered by some of the provisions of Supreme Court Regulation No. 1 of 1990, have also been eliminated with the promulgation of the Arbitration Law, which does not repeal the Regulation but reflects and improves upon it.

8.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Yes. Article 34 (1) of the Arbitration Law provides:

"Resolution of a dispute through arbitration may be referred to a national or international arbitration institution if so agreed upon by the parties."

29 Published in the state Gazette of 1981, as No. 40, of 5 August, 1981. Indonesia made both the commerciality and the reciprocity reservations in its accession.

Regardless of where the parties are domiciled, the Arbitration Law allows the choice of any arbitral institution, foreign or domestic, or any other rules to be applied, to resolve a dispute by arbitration.

8.6 Does the Indonesian arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Law provides some skeletal procedural rules which will apply to arbitrations held in Indonesia if the parties have not designated other rules or administering institutions. These basic procedural rules can be found in Articles 27 through 51 of the Arbitration Law.

The substantive requirements for the procedures as set out in the Law are basically as follows:

1. Submissions shall be made in writing (this would be mandatory, whatever rules are followed);

2. The Statement of Claim shall include at least, the full name and address or the parties' domicile;

3. The examination of witnesses and experts shall be governed by the provisions contained in the Civil Procedural Law;

4. The hearing shall be completed within 180 days from the date the arbitrator is confirmed or the tribunal is established. This is mandatory, unless the parties specifically waive it;

5. The award shall be issued within 30 days as of the close of the hearings. This is also mandatory, but also may be specifically waived.

8.7 Does a valid arbitration clause bar access to state courts?

Yes, Article 3 of the Arbitration Law clearly states that the District Court has no jurisdiction to try disputes between parties bound by an arbitration agreement. Further, Article 11 of Arbitration Law upholds the provision

under Article 3 which states that the existence of a written arbitration agreement eliminates the right of the parties to submit resolution of the dispute or difference of opinion contained in the agreement to the District Court. The District Court also must refuse to and must not interfere in any dispute settlement which has been determined by arbitration.

8.8 What are the main arbitration institutions in Indonesia?

There are a number of arbitration institutions in Indonesia, most of them industry specific but also some are general. Probably the most commonly used arbitral body is *Badan Arbitrase Nasional Indonesia* (BANI)[30], which maintains a panel of local and international arbitrators and utilizes relatively modern rules of procedure, which are available in both Indonesian and English, although some of its less conventional policies are not provided to prospective arbitration parties, so some due diligence is recommended.

Other established institutions include the Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia,* or BAPMI)[31], set up in 2002 to administer arbitrations relating to capital market disputes and the National Sharia Arbitration Board (*Badan Arbitrase Syariah Nasional,* or Basyarnas), established by the Indonesian Ulema Council in 1993, originally under the name of *Badan Arbitrase Muamalat Indonesia,* to resolve disputes arising out of *shariah* transactions or transactions based on Islamic principles. There is also an arbitration institution to settle disputes in futures exchanges, called *Badan Arbitrase Perdagangan Berjangka Komoditi* (BAKTI)[32] which was established on 7 November 2008. Each of these bodies maintains its own panel of approved arbitrators and has its own rules of procedure and arbitrator conduct but only the official Indonesian version of this set of rules is available online. So far the services of these institutions have not been widely used in practice, but their case loads are growing.

There is also an Indonesian Chapter of the Chartered Institute of Arbitrators based in Jakarta. The Chapter is involved primarily in the

30 See http://www.baniarbitration.org
31 See http://www.bapmi.org
32 See http://www.bakti-arb.org

training of arbitrators and does not administer cases, although it can act as appointing authority if so designated.

While most local arbitrations between or among Indonesian parties only, are held at BANI, the majority of those with a more international character, unless held offshore (and the majority of these would be in Singapore) tend to apply the UNCITRAL rules or opt for ICC administration.

8.9 Addresses of the major arbitration institutions in Indonesia?

BANI's address is as follows:
Head office: Wahana Graha, 2nd Floor
Jl. Mampang Prapatan No.2
Jakarta, 12760
Tel: +6221 7940542
Fax: +6221 7940543
Website: www.baniarbitration.org
E-mail: bani-arb@indo.net.id

BAPMI's address is as follows:
Head office: Indonesia Stock Exchange Building Tower 1, 28th Floor, Jl. Jenderal Sudirman Kav. 52-53, Jakarta 12190
Tel: +6221 5150480
Fax: +6221 5150429
Website: www.bapmi.org
E-mail: sekretariat@bapmi.org

BASYARNAS' address is as follows:
Head office: MUI Building, Jl. Dempo No. 19, Central Jakarta, 10320
Tel: +6221 31904596
Fax: +6221 3924728
E-mail: basyarnas-pusat@commerce.net.id

BAKTI's address is as follows:
Head office: Graha Mandiri 3rd Floor, Jl. Imam Bonjol No.61
Central Jakarta, 10340
Tel: +6221 39833066 (ext. 706)
Fax: +6221 39833715

Website: www.bakti-arb.org
E-mail: sekretariat@bakti-arb.org

8.10 Arbitration Rules of major arbitration institutions in Indonesia?

As the most commonly used arbitration institution, BANI has its own rules in administering an arbitration case, the rules known as BANI's "Rules of Arbitral Procedure". These rules can be found in both Indonesian and English on BANI's website.[33]

The Rules of BAPMI can be found on www.bapmi.org/en/rules.php .

The Rules of BAKTI can be found on www.bakti-arb.org/rule.html .

The rules of BASYARNAS are not available online. These can be obtained by sending a request to BASYARNAS' e-mail at basyarnas-pusat@commerce.net.id

8.11 What is/are the Model Clause/s of the arbitration institutions?

BANI recommends the use of the following model clause for parties wishing to settle their dispute through their institution:

"All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules".

But the writers would recommend that parties wishing to avail themselves of BANI arbitration also specify the language of the arbitration, as the Arbitration Law requires arbitrations to be held in Indonesian if not otherwise agreed upon the parties. Other provisions might also be included to counteract some of BANI's policies, such as a provision to the effect

33 See http://www.baniarbitration.org/ina/procedures.php (Indonesian version) and http://www.baniarbitration.org/procedures.php (English version)

that transcripts or other records must be made available to the parties and not only the arbitrators, and also that the parties shall have the absolute right to appoint whomsoever they wish to act as arbitrator, subject only to conflicts of interest and misconduct and that the two party appointed arbitrators (or the parties jointly) have the unimpeded right to designate a qualified Chair.

8.12 How many arbitrators are usually appointed?

Under the prior legislative regime of the RV, parties were free to designate any number of arbitrators, so long as it was an odd number. This restriction is continued by the new Arbitration Law, but only where the parties have not previously agreed upon a certain number of arbitrators. Article 8 (2) (f) of the Arbitration Law, in setting out the requirements for the notice of arbitration, requires such notification, among other things to include:

"The agreement entered into by the parties concerning the number of arbitrators or, if no such agreement has been entered into, the Claimant may propose the total number of arbitrators, provided such is an odd number."

Under the BANI Rules, parties may appoint either a sole arbitrator or three arbitrators to sit at the arbitral tribunal adjudicating their dispute. If the parties have not previously agreed as to the number of arbitrators, the Chairman of BANI shall rule whether the case in question requires one or three arbitrators, depending on the nature, complexity, and scale of the dispute in question. However, in special circumstances where there are multiple parties in dispute, and if so requested by the majority of such parties, the BANI rules allow the Chairman of BANI to approve the formation of a tribunal comprising of five arbitrators.[34]

As to the arbitrators' qualifications, there is no restriction on the nationality or profession of arbitrators. The Arbitration Law only requires that arbitrators be competent and over the age of 35 years, have at least 15 years of experience in the "field" (not defined) and have no conflict of interest or

34 BANI Rule No.10

ties with either party. Furthermore, judges, prosecutors, court clerks or other officials of justice may not be appointed or designated as arbitrators.[35]

8.13 Is there a right to challenge arbitrators, and if so under which conditions?

Article 22 of the Arbitration Law states that the parties are allowed to challenge, or request for a recusal of, an arbitrator if there is found sufficient cause and authentic evidence to give rise to doubt that the arbitrator will not perform his/her duties independently, or will be biased in rendering an award. Demands to recuse an arbitrator may also be made if it is proven that there is any family, financial or employment relationship with one of the parties or its counsel.

This stipulation under Article 22 is further supported by Article 26 Paragraph 2 which states that an arbitrator may be dismissed from his/her mandate in the event that he/she is shown to be biased or demonstrates disgraceful conduct, which must be legally proven.

8.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Arbitration Law does not impose any conditions as to what counsel may represent a party in an arbitration, as long as such counsel is given power of attorney to do so. Thus, there is no impediment to foreign counsel appearing on behalf of any party, whether foreign or Indonesian.

In arbitrations before BANI, however, Indonesian counsel will be required to accompany any foreign counsel if Indonesian law governs the merits of the dispute.[36] Although this is not a legal requirement for non-BANI arbitrations, it would certainly be foolhardy of any party not to engage counsel conversant with the governing law wherever their arbitration is held.

---

35 Article 12 Law No.30 of 1999

36 BANI Rule No.5

8.15 When and under what conditions can courts intervene in arbitrations?

According to Article 3 and 11 of the Arbitration Law the court has no jurisdiction over a dispute if the parties have agreed to settle their dispute through the arbitration. Application to a court may be made only if the appointment of an arbitrator is challenged and the parties have not designated rules which give this power to a different institution.[37]

National courts become involved most commonly at one of three stages of the arbitration process: (i) at the outset of the dispute; to enforce the agreement to arbitrate or to appoint or recuse an arbitrator; (ii) during the arbitration proceedings: through request to enforce interim measures (although not yet tested, it is widely assumed that courts will not take such jurisdiction); and (iii) after the close of arbitration to enforce or annul the final award.

Thus, the courts have no jurisdiction to deal with any matters subject to arbitration, other than enforcement or other relief that may be sought after issuance of the final award. An exception might be to enforce interim measures of relief granted by a tribunal, but this has not yet been tested and, as interim relief is generally available only for cases already commenced and under court jurisdiction, any such application in aid of an arbitration is most unlikely to be entertained by the courts.

8.16 Do arbitrators have powers to grant interim or conservatory relief?

Article 32 of the Arbitration Law provides:

(1) ***At the request of one of the parties, the arbitrator or arbitration tribunal may make a provisional award or other interlocutory decision to regulate the manner of running the examination of the dispute, including decreeing a security attachment or***

37 Article 13, Law No.30 of 1999

ordering the deposit of goods with third parties, or the sale of perishable goods.

However, the Tribunal has no power of execution as only a court would have the power to execute such orders. But courts can only enforce final and binding awards and court judgments. Article 64 of the Arbitration Law also allows enforcement only of judgments and awards that are final and binding, and thus not subject to any further review. Thus, compliance depends primarily on the good will of the party affected.

Nor does the Arbitration Law provide sanctions for failure of a party to comply with orders of the tribunal. Article 19(6) of the BANI Rules does give the tribunal authority to impose such sanctions, but, again, enforcement of any such sanction would require court intervention, which would not be available unless and until in the final award. Although, to the knowledge of the writers, it has not as yet been tested, it is certainly highly questionable whether the courts would enforce any such interlocutory orders if an affected party fails to comply.

8.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- ### Formal requirements for arbitral awards

Article 54 of the Arbitration Law sets out the standard for an arbitral award, as follows:

a) The heading "*DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA*" (In the Name of Justice, Based on Belief in One God);

b) Full names and addresses of the parties;

c) A short description of the dispute;

d) The arguments of the parties;

e) Full names and addresses of the arbitrators;

f) The considerations of the arbitrator or arbitration tribunal regarding the whole dispute;

g) The opinion of each arbitrator, if any differences of opinion arise within the arbitration panel;

h) The award;

i) The place and date of the award; and

j) The signature of the arbitrator or arbitration panel.

- ## Deadlines for issuing arbitral awards

After the close of hearings (which are required to be completed within 6 months of the date of constitution of the full Tribunal,[38] unless such time limit is extended by mutual written consent of the parties[39]), the tribunal is allowed only thirty days to render its award,[40] but this time limit also may be extended by mutual written consent of the parties, in which case an alternative limitation should be designated or the extension may be deemed ineffective.

- ## Other formal requirements for arbitral awards

Article 54 Paragraph (2) of the Arbitration Law states that the validity of the award will not be affected even if one of the arbitrators is unable to sign the arbitration award due to sickness or death. The reason of the absence of one arbitrator's signature must, however, be recorded in the award.[41] The Tribunal, or its duly authorized representative, is required to register a signed original, or authentic copy, of the award with the court within 30 days of its rendering.[42] This time limit does not apply to registration of foreign-rendered awards as this stipulation is only regulated under the chapter of the enforcement of national arbitration awards, but in

38 Article 48, Law No.30 of 1999
39 Article 33, Law No. 30 of 1999
40 Article 57, Law No.30 of 1999
41 Article 53 (3), Law No.30 of 1999
42 Article 59 (1), Law No.30 of 1999

either case the award must be registered in order to be enforceable.[43] Domestic awards (those rendered in Indonesia) are registered in the District Court having jurisdiction over the respondent. [44] International awards are registered in the District Court of Central Jakarta.[45]

In order to register an award, the court will require an original or authenticated copy to be submitted in the Indonesian language.[46] Although not specified in the law, for purposes of registration and eventual enforcement in Indonesia, that Indonesian version will be considered as the original. Therefore, it would be wise, if possible, for any award that may require enforcement in Indonesia to be rendered in Indonesian, as well as in whatever language the arbitration is held, in most cases in English. At the very least any translation, which must be by government licensed "sworn" translator, should be carefully vetted before submission for registration. Note also that BANI will deem the Indonesian version as the original even if in fact the award has been drafted in another language and the Indonesian version is a translation.[47] It is important to ensure that any translation into Indonesian is accurate, because that is the version which will be operative in case the award must be enforced in Indonesia.

8.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

There is no appeal against the substance of an arbitration award. However, the Arbitration Law does provide for annulment of an arbitral award, either domestic or international, but on very limited grounds which primarily involve withholding of decisive documentation, forgery or fraud.[48]

43 Article 59 (4), Law No. 30 of 1999
44 Articles 59 (1) and 1 (4), Law No. 30 of 1999
45 Article 65, Law No. 30 of 1999
46 Article 67, Law No. 30 of 1999
47 BANI Rule 15 (4)
48 Article 70, Law No. 30 of 1999

Any such application must be submitted within 30 days of registration of the award,[49] and a decision must be made upon such application within 30 days of submission thereof. An appeal may be made to the Supreme Court against any such decision, and the Law requires the Supreme Court to decide upon such appeal within 30 days of application.[50]

8.19 What procedures exist for enforcement of foreign and domestic awards?

8.19.1 Domestic Awards

The enforcement procedure for domestic awards allows the appropriate District Court to issue an order of execution directly if the losing party does not satisfy the award, after being duly summoned and so requested by the court. Although no appeal is available, the losing party does have the opportunity to contest execution by filing a separate contest. Although the District Court may not review the reasoning in the award itself,[51] it may only execute the award if both the nature of the dispute and the agreement to arbitrate meet the requirements set out in the Arbitration Law[52] (the dispute must be commercial in nature and within the authority of the parties to settle, and the arbitration clause must be contained in a signed written document) and if the award is not in conflict with public morality and order. [53] There is no recourse against rejection by the court of execution.[54]

8.19.2 International Awards

As in the case of domestic awards, international awards must also be registered with the court before one can apply to have them enforced. There is no time limit for registration of international awards. However, such registration is required to be effected by the arbitrators or their duly

49 Article 71, Law No.30 of 1999
50 Article 72, Law No. 30 of 1999
51 Article 62 (4), Law No. 30 of 1999
52 Articles 4 and 5, law No. 30 of 1999
53 Article 62 (2), Law No. 30 of 1999
54 Article 62 (3), Law No.30 of 1999

authorized representatives. Arbitrators who regularly sit in arbitrations within Indonesia are aware of this requirement and will provide a power of attorney to the parties to effect registration *on behalf of the arbitrators*. However, arbitrators sitting outside of Indonesia generally are not aware of this requirement and, unless so requested by one or both of the parties, are unlikely to grant such authority. This can cause considerable delay, and often difficulty, for a party seeking to register the award later on, as the arbitrators will need to be contacted and requested to provide powers of attorney after the end of the proceedings. Aside from such powers of attorney, applications for registration of International Awards must attach the following:

> ***"(i) the original or a certified copy of the International Award, in accordance with the provisions for authentication of foreign documents, together with an official translation thereof*** *into Indonesian*[55] ***;***
>
> ***(ii) the original or a certified copy of the agreement which is the basis of the International Award, in accordance with the provisions for authentication of foreign documents, together with an official Indonesian translation thereof; and***
>
> ***(iii) a certification from the diplomatic representative of the Republic of Indonesia in the country in which the award was rendered, stating that such applicant country and Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards."***[56]

Despite the Arbitration Law having been in effect for about 20 years at the time of writing, this last-mentioned requirement still often proves difficult to satisfy. Unfortunately the Foreign Ministry has not advised its diplomatic missions of the requirement and thus many Consulates are at a loss when asked to provide such certification. This can also cause considerable delays, as well as some annoyance for all concerned.

---

55 Unless the original award is rendered in Indonesian

56 Since Indonesia is not party to any such bilateral treaty, in effect the certification should state that both countries are parties to the New York Convention. It is implicit that awards rendered in states that are not party to the New York Convention (or other such conventions, such as the ICSID, Washington convention, to which Indonesia is also a party) will not be enforced in Indonesia.

Orders of *exequatur*, granting enforcement of an award, including those ordering injunctive relief, will be issued by the court as long as the parties have agreed to arbitrate their disputes, unless the subject matter of the award was not commercial[57] and therefore not arbitrable, and as long as the award does not violate public order.[58]

8.19.3 Execution

Once an order of execution is issued, for either a domestic or an international award, the same may be executed against the assets and property of the losing party in accordance with the provisions of the RV, in the same manner as execution of judgments in civil cases which are final and binding. But note that only those assets which can be specifically identified can be attached or seized and sold. There is no provision for general orders of attachment or seizure in Indonesia.

8.20 Can a successful party in the arbitration recover its costs?

8.20.1 Costs of Arbitration

Under the Arbitration Law, arbitrators shall determine the arbitration fees, which consists of the arbitrators' honoraria, expenses incurred by the arbitrators and costs for (expert) witnesses and administrative matters.[59] The fee shall be borne by the losing party. In the event that a claim is partially granted, the arbitration fee shall be charged to the parties equally.[60]

8.20.2 Legal Costs

Generally, under Indonesian Law, parties do not have the right to recover their legal costs in litigation or arbitration, unless they have agreed that such costs can be recovered, either in their underlying agreement or in any other

57 Elucidation of Article 66 b, Arbitration Law. "Commercial" refers to activities in trade, banking, finance, investment, industry, and intellectual property.
58 Article 66 (c), Law No. 30 of 1999.
59 Article 76, Law No. 30 of 1999
60 Article 77, Law No. 30 of 1999

valid contract. Despite this general rule, many arbitrations with an international character do see legal costs awarded and as far as the writers can determine, this has never been challenged.

8.21 Are there any statistics available on arbitration proceedings in Indonesia?

Indonesia being a Civil Law jurisdiction, where prior cases do not have precedential value, very few cases are reported. This lack of reported information, coupled with the fact that both registration and enforcement of domestic awards is effected in the District Court in the domicile of the losing party, and since there are 292 judicial districts spread throughout the archipelago, it is almost impossible to obtain reliable data on enforcement of domestic awards, except with respect to cases sufficiently notorious to raise a stir in legal or business circles or warrant comment in the press. It is generally understood, however, that most domestic awards have been enforced without delay or difficulty as a matter of course.

The Clerk of the Central Jakarta District Court does keep records of the registration of international awards, indicating when application is made to enforce any of these, and when the execution order is issued. Between 2010 and 2014 there were 63 international awards registered and, to our knowledge, there have been no significant difficulties in execution. BANI keeps records of the cases it administers. Based on its most recent publication, BANI cases have shown a steady increase, from only 83 cases between 1977 and 1996, to 215 cases between 1997 and 2006, and 728 cases from 2007 to 2016.[61] Overall, to date, BANI has resolved more than 1,000 cases submitted to the institution.

61 http://www.baniarbitration.org/assets/pdf/BANI2017_brochure.pdf

8.22 Are there any recent noteworthy developments regarding arbitration in Indonesia (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

In early 2014, the Constitutional Court received a request to test the Arbitration Law specifically the elucidation of Article 70. The applicants stated that the elucidation of Article 70 of the Arbitration Law caused legal uncertainty.

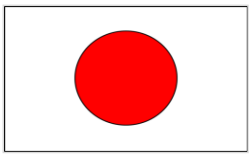
Article 70 governs that nullification of an arbitration award may be made if the award contains elements of forgery, concealment of material documents or fraud. The elucidation of Article 70 makes it clear that an application for nullification shall be supported by a court decision proving that there has been such a forgery, concealment of material documents, or fraud.

Article 71 provides that an application for annulment shall be submitted within 30 days as of the date when the award was registered.

The applicants claimed that it is impossible to obtain a court decision proving such ground for annulment within the 30-day time limit and thus claimed Article 70 to be inoperable.

On 11 November 2014, the Supreme Court rendered its judgment stating that the Elucidation of Article 70 is now revoked since it has caused legal uncertainty and injustice, thereby contravening the Indonesian Constitution. A party may now apply for nullification of an award on the ground that the award contains elements of forgery, concealment of material document or fraud, without having to have a court decision to support it.

Name of Authors:	**MS. KAREN MILLS** **MR. RIZKI KARIM**
Name of Firm:	**KarimSyah Law Firm**
Brief Profile:	**KarimSyah** is Indonesia's market leader in Dispute Resolution, Financing and Natural Resources. The firm has successfully represented the Indonesian Government in a number of Investor-State cases over the past 10 years. Areas of specialization on the transactional side include Oil, Gas, Mining and Energy and Infrastructure matters, Insurance, all manner of Financing and Restructuring, Information Technology, Land Transactions, Bankruptcy, Joint Ventures and other cross-border transactions and business structures. On the contentious side the firm handles commercial litigation and both local and international arbitration and mediation, with recent new specializations in medical malpractice defense and aviation disaster settlements.
Telephone No.:	+62 21 2966 0001
Fax No.:	+62 21 2966 0007
Email:	kmills@cbn.net.id; info@karimsyah.com
Website:	www.karimsyah.com



9. JAPAN

BY: MR. MICHAEL A. MUELLER

9.1 Which laws apply to arbitration in Japan?

The Japanese Arbitration Act[62] is the relevant law. It was enacted in 2002 and entered into force in March 2003. Before its enactment, the Japanese Civil Procedural Code included some provisions for arbitration, supported by several Japan Supreme Court decisions which might have relevance especially with regard to agreements concluded prior to the enactment. In this regard, it should be noted that dispute resolution by arbitration still has a very restricted, nonetheless increasing role in Japan.

9.2 Is the Japanese Arbitration Law based on the UNCITRAL Model Law?

Although generally based on the UNCITRAL Model Law of 1985, the Arbitration Act contains several deviations[63]. Their background is the Arbitration Act's distinct objective: Whereas the Model Law focuses on commercial arbitration, the Arbitration Act was also designed for arbitration involving parties with the need of special protection, particularly consumers and employees. Accordingly, arbitration agreements in labor disputes can exclusively be concluded after a dispute arose. However, any provisions promoting resolution of individual labor disputes that may arise in the future are null and void[64]. Similarly, a consumer may cancel an arbitration agreement if the counterparty initiates arbitration against the consumer[65]. Moreover, the Arbitration Act does not contain the Model Law's amendment as to the detailed regulation of arbitral interim measures, above all their enforcement.

---

62 Act No. 138 of 2003, amended in 2006, hereinafter referred to as "Arbitration Act".

63 Tatsuya Nakamura, "Saltient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model", [April 2004] JCAA Newsletter 17.

64 Supplementary Provision Art. 4.

65 Supplementary Provision Art. 3.

9.3 Are there different laws applicable for domestic and international arbitrations?

In contrast to other national arbitration laws, the Arbitration Act does not distinguish between domestic and international arbitration. As long as the arbitral seat is in Japan, all of the Arbitration Act's provisions apply.[66] The provisions on recognition and enforcement apply even regardless of the place of arbitration.[67]

9.4 Has Japan acceded to the New York Convention?

Since 1961 Japan is party to the New York Convention.

9.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Since the arbitration proceedings are subject to party autonomy, the parties are free to determine it. Accordingly, the Arbitration Act exclusively subjects the choice of the arbitration proceedings to the restriction of public policy.[68] Since the Arbitration Act does not distinguish between domestic and international arbitration, the parties' domiciles are irrelevant.

9.6 Does the Japanese Arbitration Law contain substantive requirements for the arbitration procedure to be followed?

The Arbitration Act's stipulation of party autonomy is subject to the principle of due process: All parties to an arbitration have to be treated equally.[69] Subject to further restrictions of public policy, the parties are free to determine the arbitration procedure to be followed. Particularly, they may

66 Art. 3 (1), (2) Arbitration Act.
67 Art. 3 (3) Arbitration Act.
68 Art. 26 (1) Arbitration Act.
69 Art. 25 (1) Arbitration Act.

select the seat of the tribunal,[70] the applicable substantive law[71], the language of the arbitration[72], place of the hearings, time restrictions for procedural participation such as defences or statements,[73] the appointment of experts[74] and the potential attempt of the tribunal to settle a dispute.[75] If the parties have not agreed on any of these aspects, the arbitral tribunal determines them.

The Arbitration Act stipulates certain formal requirements for arbitration agreements. An arbitration agreement has to be in writing.[76] However, electromagnetic records, e.g., e-mails, conform to this requirement.[77] In relation to the arbitration agreement, the Arbitration Act upholds the Doctrine of Separability. As concerns confidentiality, the rules of the major arbitration institution in Japan, the JCAA[78], ensure that the parties, arbitrators and official secretaries keep all information to the arbitration, including the file and all documents, confidential.[79]

Suspending any period of limitation,[80] the arbitral proceedings are deemed to commence on the date the claimant gives notice to the respondent that the dispute will be referred to the arbitral tribunal.[81] During the proceedings, any provision of evidence requires the party relying on it to ensure the availability of such evidence to the other party. Correspondingly, when the arbitral tribunal relies on expert witnesses, it has to ensure that every report is available to both parties.[82] If any party fails to conform to its duty to provide evidence or does not appear in the arbitral hearing, the tribunal has the competence to issue an award based on the evidence

70 Art. 28 Arbitration Act.
71 Art. 36 Arbitration Act.
72 Art. 30 Arbitration Act.
73 Art. 31 Arbitration Act.
74 Art. 34 Arbitration Act.
75 Art. 38 Arbitration Act.
76 Art. 13 (2) Arbitration Act.
77 Art. 13 (4) Arbitration Act.
78 cf. below 8.8.
79 Art. 42 JCAA Rules.
80 Osamu Inoue and Tatsuya Nakamura, "Litigation and Alternative Dispute Resolution" in Gerald Paul McAlinn (ed.), *Japanese Business Law,* Wolters Kluewer, The Netherlands 2007, p 689.
81 Art. 29 (1) Arbitration Act.
82 Art. 32 (5) Arbitration Act.

available and fairness considerations.[83] Accordingly, the tribunal has to adequately inform the parties about any duty of participation.
Since Japan is not a litigious country, it is not unlikely that arbitrators encourage amicable dispute settlements during the proceedings. In addition, arbitrators are free to issue interim measures upon a party's request. This can be subject to providing sufficient financial security.[84]

Japan's most popular arbitral rules, the JCAA Commercial Arbitration Rules (JCAA Rules) contain accelerated procedural rules (so-called expedited procedure rules) for disputes of lower economic value, i.e. below fifty million Japanese Yen, or in case the parties agree to submit the dispute to expedited procedure rules.[85]

9.7 Does a valid arbitration clause bar access to state courts?

Yes, if sued before state courts, parties to an arbitration agreement may raise an objection.[86]

9.8 What are the main arbitration institutions in Japan?

The main Japanese arbitration institution is the Japan Commercial Arbitration Association ("JCAA"). The JCAA was established within the Japan Chamber of Commerce and Industry as an arbitration committee in 1950. In 1953, the JCAA has become independent. Aside from arbitration administration, it provides a vast range of services, *inter alia,* mediation administration, seminars and conferences plus it maintains a large reference library.

Other arbitration institutions include the Japan Intellectual Property Arbitration Center, an organization established by the Japan Federation of Bar Associations in corporation with the Japan Patent Attorneys Association. Further institutions are the Japan Shipping Exchange Inc. and the National Committee of the International Chamber of Commerce (ICC).

83 Art. 33 (3) Arbitration Act.
84 Art. 24 Arbitration Act.
85 Art. 83-90 JCAA Rules.
86 Art. 14 (1) Arbitration Act.

The latter is a national body of the world's most important arbitration association. It comprises leading companies and business associations in their countries or territories. National committees shape ICC policies and alert their governments to international business concerns.

9.9 Addresses of major arbitration institutions in Japan?

Japan Commercial Arbitration Association
Tokyo Office
Hirose Building 3F
3-17 Kanda Nishiki-cho, Chiyoda-ku,
Tokyo, 101-0054 Japan
Telephone: +81 3 5280 5200
Telefax: +81 3 5280 5170
Website: http://www.jcaa.or.jp

The National Committee of the International Chamber of Commerce (ICC)
Marunouchi Nijubashi Building 6F,
3-2-2 Marunouchi, Chiyoda-ku,
Tokyo, 100-0005 Japan
Telephone: +81 3 3213 8585
Telefax: +81 3 3213 8589
Website: http://www.iccjapan.org

Japan Shipping Exchange Inc.
TOMAC (Tokyo Maritime Arbitration Commission of Japan Shipping Exchange Inc)
Wajun Building 3F
2-22-2 Koishikawa, Bunkyo-ku,
Tokyo, 112-0002 Japan
Telephone: +81 3 5802 8361
Telefax: +81 3 5802 8371
Website: http://www.jseinc.org/en/tomac/index.html

Japan Intellectual Property Arbitration Center
3-4-2 Kasumigaseki, Chiyoda-ku,
Tokyo, 100-0013, Japan
Telephone: +81(0)3 3500 3793
Telefax: +81(0)3 3500 3839
Website: https://www.ip-adr.gr.jp/eng/

9.10 Arbitration Rules of major arbitration institutions?

Upon choosing the JCAA Arbitration Rules, parties have two options to choose from:

Japan Commercial Arbitration Association (traditional Commercial Arbitration Rules):
http://www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitoration_Rules.pdf

Japan Commercial Arbitration Association (newly established Interactive Arbitration Rules):
http://www.jcaa.or.jp/e/arbitration/docs/Interactive_Arbitration_Rules.pdf

The National Committee of the International Chamber of Commerce (ICC):
https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

Japan Shipping Exchange Inc.:
http://www.jseinc.org/en/tomac/arbitration/ordinary_rules.html**Error! Hyperlink reference not valid.**

Japan Intellectual Property Arbitration Center:
https://www.ip-adr.gr.jp/data/e_1_2.pdf

9.11 What is/are the Model Clause/s of the arbitration institutions?

The model clause of the Japan Commercial Arbitration Association (JCAA) is:

"All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association."

9.12 How many arbitrators are usually appointed and which qualifications are required for the arbitrators?

As an expression of party autonomy, the parties are free to determine the number of arbitrators and the appointment procedure.[87] Absent any agreement on the number of arbitrators, there shall be three arbitrators where only two parties arbitrate.[88] If more than two parties arbitrate, the court competent for matters of the arbitration shall specify the number of arbitrators.[89]

The JCAA Rules equally uphold party autonomy for the appointment of arbitrators. The principal number of arbitrators is either one or three. However, if the parties fail to notify the JCAA of their agreement on the number of arbitrators, such number shall be one.[90] Hence, the default numbers of the Arbitration Act and the JCAA Rules differ. The latter prevails, because arbitral rules are incorporated into the arbitration agreement and thus constitute an agreement in the sense of the *lex arbitri*.[91]

87 Art. 16 (1) et. seqq. Arbitration Act.
88 Art. 16 (2) Arbitration Act.
89 Art. 16 (3) Arbitration Act.
90 Art. 26 JCAA Rules.
91 Cf. Partasides/Blackaby, Redfern and Hunter on International Arbitration, 6th Edition, Oxford University Press 2015, para. 1.162.

If three arbitrators shall be appointed, under both, the Arbitration Act and the JCAA Rules, both parties appoint one arbitrator each. The two party-appointed arbitrators eventually appoint the presiding arbitrator. It is further noteworthy that the JCAA Rules contain a specific proceeding for appointing a three arbitrator-tribunal in case of multi-party arbitrations.[92]

Under their distinct autonomy, the parties are additionally free to determine any particular qualification for arbitrators. However, in any case, every arbitrator is required to be impartial.[93] Under the JCAA Rules, arbitrators are furthermore obliged to continuously revise their impartiality during the course of the arbitral proceedings, taking into account recent Japanese judgments.[94] As a factual influence on the appointment of arbitrators, the JCAA maintains a panel of more than one hundred experts in various fields, including both Japanese and non-Japanese arbitrators.

9.13 Is there a right to challenge arbitrators, and if so under which conditions?

In order to preserve efficiency, party autonomy and due process, the Arbitration Act comprises an opportunity to challenge arbitrators. The grounds for challenge are (i.) a discrepancy between the arbitrator's qualification and the party-specified requirements and (ii.) a lack of impartiality. If, particularly in case of three arbitrators, a party challenges the arbitrator which the party itself appointed, the party must have become aware of the grounds for challenge after the appointment.[95]

The procedure is subject to the parties' agreement. Absent such an agreement, the challenging party shall first submit its request to the tribunal itself. Upon rejection of the tribunal, the party may petition the competent court.[96] If the party additionally bases its challenge on the grounds that (i.)

92 Art. 29 JCAA Rules.
93 Cf. Art. 17 (6), 18 (1) Arbitration Act.
94 Art. 24 (4) JCAA Rules; Supreme Court of Japan, December 12, 2017, Sanyo Electric.
95 Art. 18 Arbitration Act.
96 Art. 19 Arbitration Act.

the arbitrator is unable to perform its duties or (ii.) delays his performance, the party may directly petition the court.[97]

9.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

In Japan, there are no restrictions on party representatives particularly in arbitration matters. However, the general restrictions of Japanese Law apply: Exclusively attorneys (*Bengoshi*) are allowed to practice law in Japan.[98] Additionally, "foreign lawyers admitted to practice in Japan" (*Gaikokuhou Jimu Bengoshi*) which are commonly referred to as *Gaiben* may represent parties in arbitration. In any case, lawyers both practicing and appointed as party counsel outside of Japan may represent a party in an arbitration proceeding.[99]

9.15 When and under what conditions can courts intervene in arbitration?

Comparable to many arbitration laws, the Arbitration Act states that a court must not intervene in an arbitration except where explicitly provided in the Arbitration Act. This restriction does not apply to the application for interim measures before state courts.[100] Consequently, if a party to an arbitration agreement files a lawsuit before a court, the court will dismiss the claim on jurisdictional grounds. Beyond that simple principle, there are numerous situations where the multi-facetted relationship between the parties' interests such as party autonomy, efficiency, due process and enforcement raises issues with regard to court interventions.[101]

The interventions that the Arbitration Act explicitly provides for are as follows:

97 Art. 20 Arbitration Act.
98 Art. 72 Lawyers Act.
99 Art. 58-2 Foreign Lawyers Act of 1986, amended in 2003.
100 Art. 15 Arbitration Act.
101 cf. Born, International Commercial Arbitration, Wolters Kluewer 2014, pp. 2522 et. seqq.

- Service of notice (Art. 12(2))
- Appointment of arbitrators (Art. 17(3));
- Challenge of an arbitrator (Art. 19(4));
- Removal of an arbitrator (Art. 20);
- Determination on the jurisdiction of the arbitral tribunal (Art. 23(5));
- Taking of evidence (Art. 35);
- Setting aside of an arbitral award (Art. 44); and
- Enforcement of an arbitral award (Art. 46(1)).

9.16 Do arbitrators have powers to grant interim or conservatory relief?

The Arbitration Act provides that, unless otherwise agreed upon by the parties, a tribunal may take interim measures. If necessary, it may require the party requesting the interim measure to provide sufficient security. [102] However, in contrast to the UNCITRAL Model Law as amended in 2006, the Arbitration Act contains no specific provisions concerning the modification of interim measures, lifting the measures are the possibility to claim damages for wrongful damages. Furthermore, the difficult issue of parallel interim proceedings before state courts and arbitral tribunals is not addressed.[103]

9.17 What are the formal requirements for arbitral awards (form; contents; deadlines; other requirements)?

As to the formal requirements, an arbitral award has to be written and signed. It must state the place of the arbitration as well as the date of the award. Moreover, it shall state the reasons of the decision unless otherwise agreed upon by the parties.[104] The JCAA Rules additionally require that the contact data of the representing counsels, the specific relief sought and

102 Art. 24 Arbitration Act.
103 Cf. Martin Illmer, Rabels Journal on Comparative and Private International Law Vol. 62 (2011), p. 645 et. seqq.
104 Art. 39 Arbitration Act.

granted and the procedural history are stipulated within the award.[105] Furthermore, the JCAA Rules prohibit the disclosure of a dissenting opinion in case the arbitral tribunal consists of three arbitrators, thereby aiming at preventing the parties from challenging the arbitral award.[106] Whereas the Arbitration Act does not contain time requirements for the arbitral award, under the JCAA Rules, the arbitral award shall be rendered within nine months after constitution of the arbitral tribunal.[107]

A tribunal has to notify the parties of the arbitral award and send a copy.[108] In case the JCAA Rules have been agreed, the original award remains with the JCAA.[109] A deposit of the arbitral award at the competent district court, in contrast, is unnecessary.

9.18 On what conditions can arbitral awards be appealed or rescinded?

Generally, an arbitral award is final and binding upon the parties. Under the Arbitration Act, a Japanese court may set aside an award where the arbitral seat was in Japan. The Arbitration Act transfers the UNCITRAL Model Law's restricted grounds for set aside, *inter alia,* a lack of an arbitration agreement and a violation of public policy. [110]

The complex issue whether parties can deliberately agree on a more extensive and comprehensive appeal of arbitral awards before courts is not addressed in the *lex arbitri*. Hence, the validity of a contractually agreed appeal mechanism and a potential invalidity's effect on the arbitration agreement can be heavily discussed. As an illustration: Whereas for instance the German Federal Court of Justice generally upholds a party's agreed appeal mechanism,[111] the Supreme Court of New Zealand restricted an

105 Art. 66 JCAA Rules.
106 Art. 63 JCAA Rules.
107 Art. 43 (1) JCAA Rules.
108 Art. 39 (5) Arbitration Act.
109 Art. 67 JCAA Rules.
110 Art. 44 Arbitration Act.
111 Decision of 1 March 2007, Docket No. III ZB 7/06, para. 19.

appeal on the facts.[112] Similarly, the US Supreme Court banned independent court intervention beyond the grounds in the Federal Arbitration Act.[113] It is uncertain which approach Japanese courts would take if an arbitration clause containing a comprehensive court appeal mechanism was brought before it.

9.19 What procedures exist for the enforcement of foreign and domestic arbitral awards?

Japanese courts generally enforce both foreign and domestic arbitral awards. Arbitral awards shall have the same effect as judgements.[114] In order to apply for enforcement, a party has to provide a copy of the arbitral award, a document certifying that the content of said copy is identical to the arbitral award, and potentially a Japanese translation. Additionally, parties may apply for a civil execution order of an arbitral award before state courts.[115]

The grounds for refusal of enforcement in the Arbitration Act have been contained in correspondence to the New York Convention. In any case, if an application for enforcement falls under the Convention's scope, Japanese courts are required to exclusively and autonomously apply the Convention.[116]

In this regard, it is noteworthy that Japan signed numerous bilateral trade treaties, investment treaties and the Washington Convention. Subject to the statutory provisions concerning the Civil Jurisdiction of Japan with respect to a Foreign State[117], arbitral awards will consequently be enforced against states. Of specific importance is the Japan-China Trade Agreement. Japanese court decisions applied this trade agreement in preference to the New York Convention.[118] Because of a lacking reciprocity requirement[119]

112 Carr v. Gallaway (2014) NZSC 75, paras. 76-86.
113 Hall Street Associates v. Mattel Inc. 170 L.Ed. 2D 254, para. 1.
114 Art. 45 (1) Arbitration Act.
115 Art. 46 (1) Arbitration Act.
116 Cf. Gary Born, International Commercial Arbitration III, 2nd Edition, The Hague 2014, p. 2914 et. seq.
117 Art. 16 Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act. No. 24 of April 24, 2009.
118 Osaka District Court, March 25, 2011, Hanrei Taimizu, 1355, p. 249.

neither Chinese courts nor Japanese courts are able to enforce judgements provided by the courts of the other country. Hence, arbitration clauses in contracts with China are crucial to ensure later enforcement.[120]

9.20 What applies with regard to the costs of arbitration and can a successful party recover its costs?

Fees and costs for lawyers, experts, translations and transportation are typically awarded. The Arbitration Act provides that the parties can agree on any cost allocation of arbitration.[121] If there is no such agreement between the parties, the Law provides that each party shall bear the costs it has disbursed with respect to the arbitral proceedings. The Japanese Arbitration Act does accordingly not provide that the unsuccessful party should always bear the costs of the arbitration. The parties have to agree on an allocation of costs if they consider it appropriate.[122] This is in the line with the allocation of costs in case of ordinary court proceedings in Japan.

Most importantly however, the JCAA Rules contain a tribunal's discretion to allocate the costs between the parties. It shall take both the merits of the dispute and other circumstances into account.[123] The tribunal's cost decision will be treated as part of the arbitral award. Therefore, state courts can exclusively review it under the identical restricted grounds that state courts can apply to arbitral awards.

The administrative fees of the JCAA, including VAT, range from JPY 500,000 for disputes with a value of less than JPY 20 million to JPY 19 million plus 0.05 % of any amount in excess of JPY 10 billion for a dispute with a value of more than JPY 10 billion.[124]

119 Art. 118 Japan Civil Procedural Act.
120 Osaka High Court, April 9, 2003, Hanrei Jiho, 1841, p. 111.
121 Art. 47 (1) Arbitration Act.
122 Art. 49 Arbitration Act.
123 Art. 80 JCAA Rules.
124 Art. 103 JCAA Rules.

9.21 Are there any statistics available on arbitration proceedings in Japan?

Compared to other major arbitration institutions, there still is a small number of arbitration cases brought before the JCAA. Due to the confidential nature of arbitration, however, it remains difficult to access the precise arbitration data. The following statistics, comparing the annual JCAA cases with those brought before the ICC, are available:

	2007	2008	2009	2010	2011	2012	2013	2014	2015
JCAA	15	12	18	27	19	19	26	14	20
ICC	599	663	817	793	795	759	767	791	801

Hosting a community that heavily upholds harmony and amicable dispute resolution, Japan has amongst the lowest ratios of inhabitants in relation to lawsuits. Accordingly, there is only a limited number of arbitrations in Japan, especially in domestic issues. On the other hand, Japan has a long tradition of out-of-court mediation. However, it is very likely for larger Japanese corporations to include an arbitration clause in international contracts which does not necessarily lead to Japan as place of arbitration. Therefore, from an international view, arbitration cases with Japanese corporations involved as a party are seen frequently. Especially if counterparts from China or other Asian countries are involved, Japanese companies increasingly prefer arbitration clauses.

9.22 Are there any recent noteworthy developments regarding arbitration in Japan[125]?

The JCAA Commercial Arbitration Rules have been recently amended and came into effect on January 1, 2019. Particularly, these amended rules contain detailed provisions on the impartiality of arbitrators, the role of tribunal secretaries, the abovementioned disclosure of dissenting opinions by arbitrators as well as changes on arbitrator and administrative fees.

125 Goodrich; Greer: The Modernization of Japan's International Arbitration Infrastructure, Mealey's International Arbitration Report, Volume 25, #12 December 2010, p. 31 – 42

Simultaneously, the JCAA has issued a completely new set of so-called "Interactive Arbitration Rules". By introducing these rules, the JCAA aimed at making disputes more time-efficient and predictable at a lower cost for the parties.[126] Hence, the Interactive Arbitration Rules differ from the JCAA Commercial Arbitration Rules in two main aspects: (1) preliminary communication between the arbitral tribunal and the parties and (2) remuneration for arbitrators. At a stage as early as possible in the arbitral proceedings, the arbitral tribunal shall draft a summary containing each party's factual and legal positions as well as the factual and legal issues that the arbitral tribunal tentatively ascertains arising from this dispute.[127] With regard to assessment of evidence, the tribunal shall express its preliminary factual and legal views on the main issues of the dispute before making a decision whether a witness examination is to be held.[128] At the same time, the remuneration for arbitrators is fixed at a significantly lower level than under the JCAA Commercial Arbitration Rules.[129]

The parties can freely agree on a set of rules out of the described options, however, if they simply refer to "JCAA Arbitration" without specifying the applicable rules, the JCAA Commercial Arbitration Rules will apply.[130] Upon public consultation of the Interactive Arbitration Rules, several foreign lawyers as well as professional arbitrators have expressed doubts whether the abovementioned procedural differences in combination with a reduced remuneration for arbitrators will provide a considerable alternative to the JCAA Commercial Arbitration Rules.[131] It was mainly criticized that the concept of in-depth preliminary communication between the tribunal and the parties is, although not unknown in civil law jurisdictions,[132] is alien to the principle of a fair hearing according to common law. Since the concept of preliminary communication has been formulated broadly without substantial restrictions, parties from common law countries might

126 See "Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs", JCAA, December 7, 2018, p. 10.
127 Art. 48 JCAA Interactive Arbitration Rules
128 Art. 56 JCAA Interactive Arbitration Rules.
129 Art. 92-102 JCAA Interactive Arbitration Rules.
130 See "Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs", JCAA, December 7, 2018, p. 15.
131 See "Public Comments on the Proposed Three Sets of Arbitration Rules and the JCAA's Response and View", JCAA, December 26, 2018, p. 28 et. seqq.
132 Art. 265 German Civil Procedure Act; Art. 164 et seqq. Japan Civil Procedural Act.

be reluctant to choose the Interactive Arbitration Rules. The JCAA has recognized this, but explicitly chose to design the Interactive Arbitration Rules for parties from civil law jurisdictions or for domestic disputes within Japan.[133]

Since the concept of a proactive arbitral tribunal is gaining popularity in international arbitration,[134] the Interactive Arbitration Rules could foster the JCAA's international recognition. However, it remains to be seen in the future to what extent the Interactive Arbitration Rules will be applied in practice.

Name of Authors:	**MR. MICHAEL A. MUELLER**
Name of Law Firm:	**Mueller Foreign Law Office**
Brief Profile:	Michael A. Mueller is a German Attorney at Law ("Rechtsanwalt"). He came to Japan more than 30 years ago for the first time. His legal experience and career with relation to Japan goes back to 1999. In 2007, he established his own independent law firm in Tokyo's governmental district. Attorney Michael A. Mueller is registered in Tokyo as a Foreign Lawyer ("Gaikokuho Jimu Bengoshi") as well as a member of the Tokyo Bar Association ("Toben") and its International Committee. He is also registered in Germany (Berlin District Court) and a member of the Berlin Bar Association. In addition, he is a member of the Japan Commercial Arbitration Association (JCAA) as well as The Japan Association of Arbitrators (JAA) and The German Institution of Arbitration (DIS).
Telephone No.:	+81-3-6805-5161
Fax No.:	+81-3-6805-5162
Email:	info@mueller-law.jp
Website:	http://www.mueller-law.jp

133 See "Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs", JCAA, December 7, 2018, p. 10; "Public Comments on the Proposed Three Sets of Arbitration Rules and the JCAA's Response and View", JCAA, December 26, 2018, p. 28 et. seqq.

134 Cf. Peter Rees, German Arbitration Journal (SchiedsVZ) Vol. 2 (2016), p. 57 et. seqq; Art. 2 Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules).

10. KOREA

BY: MR. HYUNG SOO LEE
MR. JOACHIM NOWAK
MR. ROBERT W. WACHTER
MR. JIN-UK JOSEPH KIM

10.1 Which laws apply to arbitration in the Republic of Korea?

The Korean Arbitration Act (the "Act") applies, and the Act governs both institutional and ad-hoc arbitrations in Korea. The complete text of the Act can be found in English on the website of the Korean Commercial Arbitration Board (the "KCAB"), which is as follows: http://www.kcab.or.kr/jsp/kcab_eng/law/law_01_ex.jsp .

10.2 Is the Republic of Korea's arbitration law based on the UNCITRAL Model Law?

Yes, the current Act is based on the 1985 UNCITRAL Model Law. The Act was first enacted in 1966, and was fully amended with effect as of 31 December 1999, in order to generally adopt the Model Law with minor deviations. The Act had been amended further on 7 April 2001, on 26 January 2002, on 31 March 2010 and on 23 March 2013. In October 2015, the Korean government submitted a proposal requesting to amend the Act which, among others, adopts the 2006 Model Law with minor deviations. The National Assembly approved the proposal, and the amendment came into effect as of 30 November 2016.

10.3 Are there different laws applicable for domestic and international arbitration?

No. The Act applies to both domestic and international arbitrations.

10.4 Has the Republic of Korea acceded to the New York Convention?

Yes, the Republic of Korea has been a member of the New York Convention since 8 February 1973. The Republic of Korea has exercised the reciprocity and commerciality reservations when acceding to the New York Convention pursuant to Article 1. The reservations are as follows: *"By virtue of paragraph 3 of article I of the present Convention, the Government of the Republic of Korea declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State. It further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law."*

10.5 Can Parties agree on foreign arbitration institutions (i) if both parties are domiciled in the Republic of Korea, (ii) if one party is domiciled in the Republic of Korea and the other party abroad?

Yes, in both instances, the parties are free to agree on foreign arbitration institutions.

10.6 Does the Korean arbitration law contain substantive requirements for the arbitration procedure to be followed?

In general, the parties are free to agree on the procedures for arbitration, as the Act recognizes the principle of party autonomy, subject to the mandatory provisions of the Act (Article 20(1) of the Act). Although the Act does not clearly specify which of its provisions are mandatory, the following are widely considered to be provisions that are required under the Act: (i) an arbitrator's duty to disclose information on whether there exists any circumstances that might give rise to justifiable doubts on the arbitrator's impartiality or independence (Korean Supreme Court Decision No. 2004Da47901 dated 29 April 2005) (Article 13(1) of the Act) and

(ii) equal treatment of the parties in the arbitrational process with a full opportunity to present one's case (Article 19 of the Act). In addition, the following procedural provisions require attention as well: (iii) Article 24(1) of the Act, which requires the claimant to submit a Statement of Claim which includes the request and grounds for relief and the respondent to submit a Statement of Defense, by the dates agreed between the parties or designated by the arbitral tribunal; (iv) Article 25(1) of the Act, which requires the arbitral tribunal to decide whether to hold oral hearings or to conduct the arbitration solely based on written documents, unless agreed between the parties, and (v) Articles 26(1) and 26(2) of the Act, which require the arbitral tribunal to terminate the arbitral proceedings, if the claimant fails to submit a Statement of Claim in accordance with Article 24(1); or proceed with the arbitral proceedings, if the respondent fails to file a Statement of Defense in accordance with Article 24(2) without deeming that the respondent has admitted any of the claimant's allegations.

If the parties fail to reach an agreement on the procedures for arbitration, the arbitral tribunal may, subject to the provisions of the Act, conduct arbitration in such manner as it considers appropriate (Article 20(2) of the Act).

10.7 Does a valid arbitration clause bar access to state courts?

Yes, if a party to an arbitration raises a defense based on the existence of a valid arbitration agreement, the court is required to dismiss the suit, unless the arbitration agreement is null and void, inoperative or incapable of being performed (Article 9 of the Act).

10.8 What are the main arbitration institutions in the Republic of Korea?

The KCAB is the main and only officially recognized arbitration institution in the Republic of Korea. The KCAB was established in 1966 and has offices in Seoul, Busan, Los Angeles, and Shanghai. The KCAB administered more than 380 arbitration cases in 2017. There are over 1,200 arbitrators in the KCAB's Panel of Arbitrators. The panels include well

recognized professionals from diverse backgrounds, including academia, law and business. As of 2017, there are more than 250 arbitrators focusing solely on international arbitration from which the KCAB appoints the arbitrators. It is, however, not mandatory for parties to resolve their disputes at the KCAB.

As of April 2018, the KCAB established KCAB INTERNATIONAL, which is a new independent division within the KCAB which specializes in the administration and promotion of international arbitration services. KCAB INTERNATIONAL consults with the International Arbitration Committee, a group of 18 leading arbitration practitioners worldwide to ensure that the KCAB practices are consistent with best practices in the international arbitration community.

The Seoul International Dispute Center ("Seoul IDRC") was established in May 2013 with the support of the Korean Bar Association, the KCAB, the Seoul Metropolitan Government, the Ministry of Justice of the Republic of Korea and some arbitral institutions including, but not limited to, the ICC, the HKIAC, and the SIAC. It provides hearing rooms and facilities for international arbitrations including those held in Korea under the KCAB or other institutional rules. As of 20 April 2018, the Seoul IDRC has been relocated to the same building where the main office of KCAB is located.

10.9 Addresses of major arbitration institutions in the Republic of Korea?

The main office of the KCAB is located at (Samseong-dong, Trade Tower), 43rd Floor, 511 Yeongdong-daero, Gangnam-gu, Seoul 06164, Republic of Korea, with the website and contact information as follows: http://www.kcab.or.kr, tel. +82-(0)2-551-2000, facsimile +82-(0)2-551-2020.

The Busan office of the KCAB is located at (Munhyeon-dong, BIFC Bldg.), 52nd Floor, 40, Munhyeongeumyung-ro, Nam-gu, Busan 48400, Republic of Korea.

The Seoul IDRC is located at 18 Fl. Trade Tower, 511 Yeongdong-daero (Samseong-dong), Gangnam-gu, Seoul 06164 Korea, with the website as follows: www. http://www.sidrc.org.

10.10 Arbitration Rules of major arbitration institutions?

The KCAB has two sets of rules: the Domestic Arbitration Rules (the "KCAB Domestic Rules"), and the International Arbitration Rules (the "KCAB International Rules"). The KCAB Domestic Rules are designed to govern procedures for domestic arbitration matters and have been revised and fully approved by the Korean Supreme Court to come into effect on 30 November 2016, whereas the KCAB International Rules revised in 2016 apply to arbitration proceedings commenced after 1 June 2016, where one of the parties has its place of business in any state other than Korea or the venue of the arbitration is designated outside of the Republic of Korea, unless the parties explicitly agree otherwise.

Both arbitration rules can be accessed at the KCAB website in English at http://www.kcab.or.kr/jsp/kcab_eng/law/law_02_ex.jsp.

10.11 What is/are the Model Clause/s of the arbitration institutions?

The KCAB Domestic Rules recommend the following model clause for future disputes:

"*Any disputes arising out of or in connection with this contract shall be finally settled by arbitration in Seoul in accordance with the Domestic Arbitration Rules of the Korean Commercial Arbitration Board.*"

The KCAB Domestic Rules recommend the following model clause for existing disputes:

" We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the KCAB Domestic Arbitration Rules: [brief description of the dispute]".

The KCAB International Rules recommend the following model clause for future disputes:

"Any disputes arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the International Arbitration Rules of the Korean Commercial Arbitration Board.
The number of arbitrators shall be [one / three]
The seat, or legal place, of arbitral proceedings shall be [Seoul / South Korea]
The language to be used in the arbitral proceedings shall be [language]".

The KCAB International Rules recommend the following model clauses for existing disputes:

"We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the KCAB International Arbitration Rules: [brief description of the dispute]
The number of arbitrators shall be [one / three]
The seat, or legal place, of arbitral proceedings shall be [city / country]
The language to be used in the arbitral proceedings shall be [language]".

10.12 How many arbitrators are usually appointed?

The parties shall be free to determine the number of arbitrators by agreement according to Article 11(1) of the Act. Almost all cases are decided by (1) or three (3) arbitrators. If the parties fail to reach an

agreement on the number of arbitrators, the default number is three (3) pursuant to Article 11(2) of the Act.
On the other hand, pursuant to the first sentence of Article 11 of the KCAB International Rules, a dispute shall be heard by a sole arbitrator as a general rule. However, the rules also stipulate that a case may be heard by three arbitrators if the parties have agreed to do so or, in the absence of such an agreement, the Secretariat of the KCAB determines, in its discretion, that it would be appropriate, taking into consideration the parties' intentions, the amount in dispute, the complexity of the dispute, and other relevant circumstances (second sentence of Article 11 of the KCAB International Rules).

The KCAB Domestic Rules require the Secretariat to appoint either one or three arbitrators, unless the parties agree otherwise (Article 19(1) of the KCAB Domestic Rules).

10.13 Is there a right to challenge arbitrators, and if so under which conditions?

Yes. Article 13(1) of the Act stipulates that an arbitrator may be challenged if circumstances exist that are likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties. The grounds for challenge by a party who nominated or who participated in the appointment of an arbitrator shall be limited to those that the challenging party becomes aware of after the appointment (Article 13(2) of the Act). The parties are free to agree on a procedure for challenging an arbitrator (Article 14(1) of the Act). Failing such an agreement, a party challenging an arbitrator must submit a written application to the arbitral tribunal within 15 days of either (i) the constitution of the arbitral tribunal, or (ii) becoming aware of the grounds for challenge. Unless the challenged arbitrator withdraws, or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge (Article 14(2) of the Act). If the arbitral tribunal rejects the application, the challenging party may, within 30 days of being notified of the decision, request that the court decide on the challenge (Article 14(3) of the Act). In such case, the arbitral tribunal may proceed with the arbitration or render an award, even when the process for challenge at the court is

pending. The court's decision is final and not subject to appeal (Article 14(4) of the Act).
The KCAB International Rules and the KCAB Domestic Rules also set forth similar grounds for the challenge of arbitrators (Article 14 of the KCAB International Rules and Article 23 of the KCAB Domestic Rules).

10.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

Article 7 of the KCAB International Rules provides that a party may be represented by any person of its choice in proceedings, subject to such proof of authority as the arbitral tribunal may require. Although not specifically required under the Rules, the KCAB's normal practice is to request proof of authority even before the constitution of the arbitral tribunal.

Article 6 of the KCAB Domestic Rules provides that a party may be represented by counsel or such other persons as shall be recognized to be proper; however, the tribunal reserves the right to prohibit representation by such persons as deemed improper for arbitral proceedings. The arbitral tribunal may require a written proof of the authority of any party representative under the KCAB Domestic Rules also.

10.15 When and under what conditions can courts intervene in arbitration?

In principle, the Korean courts can only intervene or support arbitration proceedings only when expressly permitted under the Act (Article 6 of the Act). Court interventions or assistance which are allowed under the Act include: (i) court-issued interim measures before the commencement of arbitration and during the arbitration (Article 10 of the Act), (ii) appointment of arbitrators (Articles 12(3) and 12(4) of the Act), (iii) challenge of arbitrators (Article 14(3) of the Act), (iv) termination of the mandate of arbitrators (Article 15(2) of the Act), (v) jurisdiction and the scope of the arbitral tribunal (Article 17(6) of the Act), (vi) approval and enforcement of interim measures issued by the arbitral tribunal (Article 18-7(1) of the Act), (vii) challenge of tribunal-appointed experts (Article 27(3)

of the Act), (viii) assistance in taking of evidence (Article 28 of the Act), and (ix) recognition/enforcement and annulment of arbitral awards (Articles 36 through 39 of the Act). Notably, the new amendments made to the Act in 2016 make it possible for the arbitral tribunal to cooperate together with the court and essentially supervise the court's taking of evidence, rather than having the court gather evidence alone and later providing a report to the arbitral tribunal (Article 28(3) of the Act). The amendments further provide that the competent court may order witnesses or document holders to appear before the arbitral tribunal or produce documents (Article 28(5) of the Act).

As of this date, we are unaware of any anti-arbitration injunctions issued by Korean courts. Notably, the Korean Supreme Court recently rejected a party's application seeking an order to suspend a pending arbitration proceeding (Supreme Court Decision Case No. 2017*Ma*6087 dated 2 February 2018).

10.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes, Article 18 of the Act states that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, 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. In the 2016 amendments to the Act, the National Assembly adopted most of the provisions of the 2006 Model Law amendments for interim measures. In such cases, the arbitral tribunal may determine the amount of security to be provided by the respective party in lieu of such interim measure, and order the party requesting the interim measure to provide appropriate security. In order for a party to enforce the interim relief granted by the arbitral tribunal, it may file for a court order confirming that the interim relief is enforceable. However, it is understood that interim measures will only be enforced by a Korean court if the arbitration is seated in Korea and that the order that is made by the arbitral tribunal is compatible with Korean law. In this regard, although arbitral tribunals have more discretion when considering what type of interim measures they consider necessary, one

should approach with caution if it intends to enforce such interim orders through the courts of Korea.

Article 37 of the KCAB International Rules and Article 35 of the KCAB Domestic Rules also allow for arbitral tribunals to issue interim measures.

10.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

Article 32 of the Act stipulates that the award shall be made in writing, signed by all arbitrators as a general rule, stating the reasons upon which it is based (unless the parties have agreed that no reasons are to be given or the award is on agreed terms meaning that the parties settle the dispute), its date and place of the arbitration itself. The award shall be delivered to each party, and the original award shall be sent to and deposited with the competent court (accompanied by a document verifying such delivery).
The Act does not provide for the period within which an arbitral award must be issued. Article 38 of the KCAB International Rules requires the arbitral award to be delivered within 45 days from the date on which final submissions are made or the hearings are closed, whichever is later; the KCAB Secretariat may, however, extend the time limit for the final award pursuant to a reasoned request from the arbitral tribunal or on its own initiative as it deems necessary. Article 40(2) of the KCAB Domestic Rules requires the arbitral tribunal to render an award within 30 days from the date of close of the hearings.

10.18 Under what conditions can arbitral awards be (i) appealed or (ii) rescinded?

An arbitral award cannot be appealed. Article 36(2) of the Act provides that an arbitral award may be set aside by a court only if a party seeking to set aside the award demonstrates that: (i) a party to the arbitration agreement was legally incapable at the time of the agreement or the agreement is invalid under the governing law (or under Korean law, if there is no governing law); or (ii) the party seeking to set aside was not given a proper notice concerning appointment of arbitrators or arbitral

proceedings, or was unable to present his/her case; or (iii) the tribunal had no jurisdiction; or (iv) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the parties' agreement (or under the Act, absent the parties' agreement). The court may also set aside an arbitral award if it finds on its own initiative that the subject matter of the dispute is not capable to be settled by arbitration under Korean law or the recognition and enforcement is in conflict with the good morals or other public policy of the Republic of Korea.

An application for the setting aside of an award may not be made after three months have elapsed from the date on which the party making the application received the award (Article 36(3) of the Act).

10.19 What procedures exist for enforcement of foreign and domestic awards?

Arbitral awards, both domestic and foreign, are enforced by Korean courts. Notably, the amendments made to the Act in 2016 enable the courts to enforce arbitral awards by issuing a court order (rather than issuing a formal judgment, as was previously the case), which is an effort to expedite enforcement proceedings. In practice, courts rarely deny enforcement of arbitral awards in Korea.

10.20 Can a successful party in the arbitration recover its costs?

Yes. The 2016 amendments to the Act specify that the arbitral tribunal has the authority to apportion arbitration costs between the parties, having regard to all of the circumstances of the case, unless the parties agreed otherwise (Article 34-2 of the Act).

Article 56 of the KCAB Domestic Rules provides that the attorney fees or the costs incurred in connection with the proceedings including inspection, expert examination, witness interrogation and translation shall be borne by the parties in accordance with the apportionment fixed in the award by the tribunal by taking into account the circumstances of the case, unless otherwise agreed between the parties.

In contrast to the KCAB Domestic Rules, Article 52(1) of the KCAB International Rules provides that the arbitration costs including administrative fees are in principle borne by the losing party, unless specifically apportioned by the tribunal as it deems appropriate. Pursuant to Article 53, the arbitral tribunal shall have the power to allocate legal costs and other necessary expenses incurred in connection with the proceedings by taking into account the circumstances of the case, unless otherwise agreed between the parties.

10.21 Are there any statistics available on arbitration proceedings in the Republic of Korea?

The KCAB reportedly handled 385 arbitration cases in 2017, which is slightly higher than the number from the previous year (381 arbitration cases in 2016). The total number of international arbitration cases was 78 cases, accounting for 20.2% of the total. International cases involved parties from such jurisdictions as the United States, China, Turkey, Vietnam, Japan, Hong Kong, Germany, France, Taiwan, Iran and other countries. The total claim amount for international arbitration cases from 2016 to 2017 has also increased by 118.1% to KRW 466,300,000,000. Statistics in more detail are available at the KCAB website (in Korean) as follows:
http://www.kcab.or.kr/servlet/kcab_kor/claim/1000?cl_clsf=1&sNum=5&dNum=1&mi_code=claim.

10.22 Are there any recent noteworthy developments regarding arbitration in the Republic of Korea (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

As indicated in 10.2 and 10.10, the Act, along with the KCAB Domestic Rules and KCAB International Rules, underwent certain revisions in 2016 as below:

The Act has now codified interim or provisional measures in detail including requirements, suspension, revocation and enforcement thereof set

forth in the 2006 UNCITRAL Model Law (Articles 18 through 18-8 of the Act). Proceedings concerning the recognition and enforcement of arbitral awards have been streamlined as the court may now issue a decision recognizing and enforcing the award without holding a mandatory hearing while some of the previously required documents no longer need to be filed with the court (Article 37 of the Act). The Act has also eased requirements for written arbitration clauses (Article 8 of the Act), reinforced the court's cooperation with taking evidence (Article 28 of the Act) and clarified that the arbitral tribunal has power to allocate arbitration costs among the parties (Article 34-2 of the Act).

As for the KCAB International Rules, "emergency measures by emergency arbitrator" are now included in the rules, authorizing an emergency arbitrator to grant parties urgent conservatory and interim relief before the composition of the arbitral tribunal (Appendix 3 of the KCAB International Rules). The Rules have also enabled joinder of third parties to the existing proceedings for the sake of judicial economy and to prevent inconsistent outcomes between arbitral awards (Article 21 of the KCAB International Rules). In addition, the KCAB Secretariat may now refuse to confirm the nomination of any party-appointed arbitrators that it deems would compromise the impartiality and independence of arbitral tribunals (Article 13 of the KCAB International Rules).

The KCAB Domestic Rules went through rather minor revisions including allocation of arbitration costs as discussed in 10.20.

Following the new amendments made to the Act in 2016, a new law came into force aiming to improve and promote arbitration in Korea – the Arbitration Industry Promotion Act, which became effective on 28 June 2017. This law reflects the Korean government's recognition that arbitration is an important industry, and signals the legislature's commitment to investing in arbitration. This commitment is apparent in the text of the Promotion Act, which states its purpose as encouraging the use of arbitration, and attracting more international arbitration to Korea (Article 1 of the Promotion Act).

Name of Authors:	**MR. HYUNG SOO LEE** **MR. JOACHIM NOWAK** **MR. ROBERT W. WACHTER** **MR. JIN-UK JOSEPH KIM**
Name of Law Firm:	**Hwang Mok Park P.C. (HMP)**
Brief Profile:	Following its establishment in 1977, Lee & Ko has become one of Korea's premier full-service law firms, widely recognized for its leadership and outstanding success in every area of legal practice. As has been confirmed in numerous reviews conducted by Korea's major media outlets, as well as ratings produced by international law firm rating services, Lee & Ko enjoys one of the highest levels of client satisfaction and a particularly excellent reputation for the quality of the firm's legal services. Currently, Lee & Ko has 670 plus lawyers working in several practice groups for a range of industries and businesses. Hyung Soo Lee (Partner), a Korean lawyer, known for his participation and success in cases which had written law history in Korea, and his outstanding know-how on Korean law and business issues as well as his strong commitment to his clients. Joachim Nowak is the first German lawyer ever, who came to Korea to work in a Korean law firm. Since 1999, he is an arbitrator of the Korean Commercial Arbitration Board, and since 2009 he is the "*Vertrauensanwalt der Österreichischen Botschaft in der Republik Korea*". He is also a German *Bankkaufmann* and Entrepreneur. Robert Wachter is co-head of the International Arbitration & Cross-Border Litigation Group at Lee & Ko. He has acted as counsel, arbitrator or arbitral secretary in more than 75 international arbitration cases brought under all of the major arbitration rules, including the ICC, KCAB, VIAC, Swiss Chambers, SIAC, LCIA, SCC, JCAA and UNCITRAL arbitration rules.

	Jin-uk Joseph Kim is a member of Lee & Ko's International Arbitration & Cross-Border Litigation Group. He is experienced with leading international arbitral institutions such as the ICC, SIAC, HKIAC, AAA and KCAB.
Telephone No.:	+82 2 772 4000
Fax No.:	+82 2 772 4001
Email:	hyungsoo.lee@leeko.com / nowak@leeko.com / robert.wachter@leeko.com / jinuk.kim@leeko.com
Website:	www.leeko.com

11. LAOS

BY: MR. VIACHESLAV BAKSHEEV
MR. SOULIGNASACK LIEMPHRACHANH

11.1 Which laws apply to arbitration in the Laos People's Democratic Republic?

The two main laws which apply to arbitration in Lao PDR are:

1. The Law on Resolution of Economic Disputes No. 51/NA (22 June 2018) ("**Law on Resolution of Economic Disputes**") which sets out the principles, regulations and measures for the resolution of economic disputes through mediation or arbitration involving individuals, legal entities or organisations undertaking business in international trade or foreign investment in the Lao PDR; and

2. The Law on Civil Procedures No.13/NA (4 July 2012)("**Law on Civil Procedures**") which governs dispute resolution procedures for civil matters within the jurisdiction of the Lao PDR including the recognition of domestic and foreign arbitration awards.

11.2 Is the Lao PDR arbitration law based on the UNCITRAL Model Law?

No, the Lao PDR arbitration law is not based on the UNCITRAL model law.

11.3 Are there different laws applicable for domestic and international arbitration?

The Law on Resolution of Economic Disputes is applicable to domestic and international arbitration on economic disputes and the Law on Civil

Procedures is applicable to domestic and international arbitration for civil matters in general.
The Law on Civil Procedures governs the enforceability of arbitration awards for domestic and international arbitration.

11.4 Has the Lao PDR acceded to the New York Convention?

The Lao PDR acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("The New York Convention") on 17 June 1998. The Prime Minister announced that the New York Convention came into force in the Lao PDR on 15 September 1998.

It is worth noting that the Lao PDR is not a member to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971 ("The Hague Convention of 1971").

11.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Yes, Article 5 of the Law on Resolution of Economic Disputes permits parties undertaking business in international trade or foreign investment in the Lao PDR to nominate foreign or international arbitration institutions as their dispute resolution mechanism in an agreement regardless of whether both parties are domiciled in the Lao PDR or if only one party is domiciled in the Lao PDR.

For disputes relating to the performance of a contract or claim for compensation and damages pursuant to a contract, Article 101 of the Law on Contract and Tort No 01/NA (8 December 2008) ("Law on Contract and Tort") stipulates that the parties must first endeavor to resolve their dispute through amicable means or negotiations, failing which they have a right to submit the matter to mediation, arbitration, or file a claim to the court. Similarly, the Law on Contract and Tort permits parties to nominate

a foreign arbitration institution regardless of the domicile status of the parties.

11.6 Does the Lao PDR arbitration law contain substantive requirements for the arbitration procedures to be followed?

Article 5 of the Law on the Resolution of Economic Disputes permits parties to choose the arbitration rules and procedures governing the foreign arbitration institution or international organisation they have nominated to submit their economic dispute. Arbitration rules and procedures governing domestic commercial arbitration in the Lao PDR are provided in Articles 34 to 47 of the Law on the Resolution of Economic Disputes.

For an arbitral award to be enforceable in the Lao PDR, arbitration proceedings, both domestic and foreign, must comply with the basic guarantees provided for under Articles 8 to 14 of the Law on the Resolution of Economic Disputes which requires the independence and impartiality of the arbitrator, the guarantee of equity in the award, willingness of the parties to submit the dispute to arbitration, equal treatment of the parties without discrimination, mutual understanding of proceedings (by using a common language or an interpreter) and strict confidentiality of arbitration proceedings unless authorised by the parties.

11.7 Does a valid arbitration clause bar access to state courts?

Yes, the parties are free to choose arbitration as their dispute resolution mechanism in which case the Peoples' Court of Lao PDR will have no jurisdiction to hear the matter.

However, a party can apply to the court to:

1. Enforce an arbitral award under Article 42 of the Law on Civil Procedures and Article 53 of the Law on Resolution of Economic Disputes;

2. Set aside an arbitral award according to Article 47 of the Law on Resolution of Economic Disputes.

11.8 What are the main arbitration institutions in the Lao PDR?

The main arbitration institutions in the Lao PDR for economic disputes are:

- The "Centre of Economic Dispute Resolutions" ("CEDR") operating at the central level under the supervision of the Ministry of Justice with status equivalent to a department within the Ministry. The CEDR is responsible for liaising with the concerned parties, examining and receiving economic dispute applications, petitions and evidence from concerned parties, and appointing arbitrators in accordance with the laws and regulations.

- The Offices of Economic Dispute Resolution ("OEDR") operating at the provincial level under the supervision of the Provincial Departments of Justice. The OEDR have the same rights and functions as the CEDR.

- Industry-specific arbitration committees within some government line ministries in the Lao PDR such as the Labour Arbitration Committee within the Ministry of Labour and Social Welfare.

11.9 Addresses of major arbitration institutions in Lao PDR?

Centre of Economic Dispute Resolutions
Ministry of Justice
Lane Xang Avenue, PO Box 08
Vientiane, Lao PDR
Tel: +856 21 451 920

Individual OEDRs are located in the Justice Office of each province in Lao PDR: Phongsaly Province, Luang Namtha Province, Oudomxay Province,

Luang Prabang Province, Hua Phanh Province, Xieng Khuang Province, Khammuan Province, Savannakhet Province and Champasak Province.

11.10 Arbitration Rules of major arbitration institutions?

The arbitration rules are expected to be passed.

11.11 What is/are the Model Clause/s of the arbitration institutions?

There are no laws, regulations or guidelines in the Lao PDR proposing a Model Clause for contracting parties to use arbitration for dispute resolution. The Law on the Resolution of Economic Disputes and Law on Contract and Tort simply require that it is clearly the mutual agreement of the parties to voluntarily submit their dispute to foreign or domestic arbitration for dispute resolution.

11.12 How many arbitrators are usually appointed?

As mentioned previously, Article 5 of the Law on the Resolution of Economic Disputes permits parties to choose the arbitration rules and procedures governing the foreign arbitration institution or international organization they have nominated to submit their dispute including any procedures on the appointment of an arbitrator or an arbitration tribunal.

Pursuant to Article 26 of the Law on the Resolution of Economic Disputes, the parties may agree on the number of arbitrators to be appointed to the panel.

11.13 Is there a right to challenge arbitrators, and if so under which conditions?

Yes, pursuant to Article 27 of the Law on the Resolution of Economic Disputes parties have the right challenge the appointment of an arbitrator on the basis of a conflict of interest or direct relations with the parties. In

the event that an arbitrator is withdrawn, the respective CEDR or OEDRs must appoint a replacement arbitrator within seven days.

11.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no restrictions to the parties' representation in arbitration proceedings and parties have the right to be self-represented or represented by a person of their choosing. However, domestic arbitration at the CEDR or OEDR in the Lao PDR must be conducted in Lao language unless otherwise agreed by the parties.

11.15 When and under what conditions can courts intervene in arbitrations?

As mentioned previously, the jurisdiction of the court is barred from hearing a matter if the parties have chosen to submit the dispute to arbitration. However, pursuant to Articles 47, 52 and 53 of the Law on the Resolution of Economic Disputes and Article 41 of the Law on Civil Procedures, if a party subsequently submits the arbitration award within fifteen days of receiving the arbitration award to the court for an enforcement order of an arbitration award or to challenge the enforceability of the arbitral award, the court will have jurisdiction to determine the enforceability of the arbitral award.

The enforceability of an arbitral award in the Lao PDR will be subject to the determination of court on whether there has been any violation of laws and regulations on the conduct of proceedings, if the enforcement of the arbitral award is in breach of any international treaties which Lao PDR is a party to or if the enforcement of the award will affect the national security, social peace and environment of the Lao PDR. If the court finds any of the above issues in the positive, it will not issue an order certifying the enforcement of the arbitral award and such an order is not subject to appeal. Parties which had previously submitted their dispute to CEDR or OEDRs will have the right to re-submit their matter to the respective arbitration body to reconsider the arbitration award.

11.16 Do arbitrators have powers to grant interim or conservatory relief?

Article 41 of the Law on the Resolution of Economic Disputes provides that the arbitration tribunal can, by application of either party, request the court to issue an order to seize, confiscate, or take any other appropriate measure to protect the interests and rights of the applicable party within five working days from the day of receipt of the request.

11.17 What are the formal requirements of an arbitral award (form; contents, deadlines, other requirements)?

- ### Formal requirements for arbitral awards

Article 45 of the Law on the Resolution of Economic Disputes sets out the contents which are required to be contained in the arbitral award.

In summary, this includes:

a) Full names, age, occupation, nationality, present address, and location of activities of parties and their representatives;

b) Full names of the arbitrators and the minute taker;

c) Time, date, subject, and reference number of the dispute(s) and place the decision was issued;

d) Main content of the dispute(s), the decision(s) and reasons for the arbitral award;

e) division of fees and service charges and responsible party for payment; and

f) parties' right to challenge the decision of the arbitration tribunal

- ## Deadlines for issuing arbitral awards

  Article 37 of the Law on the Resolution of Economic Disputes provides that the arbitration tribunal should resolve disputes within three months from the day the arbitration tribunal was appointed, except under exceptional circumstances relating to the presentation of evidence, but does not provide a formal deadline for the issuing of an arbitral award.

- ## Other formal requirements for arbitral awards

  Article 43 of the Law on the Resolution of Economic Disputes provides that the decision of the arbitration tribunal must be read in the presence of the parties or their representatives and must be effective from the date the decision is made.

11.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in the Lao PDR?

Generally, an arbitral award cannot be rescinded. However, a party may appeal the enforceability of the arbitral award in the court within thirty days of receiving the arbitral award for reasons outlined in Articles 47, 52 and 53 of the Law on the Resolution of Economic Disputes and Article 41 of the Law on Civil Procedures including any violation of laws and regulations on the conduct of proceedings, breach of any international treaties which the Lao PDR is a party to or if the enforcement of the award will affect the national security, social peace and environment of the Lao PDR.

As mentioned previously, if the court finds any of the above issues in the positive, it will not issue an order certifying the enforcement of the arbitral award and such an order is not subject to appeal. Parties which had previously submitted their dispute to CEDR or OEDRs will have the right to re-submit their matter to the respective arbitration body to reconsider the arbitral award.

11.19 What procedures exist for enforcement of foreign and domestic awards in the Lao PDR?

Domestic arbitral awards from the CEDR or OEDRs are recognised as binding on the parties involved and parties are obliged under Article 50 of the Law on the Resolution of Economic Disputes to implement the outcome of the award within a period of 30 days from when the decision was made. In the event that the parties do not self-enforce the obligations of the arbitral award, either party may submit the arbitral award to the court and seek an enforcement order to be issued pursuant to Article 51 of the Law on the Resolution of Economic Disputes.

Foreign arbitral awards and decisions are recognised by the Lao PDR, subject to certification by the court. Pursuant to Article 53 of the Law on the Resolution of Economic Disputes and Article 41 of the Law on Civil Procedures, the court will only certify the arbitration awards and decisions of foreign or international arbitration if the following conditions are satisfied: (1) both parties hold the nationality of member countries to the New York Convention of 1958; (2) the arbitration award does not violate the Lao PDR Constitution, laws and regulations relating to national security, social peace and environment; (3) the party obliged to repay any debt under the arbitral award has property, activities, shares, money or other assets in the Lao PDR; and (4) the arbitration proceedings did not violate any procedural laws and regulations. Once these conditions have been met and the arbitral award or decision is certified by the court, the award or decision may then be implemented and enforced in accordance with the Law on Judgment Enforcement No. 04/NA (25 July 2008). If the court dismisses the application for certification of the arbitral award or decision, it may order the parties to re-submit the matter to arbitration.

11.20 Can a successful party in the arbitration recover its costs in Lao PDR?

There are no laws or regulations in Lao PDR stipulating the recovery of any costs, legal fees and expenses incurred by the successful party in arbitration. Parties may, however, agree on the responsible party to pay any such costs,

legal fees and expenses borne by either or both parties and any other costs and fees required to be paid pursuant to the arbitral award or decision under Article 55 of the Law on the Resolution of Economic Disputes.

11.21 Are there any statistics available on arbitration proceedings in Lao PDR?

Domestic arbitration proceedings are not required to be published in the Lao PDR. Based on the research undertaken, there were 258 arbitration cases from 2006-2012.

At the time of writing, we are not aware of any foreign arbitral award which has successfully obtained certification and enforcement from the court.

11.22 Are there any recent noteworthy developments regarding arbitration in Lao PDR (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

At the time of writing, we are aware of a draft Decree on the Instruction for the Implementation of the Law on Economic Dispute Resolution which seeks to clarify selected articles on the Law on Economic Dispute Resolution. We are not aware of any progress on this draft Decree at this stage.

Name of Author:	**MR. VIACHESLAV BAKSHEEV**, Senior Legal Adviser **MR SOULIGNASACK LIEMPHRACHANH**, Senior Lao Legal Adviser
Name of Law Firm:	**Arion Legal (Lao) Sole Co., Ltd**
Brief Profile:	Arion Legal has been operating in Vientiane, Lao PDR since 2008 and is the only Australian law firm with a registered office in Lao PDR. Arion Legal has a team of dedicated and experienced Australian and expatriate qualified lawyers and local Lao lawyers, providing international standard legal and tax advice and services for local and foreign investors operating in or seeking to invest in Lao PDR. Arion Legal has specialist expertise in large-scale investment projects and concession activities in Lao PDR including energy and mining, banking and finance, construction and infrastructure, agriculture and corporate activities, and has represented local and international investors, project developers, lenders and the Government of Lao PDR. As one of the longest standing law firms in Lao PDR, Arion Legal is a trusted and reliable operator and acted as legal counsel for the Australian Embassy, the British Embassy and the Embassy of the Republic of Singapore in the country. Arion Legal also has a strong local community presence and is a member of the Australian Chamber of Commerce, the European Chamber of Commerce and Industry and the British Business Group in Lao PDR.
Telephone No.:	+856 21 313 718
Fax No.:	+856 21 319 005
Email:	viacheslavbaksheev@arionlegal.com soulignasack@arionlegal.com
Website:	www.arionlegal.la

12. MACAU

Macau Special Administrative Region of the People's Republic of China ("Macau SAR")

12.1 Which laws apply to arbitration in Macau SAR?

The principal laws governing arbitration in the Macau SAR are:

- Decree-Law no. 29/96/M of 11 June (as amended by Decree-Law no. 19/98/M of 11 May and Decree-Law no. 110/99/M of 13 December). This contains the governing rules on domestic arbitration.

- Decree-Law no. 55/98/M of 23 November ("Arbitration Law"). This contains the framework of international commercial arbitration.

12.2 Is the Macau SAR arbitration law based on the UNCITRAL model law?

Macau currently follows the dual UNCITRAL rules relating to commercial arbitration, applying one set of rules for international arbitration and another one for domestic arbitration.

The Arbitration Law corresponds almost entirely to the original 1986 version of the UNCITRAL Model Law on International Commercial Arbitration 1985, except for changes made to Article 7(1) and Article 36(2).

The changes were made to align the object of arbitration and grounds for refusing recognition or enforcement of arbitral awards with the rules of the Macau SAR Civil Procedure Code.

12.3 Are there different laws applicable for domestic and international arbitration?

There are different laws applicable to domestic and international arbitration: Decree-Law no. 29/96/M governs domestic arbitration and the

Arbitration Law (Decree-Law no. 55/98/M) governs international commercial arbitration.

12.4 Has Macau SAR acceded to the New York Convention?

Macau is a party to the New York Convention through the Extension Declaration of the New York Convention applicability made by China on 19 July 2005, subject to the reciprocity reservation (i.e. it will only enforce arbitration awards from other signatory states) and the commerciality reservation (i.e. it will only enforce arbitration awards deemed commercial under national law).

12.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

According to Macau SAR Law, in both situations' parties may agree on a foreign arbitration institution.

12.6 Does the Macau SAR arbitration law contain substantive requirements for the arbitration procedures to be followed?

Section IV (Articles 20 to 25) of the Arbitration Law sets out the basis on which the arbitral proceedings are held. Most of the rules are subsidiary or auxiliary except the mandatory rule that the agreement to submit to arbitration is made in written form (Articles 6 and 7, Arbitration Law).

12.7 Does a valid arbitration clause bar access to state courts?

"If the clause foresees arbitration as the exclusive mean to resolve the dispute, access to judicial courts will not be allowed. Should a party take legal action in a judicial court, the court should find itself incompetent to try the dispute."-

12.8 What are the main arbitration institutions in Macau SAR?

There are five established arbitration institutions in the Macau SAR. The principal institutions designated for commercial arbitration are:

- World Trade Center Macau Arbitration Center; and
- Voluntary Arbitration Center of the Macau Lawyers' Association.

Although these two are generally of equal status, the World Trade Center Macau Arbitration Center is generally considered to be more suited to disputes with an international component.

The Macau Lawyers' Association is promoting Macau as an international centre to resolve the disputes between Chinese and Portuguese speaking countries' entities.

12.9 Addresses of major arbitration institutions in Macau SAR?

- World Trade Center Macau Arbitration Center: *http://www.wtc-macau.com/arbitration/eng/index.htm*.
- Voluntary Arbitration Center of the Macau Lawyers' Association Macau Lawyers' Association: *http://bo.io.gov.mo/bo/ii/98/10/desp26.asp.*

12.10 Arbitration Rules of major arbitration institutions?

World Trade Center Macau Arbitration Center have its own regulation available at http://www.wtc-macau.com/arbitration/eng/statute/regulation.pdf

12.11 What is/are the Model Clause/s of the arbitration institutions?

The recommended clauses of the World Trade Center Macau Arbitration Center are:

"RECOMMENDED CLAUSE FOR DOMESTIC AND INTERNATIONAL CONCILIATION

Any dispute, controversy or claim arising out of or relating to this contract, shall be settled by conciliation in MACAO S.A.R. at World Trade Center Macau Arbitration Center and in accordance with its Internal Regulations. If the said dispute, controversy or claim could not be resolved by conciliation, with the parties' will, it can be settled through the arbitration process."

"RECOMMENDED CLAUSE FOR DOMESTIC AND INTERNATIONAL ARBITRATION

Any dispute, controversy or claim arising out of or relating to this contract, shall be settled by arbitration in MACAO S.A.R. at World Trade Center Macau Arbitration Center and in accordance with its Internal Regulations as at present in force.

The arbitration procedure will be carried out by single Tribunal, except any further agreement made by both parties. / The arbitration procedure will be carried out by collective Tribunal, except any further agreement made by both parties.

The arbitrator is appointed by both parties or, in the absence of an agreement for that purpose, by the World Trade Center Macau Arbitration Center.

The language(s) to be used in the arbitral proceedings shall be Chinese / Portuguese / English."

12.12 How many arbitrators are usually appointed?

The arbitration tribunal can be composed of a sole arbitrator or of an odd number of arbitrators, unless the number of arbitrators is determined in the arbitration agreement or in a subsequent document signed by the parties, the tribunal must be composed of three arbitrators (Article 10, Arbitration Law). If the parties determine an even number of arbitrators, the tribunal is

complete with the appointment of one arbitrator by agreement of the other arbitrators (Article 10, Arbitration Law).

12.13 Is there a right to challenge arbitrators, and if so under which conditions?

Arbitrators can be challenged only if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess qualifications agreed to by the parties.

A party can challenge an arbitrator appointed by him/her, or in whose appointment he/she has participated, only for reasons of which he/she becomes aware after the appointment has been made. (Article 12, Arbitration Law).

The challenge procedure is set out in Article 13 of the Arbitration Law.

12.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no restrictions as to the parties' representation in arbitration proceedings.

12.15 When and under what conditions can courts intervene in arbitrations?

The arbitral tribunal can, on its own or by demand of any of the parties, request the court's assistance in specific matters, such as gathering evidence, executing decisions within the arbitration proceedings and appointing arbitrators when they are not appointed by the arbitration agreement, among other interventions.

The Base Judicial Court ("Tribunal Judicial de Base") is referred by arbitration law as the competent court.

If the parties agree on arbitration, the local courts must declare themselves not competent to settle the case.

12.16 Do arbitrators have powers to grant interim or conservatory relief?

Unless otherwise agreed by the parties, the arbitral tribunal can order (at the request of either party) either party to take any interim measure of protection considered necessary in respect of the subject-matter of the dispute, including an order to provide appropriate security.

All civil law remedies are available to the tribunal and can include damages, injunctions, declarations, costs and interest.

12.17 Arbitral Awards: (i) contents; (ii) deadlines; (iii) other requirements)?

- **Formal requirements for arbitral awards:**
  The arbitration award shall be reduced in writing and signed by the arbitrator or arbitrators.

- **Deadlines for issuing arbitral awards:**
  There are no specific statutory deadlines.

- **Other formal requirements for arbitral awards:**
  The award shall be substantiated in most cases, it shall also indicate the date on which it was rendered and the place of the arbitration. Once there is a decision, a copy signed by the arbitrator or arbitrators must be sent to each of the parties.

12.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Macau SAR?

There is no statutory right of appeal on the merits of an arbitration award.

However, the parties can agree, at the time of the arbitration agreement, that after an arbitration award is made, either party will have the right to appeal to another tribunal (an appeal arbitral tribunal). This agreement is only valid if the parties also agree on the conditions, terms and timeframe of the appeal, as well as on the composition of the appeal arbitral tribunal. The parties can also agree that they can appeal to the Macau Second Instance Court (Court of Appeal), although this must be done before the first arbitrator is confirmed in the role.

The limitation period applicable to actions to challenge the award can be agreed by the parties. If the parties do not stipulate any period, the law provides that it will be 30 days from the notification of the award or of the outcome of any arbitral appeal, review, correction to the award or an additional award (Article 38, Arbitration Law).

12.19 What procedures exist for enforcement of foreign and domestic awards in Macau SAR?

- ### Domestic Awards:

  A decision or award issued by an arbitral tribunal has the same status as a decision issued by the common judicial courts. The enforcement of Macau arbitration awards is the Macau Judicial Base Court's jurisdiction. (Article 35, Arbitration Law).

- ### Foreign Awards:

  As mentioned in 12.4 above, Macau is a party to the New York Convention hence an award obtained in Macau can be enforced in other countries which are parties to the New York Convention and vice-versa.

  In addition, according to an arrangement concerning the mutual enforcement of arbitration awards between mainland China and the Macau SAR, commercial arbitration awards made in Macau SAR are enforceable in mainland China, subject to a few exceptions.
  All foreign arbitration awards are subject to confirmation by the Macau Court of Appeal before they can be enforced in Macau SAR.

Confirmation does not therefore include a retrial on the merits, but is subject to various formal requirements (Section 1200, Civil Procedures Code), such as the authenticity of the award and the non-existence of pending proceedings on the Macau SAR courts on the same matter. The award, irrespective of the state or territory in which it was made, will be recognised as binding and will be enforced on application in writing to the competent court.

12.20 Can a successful party in the arbitration recover its costs in Macau SAR?

The fees of the arbitrators and other participants in the proceedings as well as the allocation between the parties of any advance of costs and final expenses are typically agreed in the arbitration agreement.

The final expenses should be calculated on the terms fixed on the award. The arbitration agreement will determine how the parties are to pay their own lawyers' fees and they are free to agree what these fees are. In most cases, the parties will agree that each shall bear their own legal costs.

If the arbitration agreement does not provide for costs or where the agreement has lapsed on costs and fees of the arbitrators and other participants in the proceedings, the chart contained in the Dispatch No. 109/GM/98, 23 November 1998 will apply. (Article 19.4, Arbitration Law).

12.21 Are there any statistics available on arbitration proceedings in Macau SAR?

There are no statistics available on arbitration proceedings in Macau SAR.

12.22 Are there any recent noteworthy developments regarding arbitration in Macau SAR (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

A new arbitration regime was approved in general by the Legislative Assembly on 6 June 2018 but it is not yet known when the final approval will take place, since some phases of approval are still required by the Macau Legislative Assembly.
The new law will replace the existing laws (see 1.1 above) with a single law, which will apply to both internal and external arbitrations in Macau.
It establishes a legal regime of voluntary arbitrations and the recognition and enforcement of arbitration awards issued outside Macau.

The new regime is inspired by the UNCITRAL model law (as amended in 2006) and reflects some of the previous stipulations of Decree-Law 55/98/M, as well as some provisions adopted in other jurisdictions which are compatible with the Macau legal system.

In terms of scope of application, the new law implements the principle of territoriality and generally applies only to arbitrations taking place in Macau.
The final version is not yet available since it is still being discussed by the Legislative Assembly.

Name of Author:	**DR. PEDRO CORTÉS** **MS. MADALENA PERESTRELLO**
Name of Law Firm:	**Rato, Ling, Lei & Cortés – Advogados**
Brief Profile:	Rato, Ling, Lei & Cortés – Advogados is a Law Office located in the Macau Special Administrative Region of the People's Republic of China. With more than 30 years of legal practice in Macau, the strong professional and academic profile, together with the long experience and full integration within the Region, is a guarantee of the quality of the services offered. Additionally, the permanent update and specialisation, combined with the proven professional practice in the different areas of law, allows the firm to offer a prompt, effective and efficient response to its clients, from the intervention in negotiations, disputes and alternative dispute resolutions hearings to regular and continuous legal advice in the various aspects of law.
Telephone No.:	+853 2856 2322
Fax No.:	+853 2858 0991
Email:	mail@lektou.com
Website:	www.lektou.com

13. MALAYSIA

BY: MR. THAYANANTHAN BASKARAN

13.1 Which laws apply to arbitration in Malaysia?

The Arbitration Act 2005 applies to arbitration in Malaysia.

13.2 Is Malaysian arbitration law based on the UNCITRAL Model Law?

The Arbitration Act 2005 is based on the UNCITRAL Model Law.

13.3 Are there different laws applicable for domestic and international arbitration?

Section 3(2) of the Arbitration Act 2005 provides that Parts I, II and IV of the Act apply to domestic arbitration and Part III shall apply unless the parties agree otherwise in writing. Section 3(2) provides that Parts I, II and IV apply to international arbitration and Part III shall not apply unless the parties agree otherwise in writing.

13.4 Has Malaysia acceded to the New York Convention?

Malaysia is a signatory of the New York Convention. Sections 38 and 39 of the Arbitration Act 2005, which provide for the recognition and enforcement of awards, give effect to the New York Convention.

13.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Section 19(1) of the Arbitration Act 2005 provides that, subject to the provisions of the Act, the parties are free to agree on the procedure to be

followed by the arbitral tribunal in conducting the proceedings. The parties are accordingly free to agree on foreign arbitration institutions where both parties are domiciled in Malaysia or one party is domiciled in Malaysia and the other party is abroad subject to fundamental provisions of the Act, like section 20, which provides that the parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.

13.6 Does Malaysian arbitration law contain substantive requirements for the arbitration procedures to be followed?

Sections 20 to 29 of the Arbitration Act 2005 provide for the conduct of arbitral proceedings. The arbitral proceedings must comply with section 20, which gives statutory effect to the rules of natural justice and section 29, which provides for court assistance in taking evidence in arbitral proceedings. However, the parties are not compelled to comply with section 21 to 28 and this is expressly provided for in the Act by use of words like "*unless otherwise agreed by the parties*" or "*the parties are free to agree*" which precede all these sections.

13.7 Does a valid arbitration clause bar access to state courts?

Section 10(1) of the Arbitration Act 2005 provides that a court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The Federal Court, in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1 and *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1, has recognized that under section 10(1) of the Arbitration Act 2005, it is mandatory for court proceedings to be stayed.

13.8 What are the main arbitration institutions in Malaysia?

The main arbitration institution in Malaysia is the Asian International Arbitration Centre (AIAC).

13.9 Addresses of major arbitration institutions in Malaysia?

The address of the AIAC is:

Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia.
Tel: +603 2271 1000
Fax: +603 2271 1010
Email: enquiry@aiac.world
Website: www.aiac.world

13.10 Arbitration Rules of major arbitration institutions?

The arbitration rules published by the AIAC are the AIAC Arbitration Rules, the AIAC Fast Track Arbitration Rules and the AIAC i-Arbitration Rules:

(https://www.aiac.world/Arbitration-Arbitration)
(https://www.aiac.world/Arbitration-i-Arbitration)
(https://www.aiac.world/Arbitration-Fast-Track-Arbitration).

13.11 What is/are the Model Clause/s of the arbitration institutions?

The Model Clause for the AIAC Arbitration Rules is:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Arbitration Rules."

The recommended additions to the Model Clause for the AIAC Arbitration Rules are:

- ***The seat of arbitration shall be […].***
- ***The language to be used in the arbitral proceedings shall be […].***
- ***This contract shall be governed by the substantive law of […].***
- ***Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation.***

The Model Clause for the AIAC Fast Track Arbitration Rules is:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Fast Track Arbitration Rules."

The recommended additions to the Model Clause for the AIAC Fast Track Arbitration Rules are:

- ***The seat of arbitration shall be […].***
- ***The language to be used in the arbitral proceedings shall be […].***
- ***This contract shall be governed by the substantive law*** **of […].**

And, the Model Clause for the AIAC i-Arbitration Rules is:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC i-Arbitration Rules."

The recommended additions to the Model Clause for the AIAC i-Arbitration Rules are:

- ***The seat of arbitration shall be […].***

- ***The language to be used in the arbitral proceedings shall be […].***
- ***This contract shall be governed by the substantive law of […].***
- ***Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation.***

13.12 How many arbitrators are usually appointed?

One or three arbitrators are usually appointed. Section 12(1) of the Arbitration Act 2005 provides that the parties are free to determine the number of arbitrators. If the parties fail to agree, section 12(2) provides that, in the case of international arbitration, the arbitral tribunal shall consist of three arbitrators, and, in the case of domestic arbitration, the arbitral tribunal shall consist of a single arbitrator.

13.13 Is there a right to challenge arbitrators, and if so under which conditions?

There is a right to challenge arbitrators. The grounds for challenge are set out in section 14 of the Arbitration Act 2005 and the challenge procedure is set out in section 15.

13.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no restrictions as to a party's representation in arbitral proceedings in Malaysia. Section 3A of the Arbitration Act 2005 provides that, unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by any representative appointed by the party.

13.15 When and under what conditions can courts intervene in arbitrations?

Section 8 of the Arbitration Act 2005 provides that no court shall intervene in matters governed by the Act, except where so provided by the Act. The areas where court intervention is provided for in the Act are:

Part II

(a) Section 10: provision for stay of court proceedings where there is an arbitration agreement;

(b) Section 11: the High Court's power to grant interim measures of protection;

(c) Section 13(7): the High Court's power to appoint an arbitrator in certain situations;

(d) Section 15(3): the High Court's power to deal with challenges to an arbitrator;

(e) Section 18(8): the High Court's power to hear appeals on the jurisdiction of the arbitral tribunal;

(f) Section 29: the High Court's power to assist in the taking of evidence;

(g) Section 37: applications for setting aside arbitral awards to the High Court;

Part III

(h) Section 41: determination of preliminary point of law by the High Court;

(i) Section 44(1): taxed costs by the High Court in certain circumstances;

(j) Section 44(2): power of the High Court to order the arbitral tribunal to deliver the award in certain circumstances;

(k) Section 45: power of the High Court to extend time for the commencing arbitral proceedings; and

(l) section 46: power of the High Court to extend time for the making of the award.

13.16 Do arbitrators have powers to grant interim or conservatory relief?

Section 11(1) of the Arbitration Act 2005 provides that a party may, before or during the arbitral proceedings, apply to the High Court for any interim measures and the High Court may make the following orders for the party to:

(a) maintain or restore the status quo pending the 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, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
(d) preserve evidence that may be relevant and material to the resolution of the dispute; or
(e) provide security for the costs of the dispute.

A party should apply to the arbitral tribunal first for interim measures, where there is an overlap between the powers of the High Court and the arbitral tribunal under sections 11 and 19. However, a party may immediately apply to the High Court, where there is a third party involved, an emergency or a need for coercive powers. See *Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd* [2010] 1 LNS 1834.

13.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

Section 33(1) of the Arbitration Act 2005 provides that an award shall be in writing and subject to section 33(2) shall be signed by the arbitrator. Section 33(2) provides that, in arbitral proceedings with more than one arbitrator, the signature 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(3) provides that an award shall state the reasons upon which it is made unless: (a) the parties have agreed that no reasons are to be given; or (b) the award is an award on agreed terms under section 32.

Section 33(4) provides that an award shall state its date and the seat of arbitration as determined in accordance with section 22 and shall be deemed to have been made at that seat.

Section 33(5) provides that, after an award is made, a copy of the award signed by the arbitrator in accordance with sections 33(1) and (2) shall be delivered to each party.

Section 33(6) provides that, unless otherwise provided in the arbitration agreement, the arbitral tribunal may: (a) award interest on any sum of money ordered to be paid; and (b) determine the rate of interest.

In summary, the formal requirements of an arbitral award under section 33 of the Arbitration Act 2005 are that:

(a) it must be in writing;
(b) it must be signed by a majority of the arbitral tribunal;
(c) it must be reasoned unless otherwise agreed by the parties or it is an agreed award;
(d) it must be dated;
(e) it must state the seat;
(f) it must be delivered; and
(g) it may include interest.

There are no deadlines for the delivery of an award under the Arbitration Act 2005.

13.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Malaysia?

There are no provisions in the Arbitration Act 2005 to appeal against or rescind an arbitral award as such. Instead, section 37 provides that an award may be set aside on limited grounds.

Specifically, section 37(1) provides that an award may be set aside by the High Court only if the party making the application provides proof that:

(a) a party to the arbitration agreement was under an incapacity;

(b) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(c) 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 the party's case;

(d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(e) subject to section 37(3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(f) the composition of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Act.

Section 37(1) also provides that an award may be set aside by the High Court only if, the High Court finds that:

(a) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(b) the award is in conflict with the public policy of Malaysia.

The High Court, in *Kelana Erat Sdn Bhd v. Niche Properties Sdn Bhd & another application* [2012] 5 MLJ 809, recognized that an award under the Arbitration Act 2005 was by and large immune from any interference by the courts unless the award was infected with the infirmities identified in section 37(1).

Similarly, the High Court, in *The Government of India v. Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149, held that the courts do not sit in an appellate capacity under section 37. Furthermore, the courts

will be slow to interfere even when there is a specific discretion to do so under section 37.

The Court of Appeal, in *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* [2016] 3 CLJ 403, held that a party may apply to set aside an award under section 37 or for determination of questions of law under section 42 but not both.

13.19 What procedures exist for enforcement of foreign and domestic awards in Malaysia?

Section 38(1) of the Arbitration Act 2005 provides that, on an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to sections 38 and 39, be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

Section 38(2) provides that, in an application under section 38(1), the applicant shall produce: (a) the duly authenticated original award or a duly certified copy of the award; and (b) the original arbitration agreement or a duly certified copy of the agreement.

Section 38(3) provides that, where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

Section 38(4) provides that, for the purposes of the Arbitration Act 2005, "foreign State" means a State which is a party to the New York Convention.

13.20 Can a successful party in arbitration recover its costs?

A successful party may recover its costs subject to the agreement between the parties and the discretion of the arbitral tribunal. Section 44(1)(a) of the Arbitration Act 2005 provides that, unless otherwise agreed by the parties,

the costs and expenses of an arbitration shall be in the discretion of the arbitral tribunal who may:

(a) direct to and by whom and in what manner those costs or any part thereof shall be paid;
(b) tax or settle the amount of such costs and expenses; and
(c) award such costs and expenses to be paid as between solicitor and client.

The High Court, in *Magnificent Diagraph Sdn Bhd v. JWC Ariatektura Sdn Bhd* (2009) Transcript, recognized that the jurisdiction to determine costs vests with the arbitrator in the absence of agreement between the parties.

The Court of Appeal, in *SDA Architects v. Metro Millennium Sdn Bhd* [2014] 3 CLJ 632, held that, as costs were at the discretion of the arbitral tribunal under section 44, the courts would not intervene based on a question of law under section 42.

13.21 Are there any statistics available on arbitration proceedings in Malaysia?

Statistics on arbitration proceedings in Malaysia are available upon request from the AIAC.

13.22 Are there any recent noteworthy developments regarding arbitration in Malaysia (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

The Arbitration Act 2005 was amended in 2018 to bring it closer to the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006. Malaysia has become even more arbitration friendly after these recent amendments.

Name of Authors:	**MR. THAYANANTHAN BASKARAN**
Name of Law Firm:	**Baskaran**
Brief Profile:	**Baskaran** is an international arbitration boutique based in Kuala Lumpur. Baskaran advises clients throughout Malaysia and around the world.
Telephone No.:	+60 3 2083 0888
Fax No.:	+60 3 2083 0880
Email:	thaya@baskaranlaw.com
Website:	www.baskaranlaw.com

14. MONGOLIA

BY: MS. ENKHTSETSEG NERGUI
MR. MUNKH-ORGIL TUVAANDORJ

14.1 Which laws apply to arbitration in Mongolia?

The main source of law for arbitration in Mongolia is the Arbitration Law ("Arbitration Law") which was revised and adopted on 26 January 2017 and came into force on 27 February 2017.

14.2 Is the Mongolian arbitration law based on the UNCITRAL Model Law?

Yes. The current Arbitration Law adopts the UNCITRAL Model Law 1985 and its amendments of 2016. However, additional provisions which supplement the Model Law can also be found in the law.

Some of the additional provisions that can be found in the Arbitration Law:

(i) difference of international and domestic arbitration (Article 3). Arbitration Law provides determination of international and domestic arbitration with different regulations with respect to time and term of making requests or decisions and the jurisdiction of courts in arbitration procedures.

(ii) exclusive jurisdiction of courts in arbitration procedures (Article 6). Arbitration Law specifically states exclusive jurisdiction of courts regarding the court intervention in arbitration proceedings.

(iii) consumer protection mechanism in respect of arbitral clause (Article 8.11). To protect consumer rights, the parties shall make an arbitration agreement in writing only after a dispute arises and such agreement shall state the seat of arbitration.

(iv) provision on confidentiality of the arbitration proceedings (Article 50). The Arbitration Law obliges the arbitral tribunal, the parties and institutional arbitrators to maintain the confidentiality of confidential information which were revealed during the arbitration proceedings and arbitral awards and orders unless the parties agreed otherwise.

regulation on bankruptcy (Article 51). If a party to a contract with an arbitration clause is subject to bankruptcy proceedings and the other party does not refuse the proceedings from the contract, the arbitration clause shall remain valid.

14.3 Are there different laws applicable for domestic and international arbitration?

Where the seat of arbitration is in Mongolia, the Arbitration Law is applicable for domestic and international arbitration

14.4 Has Mongolia acceded to the New York Convention?

Yes, Mongolia is one of the contracting states of the New York Convention, which was officially ratified on 24 October 1994. However, Mongolia has also declared that the Convention shall apply only to recognition and enforcement of awards made in the territory of another contracting State and to differences arising out of legal relationships, contractual or otherwise, that are considered commercial under the national law. Furthermore, the Arbitration Law specifically states that the procedure of recognizing and enforcing foreign arbitral awards should be regulated in accordance with the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award and Chapter Eight (Recognition and Enforcement of Awards) of the Arbitration Law.

14.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

There are no restrictions regarding the choice of arbitration institutions by the parties. On the other hand, the Arbitration Law provides the determination of international and domestic arbitration. Under Article 3 of the Arbitration Law, the following arbitrations are considered as international arbitrations:

- if the parties conduct their businesses in different countries at the time of making the arbitration agreement;
- if the seat of arbitration in the arbitration agreement is in a different location other than the domicile of the parties;
- if a place of execution of most duties or location of a matter in a dispute is different from the place of operation of the parties;
- if any relations arisen from the arbitration agreement are connected to more than one country.

Any other arbitration procedures other than above shall be considered as domestic arbitrations. Although the Arbitration Law distinguishes international and domestic arbitration, there are slightly different regulations in terms of time and the period for making requests to the courts as well as the jurisdiction of courts in arbitration proceedings.

14.6 Does the Mongolian arbitration law contain substantive requirements for the arbitration procedures to be followed?

Under the Arbitration Law, the parties are free to agree on the arbitration procedures to be followed by the arbitrators. However, under Article 50 of the Arbitration Law, there is an obligation of the arbitral tribunal and the parties as well as institutional arbitration to maintain confidentiality regarding matters that were revealed during the proceedings, arbitral awards and orders unless such confidential information is disclosed under applicable laws or if such disclosure is necessary to enforce the legal rights or if either party started a motion to set aside the award. Also, the parties to an arbitration shall have to be treated equally according to Article 30 of the Arbitration Law. Apart from the aforesaid matters, the parties are free to agree on the type of proceedings they wish to conduct, starting from the

commencement of arbitration proceedings, the appointment and challenge of arbitrators, seat of arbitration, substantive law and hearing.

14.7 Does a valid arbitration clause bar access to state courts?

Yes. According to the Arbitration Law and the Civil Procedure Code, if there is an arbitration agreement or clause in the contract, the dispute should be resolved through arbitration proceedings. If a party to a valid arbitration agreement files a claim to the courts and when a party requests to resolve the claim by the arbitral tribunal before making its statement on the substance of the case, the courts will refer the parties to arbitration unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

14.8 What are the main arbitration institutions in Mongolia?

Under the Arbitration Law, an institutional arbitration can be established at the chambers of commerce and industry, trade unions, professional associations or non-governmental organizations such as customer protection centers.

The best-known arbitration institution in Mongolia is the Mongolian International and National Arbitration Center ("MINAC") at the Mongolian National Chamber of Commerce and Industry ("MNCCI") which was founded on 2 July 1960. MINAC has its 21 arbitration branch centres in provinces encouraging the settlement of domestic disputes through arbitration.

Besides the MINAC, the Ulaanbaatar City's Chamber of Commerce Arbitration ("UBCC Arbitration") was established in 2015.

14.9 Addresses of major arbitration institution in Mongolia?

- **Mongolian International and National Arbitration Center**
  Suite 502, MNCCI Building,
  Mahatma Gandhi Street,
  15th Khoroo, Khan-Uul District,
  Ulaanbaatar

Tel/Fax: +976-70111545
Email: info@arbitr.mn
Website: http://www.arbitr.mn

- **Ulaanbaatar City's Chamber of Commerce Arbitration**
  14F, Express tower,
  Chingeltei district,
  Ulaanbaatar city, Mongolia
  Tel: +976 7700 3883
  Fax: +976 7700 3883
  Email: info@ubchamber.mn
  Website: https://www.ubchamber.mn

14.10 Arbitration Rules of major arbitration institutions?

The Arbitration Rules of 2017, the Rules on Assistance to Ad-hoc Arbitration of 2014 and the Regulation of Arbitration Fee and Additional Costs of MINAC are available on the website of MINAC.

UBCC Arbitration has its Arbitration Rules, Rules on Mediation and Conciliation, Rules of Expedited Arbitration Rules.

14.11 What is the Model Clause of the arbitration institutions?

Model Clause of the MINAC Arbitration Rules:

" All disputes arising out of or in connection with this contract or related to its violation, termination or nullity shall be finally settled in the Mongolian International and National Arbitration Center at the Mongolian National Chamber of Commerce and Industry in Mongolia under its Rules on Arbitration in Mongolia"

Model Clause of UBCC Arbitration:

"Any dispute arising out of or relating to this contract shall be resolved by Ulaanbaatar Chamber of Commerce Arbitration in

accordance with the UBCC Arbitration Rules for the time being in force.
The tribunal shall consist of _____."

14.12 How many arbitrators are usually appointed?

An arbitral tribunal may consist of a sole or more arbitrators. The parties have the freedom to determine the number of arbitrators and if the parties fail to agree on a certain number, the default number of arbitrators will be three. If the parties have not agreed on appointment procedures of the arbitrators, each party shall appoint one arbitrator, and those two appointed arbitrators shall then appoint the third arbitrator who will act as the chairman of the arbitral tribunal.

14.13 Is there a right to challenge arbitrators, and if so under which conditions?

Arbitrators may only be challenged if there are circumstances that give rise to justifiable doubts as to their impartiality or independence or if they do not possess the qualifications agreed to by the parties. According to the Arbitration Law, the parties are free to agree on a procedure for challenging an arbitrator. If the parties do not have such agreement, the challenging party may submit its request to the arbitral tribunal within 14 days after becoming aware of any circumstances to challenge and the arbitral tribunal shall decide the request within 30 days unless the challenged arbitrator withdraws from his/her office or the other party agrees to the challenge. If a challenge is not successful, in case of international arbitration, the challenging party may request within 30 days after having received notice of the decision rejecting the challenge, the court which decision shall be subject to no appeal. For domestic arbitrations, the period to make such request is 14 days. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration procedures and make an award.

14.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Arbitration Act does not impose any restrictions as to the parties' representation in arbitration proceedings.

14.15 When and under what conditions can courts intervene in arbitrations?

In general, the courts cannot intervene in arbitration proceedings in matters governed by the Arbitration Law.
Under the Arbitration Law, in case of international arbitration, the court of appeal of the capital city has the competency to decide the following matters:

- requests to grant interim measures (Article 11.1)
- appointment of arbitrators (Article 13.4 and Article 13.5)
- challenge of arbitrators (Article 15.3)
- removal of arbitrators from their duties (Article 16.1)
- dispute on arbitration jurisdiction (Article 18.7)
- taking of evidence (Article 39.1)
- setting aside of an arbitral award (Article 47)

For domestic arbitration, the above matters are under the jurisdiction of the civil appeal court of the seat of arbitration.

The first instance court of the residential place of the defendant or location of the property of the defendant shall have jurisdiction to decide the following instances:

- enforcement of a decision of interim measures (Article 27)
- issuance of an interim measure in relation to arbitration proceedings irrespective of whether their place is in Mongolia (Article 29)
- recognition and enforcement of an arbitral award (Article 48)
- bankruptcy matters (Article 51).

14.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes. According to Article 19 of the Arbitration Law, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute unless otherwise agreed by the parties. The arbitral tribunal may also require any party to provide appropriate security in connection with such measures.

14.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- ### Formal requirements for arbitral awards

An arbitral award has to be made in writing and has to be signed by the arbitrator/s. In a tribunal with more than one arbitrator, the signature of the majority members of the arbitral tribunal should be sufficient. However, the reason why such signature is omitted has to be stated clearly in the award. Unless otherwise agreed by the parties, the arbitral award shall state the reasons of the decision. It also must state the date of the award and seat of arbitration. The arbitral award with signature of the arbitrators will be delivered to each party.

- ### Deadlines for issuing arbitral awards

There is no provision on the deadline for arbitral tribunals to issue arbitral awards under the Arbitration Law.
Unless otherwise agreed by the parties, a party with notice to the other party, may request the arbitration tribunal within 30 days after receiving the award:

- to correct any errors in computation, any clerical or typographical errors or any errors of similar nature or to give an interpretation of a specific point or part of the award
- to make an additional award as to claims presented in the arbitration procedures but omitted from the award.

- **Other formal requirements for arbitral awards:**

There are no other formal requirements for arbitral awards.

14.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Mongolia?

In principle, an arbitral award is final and binding upon the parties. Under the Arbitration Law, the court may set aside an arbitration award, by the parties' application, only under the following circumstances:

(i) if one party to the arbitration agreement did not have legal capability or, the arbitration agreement was invalid under the law chosen and agreed by the parties or Mongolian law if there is no such chosen law;

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration procedures 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 matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

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

The court may also set aside the award if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration in Mongolia; or

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

The application for setting aside an award must be made within 90 days from the date of the parties' receipt of the award in case of international arbitration and within 30 days in case of domestic arbitration.

14.19 What procedures exist for enforcement of foreign and domestic awards in Mongolia?

Under the Arbitration Law and Civil Procedure Code, both foreign and domestic awards are enforceable.

Article 48 of the Arbitration Law clearly states that the procedure of recognizing and enforcing foreign arbitral awards shall be regulated in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award.

The party applying for the enforcement of an award shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. If an arbitration award or agreement is written in a foreign language, it has to be translated into Mongolian and attached to an act on the enforcement of arbitral award.

14.20 Can a successful party in the arbitration recover its costs?

Unless otherwise agreed by the parties, the arbitral tribunal shall decide on the arbitration costs, responsible person to pay and payment procedure. The arbitration costs include the arbitral tribunal's fees and expenses, arbitration service fee of the arbitration institution (if any) and other costs related to witnesses and experts and other legal services or expertise analysis.

14.21 Are there any statistics available on arbitration proceedings in Mongolia?

MINAC handled 48 dispute resolution matters in 2014, 65 in 2015 and 95 in 2016, of which 260 were arbitration matters. Among 206 cases resolved at the MINAC, 23 were international arbitration cases with the participants from Vietnam, Singapore, Korea, the USA, the UK, Turkey, Australia, Russia and China.

(a) Caseload

Below is a summary table on the total number of cases administered by the MINAC and UBCCA* as follows:

Year	Total number of cases of MINAC	Total number of cases of UBCCA
2018	**74**	**4**
2017	**71**	**-**
2016	**100**	**1**
2015	**65**	**-**
2014	**48**	
2013	**51**	
2012	**45**	
2011	**41**	
2010	**35**	
2009	**31**	
2008	**16**	
2007	**25**	
2006	**18**	
2005	**11**	

*These statistics have been received from MINAC and UBBCA.

Below is a table summarizing the number of cases where one of the parties is a foreign business entity/individual:

Year	Total number of cases of MINAC	Total number of cases of UBCCA
2018	**7**	**-**
2017	**9**	**-**
2016	**15**	**-**
2015	**6**	-
2014	**5**	
2013	**11**	
2012	**6**	

2011	**11**	
2010	**15**	
2009	**12**	
2008	**9**	
2007	**14**	
2006	**19**	
2005	**5**	

The table below summarizes the number of cases where the parties are foreign business entities/individuals:

Year	**Total number of cases of MINAC**	**Total number of cases of UBCCA**
2013	**3**	
2012	**3**	
2011	**1**	
2010	**1**	
2009	**2**	
2008	**2**	
2007	**5**	
2006	**6**	
2005	**3**	

The table below summarizes the number of cases where the parties are Mongolian business entities/individuals:

Year	**Total number of cases of MINAC**	**Total number of cases of UBCCA**
2018	**67**	**4**
2017	**62**	**-**
2016	**85**	**1**
2015	**59**	**-**
2014	**43**	
2013	**40**	
2012	**23**	
2011	**32**	
2010	**9**	
2009	**15**	
2008	**10**	
2007	**10**	
2006	**6**	
2005	**6**	

14.22 Are there any recent noteworthy developments regarding arbitration in Mongolia (new laws, new arbitration etc)?

Mongolia revised its Arbitration Law in 2017 which adopted the UNCITRAL Model law including its amendments of 2016 for both international and domestic arbitration.

As the Arbitration Law provides the opportunities for trade associations and other non-governmental organizations to set up institutional arbitration, recently some organizations are establishing the specialized arbitration such as Ulaanbaatar Chamber of Commerce Arbitration and Mongolian International and National Arbitration for Sport.

Name of the authors:	**MS. ENKHTSETSEG NERGUI** **MR. MUNKH-ORGIL TUVAANDORJ**
Name of the law firm:	**Anand Advocates LLP**
Brief profile:	Anand Advocates LLP is recognized as one of the leading professional law firms in Mongolia. Our firm is distinguished by the depth and scope of its legal advisory services and a deep understanding of the business culture in Mongolia. As a result, Anand Advocates are listed in Chambers and Partners in Band 1 for General Business Law in Mongolia. The firm's practice has a strong focus on assisting both foreign and local companies in investing and doing business in Mongolia, and is particularly experienced in such areas as banking and finance, mining and petroleum, corporate and M&A, real estate, litigation, dispute resolution, intellectual property, and tax, as well as infrastructure and foreign direct investment.
Tel No:	+976-11-75753322
Fax No:	+ 976-70119442
E-mail:	enkhtsetseg@anand-advocates.mn
Website:	www.anand-advocates.mn

15. MYANMAR

BY: MR. JAMES FINCH
(Retired Partner, DFDL Myanmar Limited)
MRS. THIDA AYE
(Country Partner, DFDL Myanmar Limited)

15.1 Which laws apply to arbitration in Myanmar?

On January 5, 2016 the Myanmar *Pyidaungsu Hluttaw* (Parliament) passed Law No. 5/2016 the Arbitration Law (the "Law").

15.2 Is the Myanmar arbitration law based on the UNCITRAL Model Law?

Yes, the Law is based on the UNCITRAL Model Law.

15.3 Are there different laws applicable for domestic and international arbitration?

The Law applies to both international arbitration and domestic arbitration. International arbitration is defined in the Law as arbitration in which (1) one party's place of business and trading activity is outside Myanmar or (2) the place the parties agree to conduct the arbitration outside the country where the parties have their places of business or (3) the place a substantial part of the obligations under the agreement are to be performed or the closest place connected to the subject matter of the dispute is outside the country where the parties have their place of business or (4) the parties to the arbitration have agreed that the subject matter relates to more than one country. The Law defines "domestic arbitration" as arbitration that is not international arbitration, as defined above.

15.4 Has Myanmar acceded to the New York Convention?

Myanmar acceded to the New York Convention on April 16, 2013. The primary purpose of the Law is to give effect to the New York Convention.

15.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Both parties can agree on foreign arbitration institutions either if they are domiciled in Myanmar or if one is domiciled in Myanmar and one abroad. The Law does not expressly allow or prohibit foreign arbitration institutions to administer arbitrations in Myanmar. The Law, however, provides that arbitrators may be of any nationality and an arbitrator may be an individual or association. It could therefore be concluded that parties may appoint foreign institutions as arbitrator either if they are domiciled in Myanmar or if one is domiciled in Myanmar and one abroad. It should also be noted that under section 1 of the Law, if the seat of arbitration is in Myanmar, the Law must apply to the arbitration. Meaning that foreign arbitration institutions must conduct arbitration in Myanmar in accordance with the Law, not their own arbitration procedures. Of course, the Law allows parties to agree on the arbitration procedure for their arbitration proceedings as long as the procedure is not against the Law.

15.6 Does the Myanmar arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Law contains substantive requirements for arbitration procedures. As mentioned above, they are based on those laid out in the UNCITRAL Model Law.

15.7 Does a valid arbitration clause bar access to state courts?

The mere existence of a valid arbitration clause included in an agreement does not bar access to state courts. If a party to an agreement that includes an arbitration clause commences legal proceedings with respect to the subject matter of such agreement, the other party has a right to get such proceedings referred to arbitration. The court must then refer the parties to arbitration and then give an order to stay the suit unless it finds that the agreement is null and void, inoperative or incapable of being performed.

15.8 What are the main arbitration institutions in Myanmar?

No arbitration institution exists in Myanmar yet. The Law requires that the support for the arbitration process come from the judicial system.

15.9 Addresses of major arbitration institutions in Myanmar?

Not applicable.

15.10 Arbitration Rules of major arbitration institutions?

Not applicable.

15.11 What is/are the Model Clause/s of the arbitration institutions?

Not applicable.

15.12 How many arbitrators are usually appointed?

Parties are free to agree on the number of arbitrators to be appointed. In the absence of such an agreement, there will be a sole arbitrator. If the parties agree on a larger number of arbitrators, it must be an odd number.

15.13 Is there a right to challenge arbitrators, and if so under which conditions?

An arbitrator may be challenged if there are circumstances that raise justifiable doubts as to the arbitrator's independence or neutrality or if the arbitrator does not possess the qualifications mutually set forth by the parties.

15.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

Subject to the provisions of the Law, any arbitral procedure for appointment of arbitrators adopted by the parties is acceptable.

15.15 When and under what conditions can courts intervene in arbitrations?

First, the Law provides that in matters governed by the Law no court may intervene other than as provided in the Law.

The court may set aside a domestic arbitral award only if:

(1) a party to the arbitration agreement was under some incapacity; or

(2) the arbitration agreement is not valid under the law to which the parties have agreed or, failing any indication thereon, under the law of the Republic of the Union of Myanmar; or

(3) 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

(4) the award deals with a dispute not in accordance the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

Proviso: If the decisions 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

(5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or does not comply with this Law.
Proviso: Such agreement shall not be in conflict with a provision of this Law which the parties cannot derogate.

(6) the subject-matter of the dispute is not capable of being settled by arbitration under the existing law; or

(7) the award is in conflict with the national interest of the Republic of the Union of Myanmar.

The court can refuse to enforce a foreign award if it is proven that:

(1) the party to the arbitration agreement referred to was under some incapacity; or

(2) the said agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law of the country where the award was made; or

(3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(4) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or

(5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(6) 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.

15.16 Do arbitrators have powers to grant interim or conservatory relief?

The arbitral tribunal may issue interim orders, which include decisions, orders and instructions. It should be pointed out, moreover, that the arbitral tribunal may make orders for securing the amount in dispute. Interim orders, may include those pre-judgment attachment, garnishment and injunctions, subject to the rules or procedures to be issued under the Law.

The court will have the following powers with respect to interim measures:

(1) taking evidence;

(2) the preservation of any evidence;

(3) passing an order related to the property in dispute during the arbitration or any property which is related to the subject-matter of the dispute;

(4) inspection, taking photos for evidence, preservation and seizure of the property which is related to the dispute;

(5) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(6) allow to enter the premises owned by or under the control of the parties to the dispute for the purpose of the above mentioned matters;

(7) sale of any property which is the subject-matter of the dispute;

(8) an interim injunction or appointment of a receiver.

The court may, moreover, refuse to enforce the arbitral award if it determines that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of the Union of Myanmar; or the enforcement of the award would be contrary to the national interest (public policy) of the Republic of the Union of Myanmar.

15.17 What are the formal requirements for an arbitral award (form; content; deadlines; other requirements)?

The award must be in writing and signed by a majority of the arbitrators. The award must state the reasons for the award, unless the parties have agreed otherwise. The award must state the date and place of its making and be delivered to each party.

The Law makes no mention of a time limit when arbitral award must be rendered.

Except an award directing a partition, or one made by an order of the court where the amount or value of the property to which the award relates as set forth in such award exceeds kyat 1,000,000, an award is chargeable with a stamp duty in a maximum amount of Kyat 2500 plus kyat 250 for every additional kyat 100,000 or part thereof in excess of kyat 1,000,000. If the award directs the partition of property, the stamp duty must be paid at the rate of 0.5 % on the value of the property.

15.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Myanmar?

Setting aside and refusal to enforce were discussed in No. 15.15 above.

The Law provides that the following orders passed by an arbitral tribunal may be appealed to the competent Court: (i) Those on the arbitral tribunal's jurisdiction, including objections with respect to the existence or validity of the arbitration agreement as discussed above. (ii) An order granting or denying interim measures.

The following court orders may be appealed from the court with competent jurisdiction to a higher court:

(i) An order resolving not to refer a matter to arbitration;

(ii) An interim order granting or refusing to perform an interim measure;

(iii) A refusal to recognize or enforce a foreign arbitral award;

(iv) An order setting aside or refusing to set aside an award.

15.19 What procedures exist for enforcement of foreign and domestic awards in Myanmar?

A domestic award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court, unless the respondent can prove that the arbitral tribunal was not competent to make the award. As for a foreign award, in order to enforce it, a foreign arbitral award or a copy thereof must be authenticated in the manner required by the law of the country where it was made. This must be submitted with the original or a duly certified copy of the agreement for arbitration to the Court. Where the above documents are in any language other than the Myanmar language, translations into the Myanmar language, certified as correct in accordance with Myanmar law or by the ambassador or consulate in Myanmar, must also be submitted to the Court. Following the above submission, the award shall be enforced under the Myanmar Code of Civil Procedure as if it was a court decree. The court may refuse to recognize the award if the party against the award is sought to be enforced presents to the court proof that (1) the parties to the arbitration agreement referred were under some incapacity; or (2) the said agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law of the country where the award was made; (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (4) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or

(5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (6) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The court may refuse to enforce the arbitral award if it determines that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of the Union of Myanmar; or the enforcement of the award would be contrary to the national interest (public policy) of the Republic of the Union of Myanmar.

15.20 Can a successful party in the arbitration recover its costs in Myanmar?

The Law provides that the award may allocate costs. A successful party in the arbitration could, therefore, recover its costs in Myanmar.

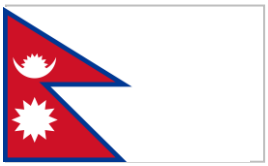
15.21 Are there any statistics available on arbitration proceedings in Myanmar?

No statistics are available on arbitration proceedings in Myanmar.

15.22 Are there any recent noteworthy developments regarding arbitration in Myanmar (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

As mentioned above, the passage of the Law in 2016 constituted a major development. The primary objective of the Law is to implement Myanmar's accession to the New York Convention.

Name of Authors:	**MR. JAMES FINCH** **(Retired Partner, DFDL Myanmar Limited)** **MRS. THIDA AYE** **(Country Partner, DFDL Myanmar Limited)**
Name of Firm:	**DFDL Myanmar Limited**
Brief Profile	Chambers has to say the following about the firm: "This firm is widely commended for "its practical application of the law and its understanding of the local situation." It is currently benefiting from an increasing amount of inward investment from companies in India and China. The firm handles work which traverses several practice areas, including maritime and energy, aircraft leases, corporate matters, and tax. It also has strong links with companies in the tourism and hospitality sector and is regarded as a "dependable firm which offers reasonable fees." James Finch has an impressive background of working in the fields of banking and finance, real estate, hotel development and IP, and is described as "highly responsive and the go-to lawyer for foreign investors into Myanmar."
Telephone No.:	+959 4200 40319
Fax No.:	+951 548835
Email:	Jamesfinch1023@yahoo.com; thida.aye@dfdl.com



16. NEPAL

BY: ANUP RAJ UPRETI

16.1 Which laws apply to arbitration in Nepal?

The Arbitration Act, 1999 (2055) and the Arbitration Court Procedure Rules, 2002 (2059) apply to arbitrations in Nepal.

16.2 Is the Nepalese arbitration law based on the UNCITRAL model law?

Nepalese arbitration law is generally based on UNCITRAL model law.

16.3 Are there different laws applicable for domestic and international arbitration?

No. The Arbitration Act deals with both domestic arbitration and enforcement of foreign arbitral award in Nepal.

16.4 Has Nepal acceded to the New York Convention?

Yes. Nepal is a party to New York Convention which was ratified on March 04, 1998 and became effective from June 02, 1998. Nepal has ratified the New York Convention with the following declaration: (a) Nepal will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting state, and (b) Nepal will apply the Convention only to the differences arising out of legal relationship, whether contractual or not, which are considered as commercial disputes under the law of Nepal.

16.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

The Arbitration Act provides autonomy to the parties to agree on arbitration rules and the arbitration institutions irrespective of the domicile status of the parties to the arbitration agreement. While the Arbitration Act itself provides autonomy to the parties in relation to selection of arbitration rules and institutions, there is certain legislations which prescribes arbitration rules that need to be followed.

For example, the Foreign Investment and Technology Transfer Act 1992 provides that disputes between foreign investors and local entities/local investors need to be settled through arbitration held in Kathmandu as per the UNCITRAL Rules. However, if the local entity has investments of more than NPR 500 Million (approximately USD 4.5 Million) in fixed assets, in such cases the mandatory requirement of arbitration to be held in Nepal under the UNCITRAL Rules does not apply and the parties are free to agree on their dispute settlement mechanism.

16.6 Does the Nepalese arbitration law contain substantive requirements for the arbitration procedures to be followed?

Section 18 of the Arbitration Act provides that Nepalese law shall apply in arbitration proceedings except where the arbitration agreement provides otherwise. Section 18 further provides that arbitrators shall make decisions subject to the provision of the agreement and the commercial usages with regards to the concerned transaction.

16.7 Does a valid arbitration clause bar access to state courts?

Yes. The Arbitration Act provides that where the agreement contains an arbitration clause, the dispute should be resolved through arbitration as per the procedures provided in the agreement and as per the provisions of the Arbitration Act if the procedures have not been specified in the agreement.

Section 40 of the Arbitration Act provides that the courts do not have jurisdiction over the matter regulated by the Arbitration Act. The courts of Nepal have interpreted and established a clear jurisprudence that the courts do not have jurisdiction to decide on disputes which are governed by arbitration. The parties that are subject to an arbitration agreement may take recourse to the courts only on limited grounds like (a) appointment of arbitrators, (b) seeking injunctive relief (usually prior to formation of the arbitration tribunal), (c) review against the award on the defined grounds and (d) enforcement of the award.

16.8 What are the main arbitration institutions in Nepal?

The "Nepal Council of Arbitration" (NEPCA) is the only arbitration institution in Nepal. NEPCA is registered as Non-Government Organization (NGO) under the Societies Registration Act, 1977 (2034).

16.9 Addresses of major arbitration institutions in Nepal?

NEPCA is situated at:
Jwagal-10, Kupondole, Lalitpur, Nepal
Tel: +977 1 5530894
Email: info@nepca.org.np
Website: nepca@ntc.net.np

16.10 Arbitration Rules of major arbitration institutions?

The "Statute of the Nepal Council of Arbitration" (NEPCA), 1991 and the "Arbitral Procedures Regulations of Nepal Council of Arbitration" (NEPCA) 2015 are the arbitration rules of NEPCA which are available on the website of NEPCA.

16.11 What is/are the Model Clause/s of the arbitration institutions?

The Model Clause of NEPCA is available on its website.

16.12 How many arbitrators are usually appointed?

The Arbitration Act provides that the number of arbitrators shall be as provided in the agreement and in the absence of a specific provision, the number of arbitrators shall consist of three arbitrators. In practice in relation to domestic arbitration, it is common to appoint three arbitrators. The Arbitration Act also requires that the arbitrators shall consist of odd numbers and further provides that if the arbitration agreement provides for appointment of arbitrators in even numbers, one additional arbitrator nominated by such arbitrators shall have to be appointed to make the number of arbitrator's an odd number.

16.13 Is there a right to challenge arbitrators, and if so under which conditions?

Yes. Section 11 of the Arbitration Act provides as a general rule that the provision related to the removal of arbitrators shall be as provided in the agreement and if no provision is provided, the statutory provision as outlined in Section 11 will apply. An application should be submitted to the arbitrator requesting to remove the arbitrator within 15 days from the date of his/her appointment or from the date when the party learns that the concerned arbitrator has failed to act as required. The application may be submitted if any of the following activities carried out by any of the arbitrators.

a) bias towards or discriminates against any party,

b) improper conduct or fraud in the course of arbitration,

c) frequent mistakes or irregularities during the proceedings,

d) absence in the meetings or refusal to take part in the meeting for more than three times without furnishing satisfactory reasons with the intent of delaying the arbitral proceeding,

e) any actions taken opposing the principles or rules of natural justice,

f) lack of required qualifications or cease to be qualified.

In case the arbitrator whose removal has been requested does not relinquish his/her post voluntarily, or the grounds of removal are not agreed upon by the other party, then the arbitrator has to take a decision on the matter within 30 days from the date of application. The decision can be challenged before the High Court the decision of which is final.

16.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Arbitration Act does not impose any restrictions as to the parties' representation in arbitration proceedings.

16.15 When and under what conditions can courts intervene in arbitrations?

The courts can intervene in arbitration proceedings only in the following circumstances:

a) For the appointment and removal of the arbitrator.

b) Granting of interim relief (this usually until the period of formation of the arbitration tribunal).

c) Review of the award.

d) Enforcement of the award.

16.16 Do arbitrators have powers to grant interim or conservatory relief?

As provided under Section 21 of the Arbitration Act, an arbitration panel can issue preliminary orders, or interim or interlocutory orders in respect to any matter connected with the dispute on the request of any party, or take a conditional decision.

16.17 Arbitral Awards: (i) contents; (ii) deadlines; (iii) other requirements?

Sections 24 to Section 29 in Chapter 5 of the Arbitration Act deal with the arbitral award.

The arbitral award should contain the following matters:

a) Award must be in written form and must be signed by the member of the arbitration tribunal;

b) Short descriptions of the issues referred for settlement and of the terms of reference approved;

c) Grounds to accept jurisdiction if any party raises questions on the jurisdiction of the arbitration;

d) Summary of the expert's report if such expert has been appointed;

e) Decision of the arbitrator, and reasons and grounds taken for such decision; –If a partial award has already been made, details thereof;

f) The amount or goods to be recovered or compensated;

g) If there is interest chargeable on amount, details thereof;

h) Place of the Arbitration Office and date of the award and

i) Any other necessary matters.

The Arbitration Act also defines the timeline applicable to the arbitration proceedings. For example, the Arbitration Act requires the tribunal to give a final award generally within four months (120 days) from the date of submission of claim, counter claim and the documents.

There are other formal requirements for arbitral awards such as the arbitrator must read out the award to the parties, provide a copy of it to each party and record the evidence of the receipt in the original file. After the final award, the original file should be submitted to the District Court having its jurisdiction.

The decision of the majority shall be deemed to be the decision of the arbitration. In case the arbitrators have dissenting opinions because of which the majority (opinion) cannot be ascertained, the opinion of the chief arbitrator shall be deemed to be the decision of the arbitration, except when otherwise provided for in the agreement.

In case any arbitrator does not agree with the decision of the arbitration, he/she may express his/her dissenting opinion.

16.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Nepal?

The Arbitration Act provides few grounds which permits the dissatisfied party to challenge the arbitral award before the High Court.

The High Court may either set-aside the award or pass an order for re-arbitration on the following grounds as provided under Section 30 of the Arbitration Act:

a) If the agreement is illegal due to lack of capacity of the party or illegal under the law;

b) Lack of notice to the other party of the arbitration proceeding,
c) Lack of jurisdiction,

d) If formation of the tribunal is against the agreement or the Arbitration Act.

Under the following grounds as provided by Section 30(3) of the Arbitration Act, the High Court will set the arbitral award aside:

a) If the dispute is not subject to arbitration under the law;

b) If the award is against public interest or policies.

The petition to challenge the award may be filed before the High Court within thirty-five (35) days from the date of the receipt of the award or the notice received thereof.

16.19 What procedures exist for enforcement of foreign and domestic awards in Nepal?

a) In the case of a domestic award:

Section 31 of the Arbitration Act and Rule 12(1) of the Arbitration Rule require the parties to implement the award within 45 days from the date of receiving the copy of the award.

Section 32 of the Arbitration Act provides that if the award is not implemented within the period as stipulated above, any party may file an application to the court after 30 days from the date of expiry of such time limit prescribed for that purpose to implement the award.

As per Section 32 of the Arbitration Act and Rule 12(2) of the Arbitration Rule, the application for enforcement is to be submitted to the Enforcement Section of the respective District Court. After the application, the District Court implements the award as if it was its own judgment.

Section 41 of the Arbitration Act has fixed the enforcement fee as 0.5 percent of the amount recovered through the enforcement. If the amount cannot be determined at market value than the fee of Rs.500 (approximately 4.5 USD) is payable.

b) In the case of a foreign award:

Section 34 of the Arbitration Act deals with the implementation of foreign awards in Nepal.

A party willing to enforce the foreign award in Nepal has to submit an application to the High Court along with the original or certified copy of the arbitration award, the original or certified copy of the arbitration agreement and an official translation of the award in Nepali in case it is drafted in any other language.

In case Nepal is a party to a treaty which provides for the recognition of a foreign award taken within the area of a foreign country which is also a party to that treaty, then the award shall be recognized under the following conditions:

(i) If the arbitrators are appointed and the award is made according to the agreement,
(ii) If the parties were duly notified about the arbitration proceedings,
(iii) If the award was taken under the conditions of the agreement,
(iv) If the award was within the subject matter referred to by the arbitrators,
(v) If the laws of the foreign country do not contain provisions under which the arbitration awards taken in Nepal cannot be enforced,
(vi) In case the application for implementation has been filed within 90 days from the date of the award,
(vii) If the High Court is satisfied with the conditions above, then it shall forward the award to the District Court for its enforcement.

However, a foreign award shall not be enforced if: (a) the dispute cannot be settled through arbitration under the laws of Nepal or (b) the enforcement of the award would be detrimental to the public policy.

16.20 Can a successful party in the arbitration recover its costs in Nepal?

Section 35 of the Arbitration Act provides that the costs of arbitration shall be borne by the parties as provided in the arbitration agreement. If the arbitration agreement does not provide specific provisions on the costs of arbitration, the costs of the arbitration shall be borne by the parties in the proportion decided by the arbitration tribunal. In the case of enforcement of an award from the court, Section 41 of the Arbitration Act provides that the party on whose favor the award is made can recover the enforcement costs from other parties. However, in practice the recovery is rare.

16.21 Are there any statistics available on arbitration proceedings in Nepal?

No.

16.22 Are there any recent noteworthy developments regarding arbitration in Nepal (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

No.

Name of Author:	**MR. ANUP RAJ UPRETI**
Name of Law Firm:	**Pioneer Law Associates**
Brief Profile:	Pioneer Law Associates is one of the leading commercial law firms in Nepal awarded as highest tax payer in the legal sector. Pioneer Law covers a wide array of practice areas ranging from Foreign Investment and Business Incorporation to Project Finance. Our services extend to a large spectrum of sectors ranging from industrial projects to the financial sector. Legal reform projects have always been a subject matter of keen interest of Pioneer Law and Pioneer Law takes great pride in being part of some of the most notable commercial law reform projects. We also strongly believe in knowledge sharing and disseminating our knowledge to the legal fraternity and stakeholders, through academic presentations and publications.
Telephone Nos.:	+977-1-4221340 / +977-9801024444
Email:	anup@pioneerlaw.com
Website:	www.pioneerlaw.com

17. PAKISTAN

BY: JUSTICE S. AHMED SARWANA

17.1 Which laws apply to arbitration in Pakistan?

Pakistan currently has the following arbitration regimes:

i) "The Arbitration Act", 1940 which governs and regulates domestic arbitration matters.

ii) "The Recognition and Enforcement (Arbitration Agreements & Foreign Arbitral Awards) Act", 2011 ("REA"). This Act incorporates the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958 as a part of the national laws of Pakistan and thereby facilitates the enforcement of international arbitration agreements and foreign arbitral awards in Pakistan.

iii) "The Arbitration (International Investment Disputes) Act, 2011" ("IIDA") was enacted on 30 April 2011 to implement the International Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention").

17.2 Is Pakistan's arbitration law based on the UNCITRAL Model Law?

The Arbitration Act, 1940 ("AA") is based on the principles of English arbitration laws and the Second Schedule of the Pakistan Code of Civil Procedure, 1908. A new arbitration statute is under consideration by the Government.

17.3 Are there different laws applicable for domestic and international arbitration?

Domestic arbitration is governed by the AA while International arbitration falls within the realm of the REA.

17.4 Has Pakistan acceded to the New York Convention?

Pakistan signed the New York Convention on 20 December 1958 and ratified it on 12 October 2005. A foreign arbitral award made in a State which is a party to the New York Convention and such other State as may be notified by the Federal Government in the Official Gazette may be enforced in Pakistan.

17.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

There are no restrictions. Parties can agree on foreign arbitration (i) where both parties are domiciled in Pakistan and (ii) where one party is domiciled in Pakistan and the other in a foreign country.

17.6 Does Pakistan's arbitration law contain substantive requirements for the arbitration procedures to be followed?

The guiding principle is that the parties to an arbitration agreement are free to agree to any terms with respect to arbitration proceedings. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule of the AA in so far as they are applicable to the reference. The requirements in the First Schedule include, among others, provisions relating to appointment of arbitrators, umpire, recording of evidence on oath, production of documents and costs of arbitration.

17.7 Does a valid arbitration clause bar access to state courts?

The arbitration agreement can be enforced by filing an application to the courts under Section 34 of the AA for stay of proceedings commenced by any person who is a party to an arbitration agreement in respect of the matter forming the basis of the suit. The application must be made before filing a written statement or taking any other step in the proceedings.

Under the AA the power to grant a stay is not absolute. The Court may refuse to stay proceedings if by looking upon the facts and circumstances of the case the Court is satisfied that there is no sufficient reason for making reference to arbitration and substantial miscarriage of justice would take place or inconvenience would be caused to parties if a stay is granted.

Under the REA arbitration agreements can be enforced by making an application to the Court for the stay of proceedings. The Court has no discretion and it must stay the proceedings and shall refer the parties to arbitration unless it finds that the agreement itself is null and void, inoperative or incapable of being performed.

17.8 What are the main arbitration institutions in Pakistan?

Centre for International Investment and Commercial Arbitration is the only arbitration institution in Pakistan that provides institutional arbitration, mediation and other dispute avoidance and resolution services.

17.9 Addresses of major arbitration institutions in Pakistan?

Centre for International Investment and Commercial Arbitration
3rd Floor
7-A Turner Road, Lahore
Pakistan
Tel: +92 42 3711 2468
Fax: +92 42 3711 2467
Website: www.ciica.org

17.10 Arbitration Rules of major arbitration institutions?

The Institution's arbitration rules are available on its website.

17.11 What is / are the Model Clause / s of the arbitration institutions?

The model clauses of the arbitration institute are available on its website.

17.12 How many arbitrators are usually appointed?

Under the AA the parties are free to determine the number of arbitrators in the arbitration agreement. If the arbitration agreement is silent about the number of arbitrators, the reference shall be to a sole arbitrator. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments. Where an arbitration agreement provides a reference to three arbitrators, the award of the majority, unless provided otherwise in the agreement, shall prevail. If the arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire, shall prevail.

The REA does not have any provision relating to the appointment of arbitrators. Arbitration clauses directly or indirectly provide the number of arbitrators.

17.13 Is there a right to challenge arbitrators, and if so under which conditions?

There is no provision in the AA which gives a party the right to challenge arbitrators. However, a party may move the court under Section 11 for removal of an arbitrator if he can by evidence establish reasonable doubts about the arbitrator's independence or impartiality.

17.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The parties may be represented by counsel of their choice both in international and domestic arbitration proceedings. There are no nationality restrictions and parties can be represented by any counsel they deem fit. There is no law or regulation which prohibits a foreign counsel to work on arbitrations in Pakistan. The parties may even appoint non-lawyers as their representatives.

17.15 When and under what conditions can courts intervene in arbitrations?

Under the AA the courts in Pakistan may only intervene in the arbitration proceedings if they are required to do so by the parties to an arbitration agreement by making an application to:

i) appoint an arbitrator where any appointed arbitrator neglects or refuses to act, or is incapable of acting or dies and parties do not supply the vacancy (Section 8);

ii) remove arbitrators or umpire where the arbitrator or umpire has failed to use all reasonable dispatch to enter on the reference and make the award or misconducted himself or the proceedings (Section 11);

iii) enlarge time for making an award (Section 28; Para 8, First Schedule);

iv) set aside an arbitral award (Section 30);

v) order the tribunal to deliver the award to the applicant on payment of fees into the court (Section 38(i));

vi) issue process to parties and witnesses to attend arbitration proceedings and assist in taking evidence (Section 43);

vii) take interim measures (Second Schedule).

17.16 Do arbitrators have powers to grant interim or conservatory relief?

Under the AA the arbitrators do not have powers to grant interim or conservatory relief. It is the Court which has the power to issue orders for interim injunction, appointment of receiver, preservation of property, interim custody or sale of goods which are the subject matter of reference.

17.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- ### Formal Requirements for Arbitral Awards

Section 14 of the AA requires that every arbitral award shall be made in writing and shall be signed by the arbitrators or umpire and shall state the reasons upon which the award is based in sufficient detail.

The arbitrators or umpire shall give notice in writing to the parties of the making of the award and signing thereof. Thereafter, an award or a signed copy of it, together with any depositions and documents, must be filed in the Court for pronouncement of Judgment in terms of the award.

- ### Deadlines for issuing Arbitral Awards

Unless a different intention is expressed in the arbitration agreement, an arbitral award shall be made within four months after the arbitrators have entered on the reference or they have been called upon to act by notice in writing by any party to the arbitration agreement or within such extended time as the court may allow. However, the time limit can be extended by the court or by the arbitrators with the consent of all parties to the agreement as provided under Section 28. The Umpire shall make the award within two months of entering the reference or within such extended time as the Court may allow.

17.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Pakistan?

Under the AA any party to an arbitration agreement or any person claiming thereunder, desiring to challenge the existence or validity of an award or to have its effect determined, shall apply to the court. The court shall then decide the question on affidavits provided that where the court deems it just and expedient, it may, inter alia, hear other evidence and pass an order for discovery and particulars as in an ordinary suit.
However, the Court shall not entertain such application challenging the existence or validity of an award or to have its effect determined unless the applicant has deposited in the Court the amount required to be paid under the award or has furnished security for the payment of such sum or the fulfillment of any other obligation by him under the award.

The court may, inter alia, set aside an award on the following grounds: (i) that the arbitrator or umpire misconducted himself or the proceedings; (ii) that the award has been made after issue, by the court, of an order superseding the arbitration; or (iii) that an award has been improperly procured or is otherwise invalid.

Under the REA recognition and enforcement of a foreign arbitral award may be refused on the following conditions:

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

(ii) the party against whom the award is invoked was not given proper notice of the appointment of arbitrators or the arbitration proceedings or was unable to present his case; or

(iii) the award deals with a difference not contemplated in the submission to arbitration or it contains decisions on matters beyond the scope of arbitration; or

(iv) the arbitration procedure or the composition of the arbitral tribunal was not in accordance with the arbitration agreement or was not in accordance with the law of the country where the arbitration took place; or

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

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

(vii) the award is contrary to the public policy of the country.

17.19 What procedures exist for enforcement of foreign and domestic awards in Pakistan?

• Domestic Awards

Where the validity of a domestic award is not challenged, or any challenge has been unsuccessful and the court sees no cause to modify, remit or set aside the arbitral award, the court, after the time for parties to apply to set aside the award has expired, may pronounce judgment according to the award, and issue a decree. Such a decree may be executed under the Code of Civil Procedure, 1908 as a decree issued in a suit.

• Foreign Awards

The court shall recognize and enforce a foreign award in the same manner as a judgment or order of a court in Pakistan. Section 5 of the REA stipulates that the party seeking enforcement shall furnish to the court the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof.

An award made under the ICSID Convention may be enforced through the IIDA. The party seeking to enforce such an award may register the award in the court subject to proof of any matters that may be prescribed and to the other provisions of the Act. Once registered, the award, as respects the pecuniary obligations which it imposes, shall be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the ICSID Convention and entered on the date of registration under the Act.

17.20 Can a successful party in an arbitration recover its costs?

There is no express provision in the AA which allows a successful party to recover costs of the dispute. The arbitrator or umpire may include the costs of arbitration in the award if so authorized by the arbitration agreement or by the terms of the reference. Under Paragraph 8 of the First Schedule to AA the costs of the reference and award is at the discretion of the tribunal. The court may also make such orders as it thinks fit respecting the costs of arbitration where a dispute arises as to such costs and the award contains no sufficient provision concerning them.

The successful party in an international arbitration can recover the costs allowed by the arbitrator in the award.

17.21 Are there any statistics available on arbitration proceedings in Pakistan?

No statistics are available on arbitration proceedings in Pakistan.

17.22 Are there any recent noteworthy developments regarding arbitration in Pakistan (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

The High Court of Sindh at Karachi has consistently held that the discretion available to the Court under Section 34 of the AA is not available under the REA and the Court must stay the proceedings and refer the matter to arbitration unless it finds the arbitral agreement is null and void, inoperative or incapable of being performed. (*Cummins Sales & Service (Pakistan) Ltd. v. Cummins Middle East FZE*, 2013 CLD 292; *Far Eastern Impex (Pvt.) Ltd. v. Quest International Nederland BV*, 2009 CLD 153; *Travel Automation (Pvt.) Ltd. v. Abacus International (Pvt.) Ltd.*, 2006 CLD 497)

It has been held by the High Court of Sindh that an exchange of emails between the parties is an "arbitration agreement in writing" as provided in Article II (2) of the NY Convention and does not necessarily require

signature of both parties to be enforceable in law. *Metropolitan Steel Corporation Ltd. v. McSteel International U.K. Ltd.*, PLD 2006 Karachi 664

In *Lakhra Power Generation Company Ltd. v. Karadeniz Powership Kaya Bey and others*, 2014 CLD 337, the Plaintiff had filed a suit under the Admiralty Jurisdiction of the High Court Ordinance, 1980 and moved an application seeking arrest of the Defendant's four vessels while the owner Karkey (Defendant No.5) filed an application under Section 4 of the REA asking for stay of the proceedings. The High Court held that in view of the fact that Karkey had itself initiated the proceedings under the ICSID Convention which were subsisting, the arbitration agreement, in the circumstances, was incapable of being performed and dismissed the application.

In the case of *Abdullah v. CNAN Group SPA*, PLD 2014 Sindh 349, the High Court of Sindh in relation to international commercial arbitration, after considering several English and US cases, has held that an award debtor cannot bring a suit for declaration and injunctive relief against recognition and/or enforcement of a New York Convention award in so far as the ground taken falls under paragraph 1 of Article V of the Convention.

Name of Author:	**JUSTICE S. AHMED SARWANA** **Former Judge, High Court of Sindh, (Court of Appeal) Pakistan**
Name of Law Firm:	**Abraham & Sarwana**
Brief Profile:	As Pakistan's finest in conflict resolution in and out-of-court, ABRAHAM & SARWANA is a dedicated, experienced, quick and cost-efficient full service law firm. With over 50 years of experience in international practice and partnerships with leading law firms around the globe, the Firm offers peerless legal expertise to anyone wishing to do business in Pakistan.
Telephone Nos.:	+92 3586 7360, +92 3568 7370
Fax No.:	+92 3568 7364
Email:	info@abrahamslaw.net
Website:	www.abrahamslaw.net

18. PHILIPPINES

BY: MS. RENA RICO-PAMFILO

18.1 Which laws apply to arbitration in the Philippines?

The Philippines adopts a dual-system approach to arbitration with one law dealing with domestic arbitration and another law dealing with international arbitration.

Domestic arbitration is governed by Republic Act 876. Republic Act 876 was enacted on 19 June 1953 and deals with domestic arbitration proceedings in the Philippines, i.e., arbitration between two Philippine entities or individuals with a seat of arbitration in the Philippines. This law provides who may be parties to an arbitration, what matters may be subject to arbitration, when and how arbitration proceedings may be commenced. The law also provides the procedure for appointment of arbitrators, the qualifications of arbitrators, and the conduct of the arbitration proceedings. Finally, the law also provides the procedure and grounds to set aside, modify or correct an arbitral award. The law has been amended in part by Republic Act 9285 which covers mediation and international arbitration proceedings.

International arbitration is governed by the Republic Act 9285 or the "Alternative Dispute Resolution Act of 2004," enacted on 13 April 2004. The Philippines adopted with this law the UNCITRAL Model Law on International Commercial Arbitration.[135] Republic Act 9285 amends, to a certain extent, the provision of Republic Act 876 on domestic arbitration, by providing that certain provisions of the UNCITRAL Model Law are applicable to domestic arbitration. These provisions include the enforcement of the arbitration agreement (Article 8), number and procedure of appointment and challenge of arbitrators (Articles 10-14), the arbitration procedure and making of the award (Articles 18-19, 29-32). Thus, to the extent indicated, the provisions of Republic Act 876 on

135 Section 19, R.A. 9285. The Philippines adopted the 1985 version of the UNCITRAL Model Law and has not adopted the 2006 amendments to the UNCITRAL Model Law.

domestic arbitration are modified and adopt the provisions of the UNCITRAL Model Law. Republic Act 9285 further provides that Sections 22 to 31 therein applies to domestic arbitration. These Sections refer to legal representation in arbitration proceedings, confidentiality, and designation of appointing authority, grant of interim measures of protection, place and language of the arbitration.

Republic Act 9285 also provides the procedure for ad hoc mediation[136] in the Philippines.

Arbitration of disputes arising from construction contracts in the Philippines is governed by Executive Order 1008 or the Construction Industry Arbitration Law. The law created a body known as the "Construction Industry Arbitration Commission" (CIAC) which will have original and exclusive jurisdiction over disputes arising from, or connected with contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof. These disputes may involve government or private contracts. For the CIAC to acquire jurisdiction, the parties to a dispute must agree to submit the same to voluntary arbitration.[137] Section 35 of Republic Act 9285 provides that construction disputes which fall within the original and exclusive jurisdiction of the CIAC shall include those between or among parties to, or who are otherwise bound by, an arbitration agreement, directly or by reference whether such parties are project owner, contractor, subcontractor, fabricator, project manager, design professional, consultant, quantity surveyor, bondsman or issuer of an insurance policy in a construction project. Further, the CIAC shall continue to exercise original and exclusive jurisdiction over construction disputes although the arbitration is "commercial" pursuant to the provisions of Republic Act 9285.

136 Administrative issuances of the Supreme Court govern court annexed mediation.
137 Section 4, Executive Order 1008 dated 4 February 1985.

18.2 Is the Philippine arbitration law based on the UNCITRAL Model Law?

Yes, Republic Act 9285 adopts the 1985 UNCITRAL Model Law to govern international arbitration proceedings.[138]

18.3 Are there different laws applicable for domestic and international arbitration?

Yes, Republic Act 876, as amended by Republic Act 9285, governs domestic arbitration and Republic Act 9285 (which includes, as an Annexure, the UNCITRAL Model Law), governs international arbitration.

18.4 Have the Philippines acceded to the New York Convention?

Yes, the Philippines acceded to the New York Convention on 6 July 1967, which entered into force in the Philippines on 4 October 1967.[139] The Philippines exercised both the reciprocity and commerciality reservations. While the Philippines was one of the first countries in Asia to accede to the New York Convention, it was only in 2004 under the provisions of Republic Act 9285 that enabling legislation on the Convention was enacted. Section 42 of Republic Act 9285 states the procedure for enforcing an award under the Convention.

The procedure for enforcement of arbitral awards that are not covered by the Convention shall be governed by the rules of procedure enacted by the Supreme Court of the Philippines. The Court may, on grounds of comity

138 Section 19, Republic Act 9285.

139 The Philippines adopted reservations on applying the Convention only to awards rendered in contracting States and that the Philippines will only apply the Convention to differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law.

and reciprocity, recognize and enforce a non-Convention award as a Convention award.[140]

Rule 13 of the Special Rules of Court on Alternative Dispute Resolution (the "Special ADR Rules") promulgated by the Supreme Court in 2009[141] provides specific procedures for the recognition and enforcement of foreign arbitral awards under the Convention. A petition shall be filed, at the option of the petitioner, with the Regional Trial Court (a) where the assets to be attached or levied upon is located, (b) where the act to be enjoined is being performed, (c) in the principal place of business in the Philippines of any of the parties, (d) if any of the parties is an individual, where any of those individuals resides, or (e) in the National Capital Judicial Region.[142] Rule 13 reproduces Article V of the Convention as grounds to refuse enforcement of the award and further proscribe any ground for opposing the recognition and enforcement of a foreign arbitral award other than those enumerated.[143] Rule 13 expressly provides for the presumption that the award is enforceable and mandates the court to recognize the award unless a ground to refuse recognition or enforcement of the foreign arbitral award under this rule is "fully established".[144] The decision of the court enforcing an award is immediately executory.[145]

18.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Both Republic Act 876 (for domestic arbitration) and Republic Act 9285 (for international arbitration) do not prohibit parties from designating a foreign arbitration institution to administer the arbitration proceedings. Thus, where either or both parties are domiciled in the Philippines, the parties may designate a foreign arbitration institution to administer the arbitration proceedings.

140 Section 43, Republic Act 9285.
141 A.M. No. 07-11-08-SC , September 1, 2009.
142 Rule 13.3, Special ADR Rules.
143 Rule 13.4, Special ADR Rules.
144 Rule 13.11, Special ADR Rules.
145 Rule 13.11, Special ADR Rules.

The rule is different however, with respect to construction disputes or disputes arising from, or connected with contracts entered into by parties involved in construction in the Philippines.[146] Where parties in a construction contract in the Philippines have agreed to submit their disputes to arbitration, the arbitration shall be conducted under the auspices of the Construction Industry Arbitration Commission (CIAC), without reference to any foreign arbitration institution that may be specified in the arbitration agreement.[147] Thus, where parties, whether one or both is domiciled in the Philippines, agree in a contract involving a construction project in the Philippines to submit their dispute to arbitration, the CIAC shall have jurisdiction over the dispute regardless of any reference to a foreign arbitration institution in the contract.[148]

18.6 Does the Philippines' arbitration law contain substantive requirements for the arbitration procedures to be followed?

For international arbitration proceedings, apart from the requirement that the arbitration agreement must be in writing, there are no mandatory substantive requirements for the arbitration procedures, following the provisions of the UNCITRAL Model Law.

For domestic arbitration, Republic Act 876 requires that the arbitration agreement be in writing and subscribed by the party sought to be charged, or by his lawful agent.[149] In the institution of arbitration proceedings arising from contracts to arbitrate future controversies, the arbitration shall be instituted by service by either party upon the other of a demand for arbitration in accordance with the contract. Such demand shall set forth the

146 Section 4, Executive Order 1008 or the Construction Industry Arbitration Law.

147 This is a result of the new Rules of Procedure Governing Construction Arbitration issued by the Construction Industry Arbitration Commission and as interpreted by the Philippine Supreme Court in China *Chang Jiang Energy Corporation (Philippines) v. Rosal Infrastructure Builders et al.* (GR No. 125706, September 30, 1996); *National Irrigation Administration v. Court of Appeals* (318 SCRA 255, November 17, 1999) and *LM Power Engineering Corporation vs. Capitol Industrial Construction Groups, Inc.* (G.R. No. 141833, March 26, 2003).

148 The writers believe that in light of Republic Act 9285, there is good reason to revisit the rule.

149 Section 4, Republic Act 876 as amended.

nature of the controversy, the amount involved, if any, and the relief sought, together with a true copy of the contract providing for arbitration. The demand shall be served upon any party either in person or by registered mail.[150] In case of a submission agreement, the arbitration shall be instituted by the filing with the Clerk of the Regional Trial Court having jurisdiction of the submission agreement, setting forth the nature of the controversy and the amount involved, if any. Such submission may be filed by any party and shall be duly executed by both parties.[151] In domestic arbitration proceedings, arbitrators are required to be sworn, by any officer authorized by law to administer an oath, to faithfully and fairly hear and examine the matters in controversy and to make a just award according to the best of their ability and understanding.[152]

18.7 Does a valid arbitration clause bar access to state courts?

For both domestic and international arbitration proceedings, the existence of a valid arbitration clause bars access to the courts for the resolution *on the merits* of a dispute that is within the scope of the arbitration agreement.[153] However, parties to an arbitration may invoke the court's supervisory powers over arbitration proceedings under Republic Act 876 as amended (for domestic proceedings) and Republic Act 9285 (for international proceedings) in other ways. These include the power of the courts to (1) enforce the arbitration agreement, (2) act in the event of the failure of the Appointing Authority designated by law or agreement to act, (3) grant interim measures of protection and (4) set aside, vacate, modify or correct arbitration awards.

150 Section 5(a), Republic Act 876 as amended.
151 Section 5(c), Republic Act 876 as amended.
152 Section 13, Republic Act 876 as amended.
153 Under Section 24 of Republic Act 9285, if one party disregards the arbitration agreement and commences an action in court, and the other party does not object by the end of the pre-trial conference, the court action shall continue unless both parties thereafter request that the dispute be referred to arbitration.

18.8 What are the main arbitration institutions in the Philippines?

The main arbitration institution in the Philippines is the "Philippine Dispute Resolution Center, Inc." (PDRCI). It is a non-stock, non-profit organization incorporated in 1996 out of the Arbitration Committee of the Philippine Chamber of Commerce and Industry. It has for its purpose the promotion of arbitration as an alternative mode of settling commercial disputes and providing dispute resolution services to the business community. These services include the administration of arbitration proceedings, whether domestic or international, under its own rules of procedure and the appointment of arbitrators when designated by the parties as an appointing authority.

The Philippine International Center for Conflict Resolution (PICCR) was formally launched in 2019 and was established by the Integrated Bar of the Philippines (IBP)[154].

18.9 Addresses of major arbitration institutions in the Philippines?

The address of the PDRCI is as follows:

Philippine Dispute Resolution Center, Inc.
3rd Floor Commerce and Industry Plaza (PCCI Building)
1030 Campus Avenue corner Park Avenue
McKinley Town Center, Fort Bonifacio Taguig City
Metro Manila, Philippines
Phone : +63 2 555-0798
Fax : +63 2 822-4102
Email : secretariat@pdrci.org
Website : www.pdrci.org

154 The Integrated Bar of the Philippines is the official organization of all Philippine lawyers whose names appear in the Roll of Attorneys of the Supreme Court of the Philippines.

The address of **PICCR** is as follows :

Integrated Bar of the Philippines
IBP Building
No.15 Doña Julia Vargas Avenue
Ortigas Center, Pasig City
Philippines 1600
Phone : +63 2 631-3016; +63 2 631-3017
+63 2 631-3018; +63 2 634-4696
Email : ibp.arbitration@gmail.com
Website : www.ibp.ph

18.10 Arbitration Rules of major arbitration institutions?

The arbitration rules of the PDRCI are available on their website[155] and can also be purchased at their office.

As the time of writing, the author is informed that the arbitration rules of PICCR are still being finalized and have not been released to the public.

18.11 What is/are the Model Clause/s of the arbitration institutions?

The model clause of the PDRCI as published in their website is as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be finally resolved by arbitration in accordance with the rules of the Philippine Dispute Resolution Center (PDRC)."

Note: Parties may wish to consider adding:

155 http://www.pdrci.org/web/wp-content/uploads/2012/07/NEW-ARBITRATION-RULES-PDRCI.pdf

(a) ***The appointing authority shall be...(name of institution or person)***

(b) ***The number of arbitrators shall be...(one or three)***

(c) ***The place of arbitration shall be...(city or country)***

(d) ***The language(s) to be used in the arbitral proceedings shall be...(language)***

At the time of writing, the author is informed that the model clause of PICCR is still being finalized and has not been released to the public.

18.12 How many arbitrators are usually appointed?

In view of the modification of certain provisions in Republic Act 876 (for domestic arbitration), in both domestic and international arbitration, the parties are free to agree on the number of arbitrators.[156] If parties fail to agree on the number of arbitrators, there shall be three.

For both domestic and international arbitration proceedings, the law provides that the appointing authority for administered arbitration proceedings or arbitration pursuant to institutional rules shall be the appointing authority designated in such rules. For ad hoc arbitration, the default appointing authority shall be the National President of the Integrated Bar of the Philippines or his duly authorized representative.[157] In the event that the Appointing Authority fails or refuses to act within 30 days from receipt of the request, the parties may apply to the courts.[158]

156 Article 11, UNCITRAL Model Law, Appendix A to Republic Act 9285 and is applicable to domestic arbitration proceedings by virtue of Section 33 of Republic Act 9285.

157 Section 26, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.

158 Section 27, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.

18.13 Is there a right to challenge arbitrators, and if so under which conditions?

Following the UNCITRAL Model Law, 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. These grounds for challenge apply to both domestic and international arbitration proceedings.

18.14 Are there any restrictions as to parties' representation in arbitration proceedings?

Republic Act 9285 provides that for international arbitrations conducted in the Philippines, a party may be represented by any person of his choice, including foreign lawyers or foreign law firms. However, foreign lawyers, unless admitted to the practice of law in the Philippines, shall not be authorized to appear as counsel in any Philippine court, or any other quasi-judicial body whether or not such appearance is in relation to the arbitration in which he appears.[159] Thus, local counsel will need to be engaged for proceedings before Philippine courts even if related to international arbitration proceedings. Republic Act 9285 makes this provision applicable to domestic arbitration proceedings.

18.15 When and under what conditions can courts intervene in arbitrations?

For international arbitration proceedings with the seat of arbitration in the Philippines, Philippine courts may intervene or provide judicial support in arbitration proceedings in the following instances:

159 Section 22, Republic Act 9285.

18.15.1 Protective orders to preserve confidentiality[160]

The court where an action or appeal is pending in relation to international arbitration proceedings may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.

18.15.2 Failure or refusal to act by the Appointing Authority[161]

Where the Appointing Authority fails or refuses to act in any of the instances provided under Articles 11(3), 11(4), 13(3) or 14(1) of the UNCITRAL Model Law within 30 days from receipt of a request, a party may renew its application before the appropriate Philippine court.

18.15.3 Ruling on a Jurisdictional Issue as a Preliminary Question[162]

Where the arbitral tribunal rules as a preliminary question that it has jurisdiction under the provisions of Article 16(2) of the UNCITRAL Model Law, the aggrieved party may request, within 30 days from the receipt of the ruling, the appropriate Regional Trial Court to decide the matter.

18.15.4 Issuance and Enforcement of Interim Measures of Protection[163]

Before the constitution of the arbitral tribunal, a party may request from a Court an interim measure of protection. Provisional relief may be granted against the adverse party (i) to prevent irreparable loss or injury; (ii) to

160 Section 24, Republic Act 9285.
161 Section 27, Republic Act 9285.
162 Article 16(3), UNCITRAL Model Law in relation to Article 6, UNCITRAL Model Law and Section 3(k), Republic Act 9285.
163 Sections 28 and 29, Republic Act 9285.

provide security for the performance of any obligation; (iii) to produce or preserve any evidence; or (iv) to compel any other appropriate act or omission. The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order. Further, to the extent that the arbitral tribunal, after the constitution of the tribunal and during the course of the proceedings, has no power to act or is unable to act effectively, the request for interim relief may be made with the Court.

Interim or provisional relief is requested by written application transmitted by reasonable means to the Court and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and the evidence supporting the request.

A party who does not comply with the order shall be liable for all damages resulting from non-compliance, including all expenses and reasonable attorney's fees incurred in obtaining the order's judicial enforcement.

Further, either party may apply to Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.

18.15.5 Assistance in Taking Evidence[164]

The arbitral tribunal or a party with the approval of the arbitral tribunal may request the assistance of the courts in taking evidence. The court may execute the request within its competence and in accordance with the applicable Rules of Court on taking evidence.

164 Article 27, UNCITRAL Model Law

18.15.6 Setting Aside, Enforcement and Recognition of Arbitral Awards and Recognition and Enforcement of Foreign Arbitral Awards

The appropriate Regional Trial Court shall have the power to set aside arbitral awards issued under international arbitration proceedings with a seat of arbitration in the Philippines.[165] The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.[166]

The recognition and enforcement of foreign arbitral awards, i.e., awards issued pursuant to arbitration proceedings with a seat in a country other than the Philippines, shall be filed with the Regional Trial Court and governed by the rules of procedure issued by the Supreme Court.[167]

It should be noted that proceedings for recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.[168]

The above matters are specifically implemented by the Special ADR Rules.

18.16 Do arbitrators have powers to grant interim or conservatory relief?

For both domestic and international arbitration proceedings, arbitrators have the power to issue interim measures of protection under the same circumstances as the courts described above. After constitution of the

165 Article 34, UNCITRAL Model Law in relation to Section 3(k), Republic Act 9285.
166 Section 40, Republic Act 9285.
167 Section 42, Republic Act 9285.
168 Section 47, Republic Act 9285.

arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal. Interim relief may be granted (i) to prevent irreparable loss or injury; (ii) to provide security for the performance of any obligation; (iii) to produce or preserve any evidence; or (iv) to compel any other appropriate act or omission. The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order.[169]

Interim or provisional relief is requested by written application transmitted by reasonable means to the arbitral tribunal and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and the evidence supporting the request.[170]

The order issued by the tribunal shall be binding upon the parties. A party who does not comply with the order shall be liable for all damages resulting from non-compliance, including all expenses, and reasonable attorney's fees incurred in obtaining the order's judicial enforcement.[171]

Further, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute following the rules stated above. Such interim measures may include but shall not be limited to preliminary injunction directed against a party, appointment of receivers or detention, preservation, inspection of property that is the subject of the dispute in arbitration.[172]

169 Section 28, Republic Act 9285.
170 Section 28, Republic Act 9285.
171 Section 28, Republic Act 9285.
172 Section 29, Republic Act 9285.

18.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

Both domestic and international arbitration proceedings follow the requirements of the UNCITRAL Model Law with regard to the form and contents of an arbitral award. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 of the UNCITRAL Model Law. The award shall state its date and the place of arbitration. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

- **Deadlines for issuing arbitral awards**

There is no deadline or time limit for the issuance of arbitral awards under international arbitration proceedings. However, in domestic arbitration, Republic Act 876 requires that in the absence of an agreement between the parties, the award shall be rendered within 30 days after close of the hearings or if oral hearings have been waived, within 30 days after the arbitrators shall have declared the proceedings in lieu of hearing closed. This period may be extended by mutual consent of the parties.[173]

- **Other formal requirements for arbitral awards**

There are no other formal requirements to be followed.

173 Section 19, Republic Act 876.

18.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

A decision of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award, in both international and domestic arbitration proceedings, may be appealed to the Philippine Court of Appeals in accordance with the rules of procedure to be promulgated by the Supreme Court.

An arbitral award in international arbitration proceedings may be set aside under the grounds set forth in Article 34 of the UNCITRAL Model Law. Thus, an arbitral award may be set aside where the party making the application furnishes proof that:

(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Philippines;

(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 matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(v) the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Philippine law or the award is in conflict with Philippine public policy.

In domestic arbitration proceedings, an award may be vacated upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:[174]

(i) The award was procured by corruption, fraud, or other undue means; or
(ii) That there was evident partiality or corruption in the arbitrators or any of them; or
(iii) That 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; that one or more of the arbitrators was disqualified to act as such under section nine hereof, and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or
(iv) That the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

Where an award in a domestic arbitration is vacated, the court, in its discretion, may direct a new hearing either before the same arbitrators, a new arbitrator or arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators, and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

These are specifically implemented by the Special ADR Rules.

174 Section 24, Republic Act 876.

18.19 What procedures exist for enforcement of foreign and domestic awards?

The recognition and enforcement of foreign arbitral awards rendered in a New York Convention country shall be governed by the said Convention.[175] The recognition and enforcement of such arbitral awards shall be filed with the Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court. Republic Act 9285 states that the said procedural rules shall provide that the party relying on the award or applying for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. If the award or agreement is not made in any of the official languages, the party shall supply a duly certified translation thereof into any of such languages. The applicant shall also establish that the country in which the foreign arbitration award was made is a party to the New York Convention.

If the application for rejection or suspension of enforcement of an award has been made, the Regional Trial Court may, if it considers it proper, vacate its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security.

For arbitral awards issued in countries that are not signatories to the New York Convention, the recognition and enforcement of such awards shall be done in accordance with procedural rules to be promulgated by the Supreme Court. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award.[176]

Republic Act 9285 states that a foreign arbitral award when confirmed by a court of a foreign country shall be recognized and enforced as a foreign arbitral award and not as a judgment of a foreign court.[177] Further, a foreign arbitral award, when confirmed by the Regional Trial Court, shall be

175 Section 42, Republic Act 9285.
176 Section 43, Republic Act 9285.
177 Section 44, Republic Act 9285.

enforced in the same manner as final and executory decisions of courts of law of the Philippines.[178]

A party to the foreign arbitration proceeding may oppose an application for recognition and enforcement of the foreign arbitral award in accordance with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under Article V of the New York Convention. Any other ground raised shall be disregarded by the Regional Trial Court.[179]

The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.[180]

For domestic arbitration proceedings, a party may, at any time within one month after the award is made, apply to the court having jurisdiction, for an order confirming the award; and thereupon the court must grant such order unless the award is vacated, modified or corrected, as prescribed herein.[181] Notice of such motion must be served upon the adverse party or his attorney as prescribed by law for the service of such notice upon an attorney in action in the same court. A domestic arbitral award when confirmed shall be enforced in the same manner as final and executory decisions of the Regional Trial Court.[182]

The above provisions of law are specifically implemented by the Special ADR Rules.

18.20 Can a successful party in the arbitration recover its costs?

There is no provision in Republic Act 9285 on the recovery of costs in an arbitration proceeding nor has there been a case decided by the Supreme

178 Section 44, Republic Act 9285.
179 Section 45, Republic Act 9285.
180 Section 40, Republic Act 9285.
181 Section 23, Republic Act 876 in relation to Section 40, Republic Act 9285.
182 Section 40, Republic Act 9285.

Court dealing with this issue.[183] It is still uncertain on how the Philippine courts will react to a recovery of costs in an arbitration proceeding and whether an award of this nature will be enforced by Philippine courts. In Asset Privatization Trust v. Court of Appeals (300 SCRA 579), the arbitration panel in a domestic proceeding awarded damages and costs to a party, but on review, the Supreme Court vacated the award.

18.21 Are there any statistics available on arbitration proceedings in the Philippines?

The Secretariat of the Philippine Dispute Resolution Center, Inc. (PDRCI) compiled statistics on arbitration cases filed with the PDRCI. From 2016 to 2018, a total of 19 arbitration cases (domestic and international) were submitted under the auspices of the PDRCI. Out of the 19 cases, only five cases were for use of facilities of PDRCI (room hire, transcription, secretarial services) and the remaining 14 cases were administered arbitration proceedings under PDRCI Rules. The majority of the cases are domestic arbitration proceedings. Only two out of the 15 cases are international arbitration proceedings. The two international arbitration proceedings involved parties from the United States of America. The total sum in dispute for 2016 was approximately USD 29 million, in 2017 it was USD 14 million and in 2018 it was USD 60 million.

Since 2010, PDRCI has handled on average, about seven arbitration cases per year, a majority of which constitute domestic arbitration proceedings administered under the PDRCI arbitration rules.

183 There has been a Court of Appeals decision on the award of costs in arbitration which was struck down by the court as being "contrary to public policy." Unfortunately, no definitive ruling on the matter was given by the Supreme Court as the parties to that case settled amicably and jointly withdrew the appeal before the Supreme Court.

18.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

The Revised Corporation Code of the Philippines (Republic Act No. 11213) was signed into law by the President of the Philippines on 20 February 2019. Under this law, Philippine corporations may include in its articles of incorporation or by-laws an arbitration agreement.[184] The arbitration agreement shall cover disputes that may arise between the corporation, its stockholders or members, arising from the implementation of the articles of incorporation or by-laws or from intra-corporate relations. To be enforceable the arbitration agreement shall include the number of arbitrators and procedure for their appointment. The power to appoint the arbitrators shall be granted to a designated third party. In the event that the designated third party fails to appoint within the period specified in the agreement, the parties may request the Securities and Exchange Commission to make the appointment. The Revised Corporation Code took effect on 8 March 2019.

184 Section 181, Republic Act No. 11213.

Name of Author:	**MS. RENA M. RICO-PAMFILO**
Name of Institution:	**Ateneo de Manila University School of Law**
Brief Profile:	**Ms. Rico-Pamfilo** is admitted to the Philippine Bar (2001) and the New York Bar (2009). She started her career in international arbitration at the SIAC / Singapore. Ever since moving to the Philippines she worked for a leading law firm first, focusing on domestic and international commercial arbitration. She was also involved in various corporate transactional and project finance work on energy and infrastructure projects, including oil, gas, and power generation. Ms. Rico-Pamfilo is now Chief Legal Counsel of an investment firm based in the Philippines and a Professor of Law at the Ateneo de Manila University School of Law teaching International Commercial Arbitration. She is also an accredited lecturer of the Philippine Judicial Academy on Arbitration. She has lectured on Mandatory Continuing Legal Education seminar series both in the Philippines and in the US. She has delivered lectures in various countries in Asia on international arbitration and the UNCITRAL Model Law on International Commercial Arbitration, particularly arbitration in Singapore and in the Philippines.
Telephone No.:	+ 63 2 818 5888
Email:	renarico@gmail.com

19. SINGAPORE

BY: MR. CHAN LENG SUN, SC
MR CALVIN LIANG

19.1 Which laws apply to arbitration in Singapore?

There are three primary arbitration statutes in Singapore:

i. the International Arbitration Act (Cap. 143A) ("**IAA**"),[185] which adopts the 1985 UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") and is also the implementing legislation for the recognition and enforcement of arbitral awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**");

ii. the Arbitration Act (Cap. 10) ("**AA**"); and

iii. the Arbitration (International Investment Disputes) Act (Cap. 11) ("**AIDA**"), giving effect to the UN Convention on the Settlement of Disputes between States and Nationals of other States (the "**ICSID Convention**").

As the ICSID Convention and AIDA come under a different regime administered by the World Bank, they are not relevant here.

The IAA applies to "international" arbitrations and to all arbitrations to which parties agree that the IAA or the Model Law should apply.

An arbitration is considered "international" under the IAA if:

(a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or

185 The text of the IAA and AA is available online at https://sso.agc.gov.sg/

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; or

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The AA applies to all arbitrations outside the scope of the IAA.

The main distinction between the IAA and the AA lies primarily in the extent and degree of possible Court intervention in the arbitral process. Generally, the AA allows for a greater scope of court intervention as compared to the IAA.

For example, under the IAA, the Court's power to grant interim measures is restricted to situations of urgency, where the arbitral tribunal or institution is unable to act effectively, and by the permission of the arbitral tribunal or the agreement of parties. In contrast, under the AA, the Court's power to grant interim measures is not restricted to the same degree although it must have regard to any applications or orders made by the tribunal when exercising its power to grant interim measures. Under the IAA, the arbitral tribunal has general power to grant "an interim injunction or any other interim measure,"[186] whereas under the AA, the arbitral tribunal has no such general power as such power is reserved for the Courts.[187]

Under the AA, parties may apply to the Court to determine any question of law arising in the course of the arbitration proceedings which substantially

186 S. 12(1)(i), IAA. All references to "S." are an abbreviation of the word "Section" and "Art." are an abbreviation of the word "Article."

187 S. 28, AA read with S. 31 of the AA.

affects the rights of the parties.[188] Such application may be made with the agreement of all parties to the proceedings or the permission of the arbitral tribunal, provided that the Court is satisfied that the application is timely and will result in cost-savings. A party may also appeal an award on a question of law arising out of the award by agreement of the parties or by leave of Court provided the conditions under Section 49 of the AA are satisfied.[189]

Both the AA and the IAA were amended in 2012 to allow parties to appeal on both positive and negative jurisdictional rulings by the tribunal.[190]

19.2 Is the Singapore arbitration law based on the UNCITRAL Model Law?

The IAA largely adopts the 1985 UNCITRAL Model Law (excluding Chapter VIII of the UNCITRAL Model Law which deals with recognition and enforcement of awards), with a few modifications. While the IAA requires arbitration agreements to be in writing, it was amended in 2012 to adopt a corresponding amendment to the 2006 UNCITRAL Model Law by expanding the definition of "in writing" to include agreements concluded by any means (orally, by conduct or otherwise), as long as their content is recorded in any form.

The 2006 UNCITRAL Model Law amendments to enforce interim measures have not been adopted in Singapore.

19.3 Are there different laws applicable for domestic and international arbitration?

Yes. Generally, the IAA governs international arbitration, while the AA governs domestic arbitrations seated in Singapore. Please refer to paragraph 1 above for further detail.

188 S. 45, AA.
189 S. 45, AA.
190 S. 21A, AA and s. 10, IAA.

19.4 Has Singapore acceded to the New York Convention?

Yes. It is given effect under Part III of the IAA.

19.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Yes. There are no restrictions.

19.6 Does the IAA contain substantive requirements for the arbitration procedures to be followed?

Yes. However, many of the provisions in Part II of the IAA and in the Model Law adopted pursuant to the IAA allow for parties to agree otherwise. That said, it should be noted that the provisions relating to the power of the Courts to grant interim measures and public policy grounds to challenge an award do not provide for parties to agree otherwise.

19.7 Does a valid arbitration clause bar access to state courts?

Under the IAA and the AA, arbitration agreements may be enforced by a party making an application to the Courts for a stay of the Court proceedings commenced in breach of the arbitration agreement.

Under the IAA, a Court *must* grant a stay if the conditions provided under the IAA are fulfilled unless the arbitration agreement is null and void, inoperative or incapable of being performed. Under the AA, a Court has discretion whether or not to grant a stay.

19.8 What are the main arbitration institutions in Singapore?

Main arbitration institutions with presence in Singapore include the following:

(a) the **Singapore International Arbitration Centre** ("**SIAC**"), which was established in 1991 (see: www.siac.org.sg);

(b) the **Singapore Chamber of Maritime Arbitration** ("**SCMA**") (see: http://www.scma.org.sg);

(c) the **WIPO Arbitration and Mediation Center Singapore Office** ("**WIPO**") (see http://www.wipo.int/amc/en/center/singapore/)

(d) **International Centre for Dispute Resolution – Singapore** ("**ICDR**"), which was set up jointly between the International Division of the American Arbitration Association and the SIAC;

(e) **Permanent Court of Arbitration - Singapore facility** ("**PCA**").

(f) the **International Chamber of Commerce** ("**ICC**") – the Secretariat of the International Court of Arbitration of the ICC opened its new case management office in Singapore in April 2018 (see https://iccwbo.org/).

In addition, the Law Society of Singapore has also set up the Law Society Arbitration Scheme ("**LSAS**").

19.9 Addresses of major arbitration institutions in Singapore?

SIAC's address and contact details are as follow:
Singapore International Arbitration Centre
32 Maxwell Road
#02-01, Maxwell Chambers
Singapore 069115
Tel: +65 6221 8833
Fax: +65 6224 1882
Website: www.siac.org.sg

SCMA's address and contact details are as follows:
Singapore Chamber of Maritime Arbitration
32 Maxwell Road
#02-14 Maxwell Chambers
Singapore 069115
Tel : +65 6324 0552
Fax: +65 6324 1565
Website: http://www.scma.org.sg

The address of **WIPO Arbitration and Mediation Center Singapore** is as follows:
WIPO Arbitration and Mediation Center Singapore
Maxwell Chambers
32 Maxwell Road #02-02
Singapore 069115
Tel: +65 6225 2129
Fax: +65 6225 3568
Website: http://www.wipo.int/amc/en/contact/

The address and contact details of **International Centre for Dispute Resolution** – Singapore office are as follows:
ICDR Singapore
Maxwell Chambers
32 Maxwell Road, #02-06
Singapore 069115
Tel: +65 6227 2879
Fax: +65 6227 3942
Website: www.icdr.org

The address and contact details of the **ICC** are as follows:
SICAS, Inc
32 Maxwell Road #03-05B
Singapore 069115
Tel: +65 6805 9581
Email: ica11@iccwbo.org

19.10 Arbitration Rules of major arbitration institutions?

The **SIAC Rules** (6th Edition, 1 August 2016) can be found on the SIAC's website at http://siac.org.sg/our-rules/rules/siac-rules-2016

The **SCMA Rules** (3rd Edition, October 2015) can be found on the SCMA's website at http://www.scma.org.sg/pdf/rules_201510_eng.pdf

The **WIPO Arbitration Rules** can be found at WIPO's website at http://www.wipo.int/amc/en/arbitration/rules/newrules.html

The **ICDR's Arbitration Rules** can be found at the ICDR's website at www.icdr.org

The **PCA's Arbitration Rules 2012**, consisting of four sets of Optional Rules can be found at https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/

The **ICC Rules 2017** can be found at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

The **LSAS Arbitration Rules 2017** can be found at https://www.lawsociety.org.sg/Portals/0/ResourceCentre/ArbitrationScheme/pdf/LSAS_Rules.pdf.

19.11 What is/are the Model Clause/s of the arbitration institutions?

(a) **SIAC**'s standard model clause provides as follow:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be Singapore. [Parties may select an alternative seat to Singapore - if so, then replace "Singapore" with the city and country choice]

The Tribunal shall consist of _____* arbitrator(s) [to state an odd number - either one or three].

The language of the arbitration shall be _____."

SIAC also has model clauses for adoption of its expedited procedure and the Arb-Med-Arb process, which is a tiered dispute resolution mechanism administered by SIAC and SIMC.

The **SCMA** recommends the use of the following model clause:

"Any and all disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ("SCMA Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause".

The SCMA also has model clauses specifically designed for use with the Documents, Agreements and Forms of The Baltic and International Maritime Council ("**BIMCO**") as well as for use with its Bunker Claims Procedure for bunker-related disputes.

(b) **WIPO** recommends the use of the following model arbitration clause by parties to a contract:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction]."

WIPO also has model clauses for mediation-arbitration clauses, for binding expert determination followed by arbitration, etc.

(c) The **ICDR** recommends the use of the following model clause for international commercial contracts:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."

The parties should consider adding:

"The number of arbitrators shall be (one or three)";

"The place of arbitration shall be [city, (province or state), country]";

"The language(s) of the arbitration shall be ___."

(d) The **PCA** recommends the use of the following model clause by parties to a contract:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012.

(a) The number of arbitrators shall be ... (one, three, or five);

(b) The place of arbitration shall be ... (town and country);

(c) The language to be used in the arbitral proceedings shall be ..."

The PCA also has a slightly different model arbitration clause for treaties and other agreements.

(e) The **ICC** recommends that parties wishing to make reference to ICC Arbitration in their contracts use the following standard clause:

> **"*All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.*"**

(f) For the **LSAS**, the following model clause is recommended:

> ***"Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination, shall be determined by arbitration in Singapore in accordance with the LawSoc Arbitration Rules in force at the commencement of the arbitration."***

19.12 How many arbitrators are usually appointed?

Parties are free to determine how many arbitrators they wish to appoint. If the parties have not determined the number of arbitrators, as a general rule, a single arbitrator will be appointed under the IAA (s. 9) and the AA (s. 12).

Certain institutional arbitration rules also provide for a default number of arbitrators if parties have not reached any agreement on the number. As such, if parties have agreed to adopt such rules, the default provisions in such rules will apply. For example, pursuant to the Rule 9.1 of the SIAC Rules (6th Ed.), if the parties have not agreed on the number of arbitrators, then generally a sole arbitrator will be appointed, unless it appears to the Registrar of the SIAC, giving due regard to any proposals by the parties, that the complexity, quantum involved or other relevant circumstances of the dispute warrants the appointment of three arbitrators. All nominations of arbitrators are subject to the appointment by the President of the Court of Arbitration of SIAC in his discretion (Rule 9.3).

19.13 Is there a right to challenge arbitrators, and if so under which conditions?

Art. 12(2) of the Model Law provides that:

> ***"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 the appointment has been made."***

Similar provision is made in respect of domestic arbitrations in S. 14(3) of the AA. The SIAC Rules also provide for a similar standard for the challenge of arbitrators (Rule 14.1 of the SIAC Rules (6th Ed.)).

The IBA Guidelines on Conflicts of Interest in International Arbitration (2014) is often referred to in practice to determine whether there is a possible conflict of interest.

The standard of bias or partiality that has been applied by the Singapore Courts is whether there is an actual bias, imputed bias or apparent bias.

Proof of an actual bias will disqualify a person from sitting in judgment. Imputed bias arises where a judge or arbitrator may be acting in his own cause, for instance, if he has a pecuniary or proprietary interest in the case. If this is proven, disqualification is certain without the need to investigate whether there is a likelihood or a reasonable suspicion of bias.

The test for determining apparent bias is whether "*there are circumstances that would give rise to a reasonable suspicion or apprehension of bias in the fair-minded and informed observer.*"[191]

If the Court has issued an order to remove the arbitrator but an award has already been issued, a party need only furnish proof of the Court order for removal to support its application to set aside the award and the Court will most likely set aside the award in the absence of compelling evidence to the contrary.[192]

19.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

191 BOI v BOJ [2018] 2 SLR 1156.
192 PT Central Investindo v Franciscus Wongso [2014] 4 SLR 978.

For international arbitration proceedings, there are no formal restrictions and parties are free to choose their representatives. There are no nationality restrictions and parties can choose to be represented by any counsel they deem fit, including non-Singaporean counsel.

In terms of rules governing the conduct of party representatives, parties are free to adopt the IBA Guidelines on Party Representation in International Arbitration (2013). Party representatives who are lawyers may be bound by ethical rules in the jurisdiction(s) in which they practice.

19.15 When and under what conditions can courts intervene in arbitrations?

The courts may intervene in arbitration proceedings in Singapore in the following instances:

(a) the courts may hear appeals on tribunal's rulings on jurisdiction, whether positive or negative (s. 10 of the IAA and s. 21A of the AA);

(b) the court may hear applications to challenge an arbitrator if there is justifiable doubt regarding an arbitrator's impartiality or independence or if he does not possess the qualifications agreed by the parties (Art. 13 of the Model Law (First Schedule of the IAA) read with s. 3 of the IAA and s. 15(6) of the AA);

(c) the court has powers to grant interim measures in aid of arbitration (as elaborated upon below);

(d) the court has the power to compel the attendance of witnesses (s. 13 of the IAA and s. 30 of the AA);

(e) with respect to domestic arbitrations, the court may in limited circumstances hear appeals:

(i) against a decision of the tribunal on a question of law;[193] and

(ii) to determine a preliminary point of law;[194] and

193 S. 45, AA.
194 S. 49, AA.

(f) the court also has power to set aside awards made in Singapore, or to refuse to recognize or enforce foreign awards.

In relation to interim measures, the High Court has the same powers as a tribunal to order any interim measure, except security for costs and discovery of documents and interrogatories,[195] irrespective of whether the seat of arbitration is in Singapore.[196] Although the court may order interim measures to aid, promote or support foreign arbitrations, it may refuse to make such an order if, in its opinion, the fact that the place of arbitration is outside or likely to be outside Singapore makes such an order inappropriate.[197] Importantly, the High Court shall exercise its power to order interim measures "*only if and to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*."[198]

19.16 Do arbitrators have powers to grant interim or conservatory relief?

An arbitral tribunal has the power to grant interim and conservatory relief under the IAA (s. 12(1) of the IAA, see for example s. 12(1)(d), (f) and (i); preservation and interim custody of property, interim injunctions and other interim measures) and the AA (s. 28(2), see for example 28(2)(e) and (g); preservation and interim custody of evidence and property). Under the IAA, the tribunal has general power to grant "*an interim injunction or any other interim measure*,"[199] whereas under the AA, the tribunal has no such general power as such power is reserved for the Courts.[200]

---

195 S. 12A(2), IAA. However, where the law governing the arbitration is not the IAA, the power to order security for costs and discovery orders is not excluded: see s. 31(1), AA.

196 S. 12A(1)(b), IAA.

197 S. 12A(3), IAA.

198 S. 12A(6), IAA. This restriction does not apply where the governing law is not the IAA. Where the IAA does not apply, the High Court only needs to have regard to any application before or order made by the arbitral tribunal in respect of the same interim measure when exercising its powers to make interim orders: see s. 31(3), AA.

199 S. 12(1)(i), IAA.

200 S. 28, AA read with s. 31, AA.

Institutional rules such as the SIAC Rules may also provide for powers of the arbitral tribunal to grant interim and conservatory relief, e.g., Rule 30 of the SIAC Rules (6th Ed.) (Interim and Emergency Relief).

19.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

• Formal requirements for arbitral awards

- The IAA regulates the form and contents of an arbitral award (Model Law, Art. 31). The award shall be made in writing and shall be signed by the arbitrator or arbitrators. For arbitral proceedings with more than one arbitrator, the signature of a majority of the tribunal shall suffice, provided that the reason for any omitted signature is stated.

- The award shall state the reasons upon which it is based and state its date and the place of arbitration. The award must be delivered to each party.

- The AA contains an almost identical regulation in s. 38.

- If the tribunal makes an award on an issue, claim or part of a claim, it must specify in its award the issue, claim or part of a claim which is the subject matter of the award (s. 19A of the IAA and s. 33 of the AA).

• Deadlines for issuing arbitral awards

The IAA and the AA do not contain a specific deadline as to when the award must be rendered. Parties may apply to court to terminate an arbitrator's mandate if the arbitrator fails to act without undue delay under Art. 14 of the Model Law read with s. 3 of the IAA.[201]

For domestic arbitrations, in cases where the arbitration agreement or arbitration rules provide that an arbitrator has to issue his award within a

201 See PT Central Investindo v Franciscus Wongso [2014] 4 SLR 978.

specified time, the Singapore Court has power under s. 36 of the AA to extend such time if the failure to grant an extension causes substantial injustice. Parties may agree to exclude such power of the Court. However, the Singapore Court would not grant an extension unless exceptional circumstances can be shown, provided there is no prejudice. It has been held by the High Court of Singapore that the longer the delay in making the application to extend time, the less likely the Court would exercise its discretion to extend time.[202]

- **Other formal requirements for arbitral awards**

Institutional rules may further provide for rules to be followed with regard to the issuing of the award. For example, according to Rule 32.3 of the SIAC Rules (6th Ed.) the Tribunal shall, before issuing the award, submit it in draft form to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed. Until approved by the Registrar as to its form, the final award shall not be issued by the Tribunal.

19.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

There is a limited and conditional right of appeal on questions of law for domestic arbitrations under the AA. Institutional rules such as the SIAC Rules also often provide that the award is final and binding and cannot be appealed (Rule 32.11 of the SIAC Rules (6th Ed.)).

There is no right of appeal from an award under the IAA. However, in April 2019, following a question raised in Parliament on whether this position should be reviewed, the Ministry of Law is putting out for consultation a proposal to allow a right of appeal (provided conditions are met) where parties have agreed to this in their contract or opt in to the appeal mechanism.

Under the IAA, an award can only be set aside by the High Court:

202 Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd [2010] 2 SLR 625.

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

(b) if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; or

(c) under the grounds provided in Art. 34 of the Model Law, namely if:

(i) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of Singapore;

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

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

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

(v) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Singapore; or

(vi) the award is in conflict with Singapore public policy.

The grounds to set aside an award are exhaustive and the Court hearing an application to set aside an award under the IAA has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal.

The grounds for setting aside an award under section 48 of the AA are similar to that under the IAA. In addition, as mentioned in paragraph 1 above, it may be possible to appeal against an award with the agreement of all parties or leave of Court under limited circumstances.

19.19 What procedures exist for enforcement of foreign and domestic awards in Singapore?

For international arbitrations seated in Singapore and for domestic arbitrations, an arbitral award may by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award (s. 19 of the IAA and s. 46 of the AA).

For international arbitrations seated outside of Singapore, a foreign arbitral award rendered in any of the countries that have acceded to the New York Convention may be enforced in a Singapore Court under the IAA either by action or in the same manner as a judgment or order to the same effect, with the leave of the High Court (s. 29 of the IAA). The detailed procedure is set out in Part III of the IAA. A foreign award from a non-New York Convention country is enforceable like a domestic award under s. 46 of the AA.

No action to enforce an award shall be brought after the expiration of six years from the date of the award (s. 6(1)(c) of the Limitation Act).

Parties seeking the enforcement of a Singapore or foreign award must file an application for leave to enforce the award in the High Court of Singapore, along with a supporting affidavit. The supporting affidavit must:

(a) exhibit the arbitration agreement (or any record of the content of the arbitration agreement) and the duly authenticated original award (or duly certified copies). Where the award, agreement or record is in a language other than English, a translation of it in the English language (duly certified) must be included;

(b) state the name and the usual or last known place of abode or business (or in relation to a body corporate, its registered or principal address) of the applicant (the "**creditor**") and the person against whom it is sought to enforce the award (the "**debtor**"); and

(c) as the case may require, state 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.

In Singapore, the persons appointed to authenticate original awards and certify copies of the award and original arbitration agreement are:

(a) the Registrar and Deputy Registrar of the Singapore International Arbitration Centre;[203]

(b) the Chief Executive and Deputy Chief Executive of Maxwell Chambers Private Limited;[204] and

(c) the Registrar and Chairman of the Singapore Chamber of Maritime Arbitration.[205]

An order giving leave must be drawn up by or on behalf of the creditor and submitted to the Court (the "Order").

After the Court grants leave, a copy of the Order must be duly served on the debtor by delivering a copy to the usual or last known place of abode or business (or in relation to a body corporate, its registered or principal address) or in such manner as the Court may direct. The copy of the Order served on the debtor must state the right of the debtor to apply to set aside the Order within the relevant time (see paragraph immediately below). Service out of jurisdiction is permissible with leave and the relevant Singapore Rules of Court for service out of jurisdiction will apply in relation to such an order.

The debtor will have 14 days following service (or if the order to be served out of jurisdiction, such other period as the Court may fix) to contest recognition and enforcement by applying to set aside the Order. The award shall not be enforced until after the expiration of the above-mentioned period or, if the debtor applies to set aside the Order, until the application is finally disposed of.

Once the Order is obtained, the award can be enforced in the same manner as a judgment of the Singapore High Court. The usual enforcement procedures prescribed in the Singapore Rules of Court will apply thereafter

203 See International Arbitration (Appointed Persons under S. 19C) Order 2009.
204 See International Arbitration (Appointed Persons under S. 19C) Order 2009.
205 See International Arbitration (Appointed Persons under S. 19C) Order 2010.

for various methods of enforcement such as an application for writ of seizure and sale, garnishee order, etc.

A Court hearing the application for enforcement of a foreign award cannot review the case on the merits. It may, however, refuse to grant enforcement of the award and set aside the Court order granting leave to enforce the award in Singapore if the grounds set out in the IAA are proven. Such grounds are substantially similar to the grounds for setting aside of an award for Singapore-seated arbitrations (as described above), with an additional ground that recognition and enforcement may be refused if the award has not yet become binding on parties, or has been set aside or suspended by a competent authority in which, or under the law of which the award was made.[206]

19.20 Can a successful party in the arbitration recover its costs in Singapore?

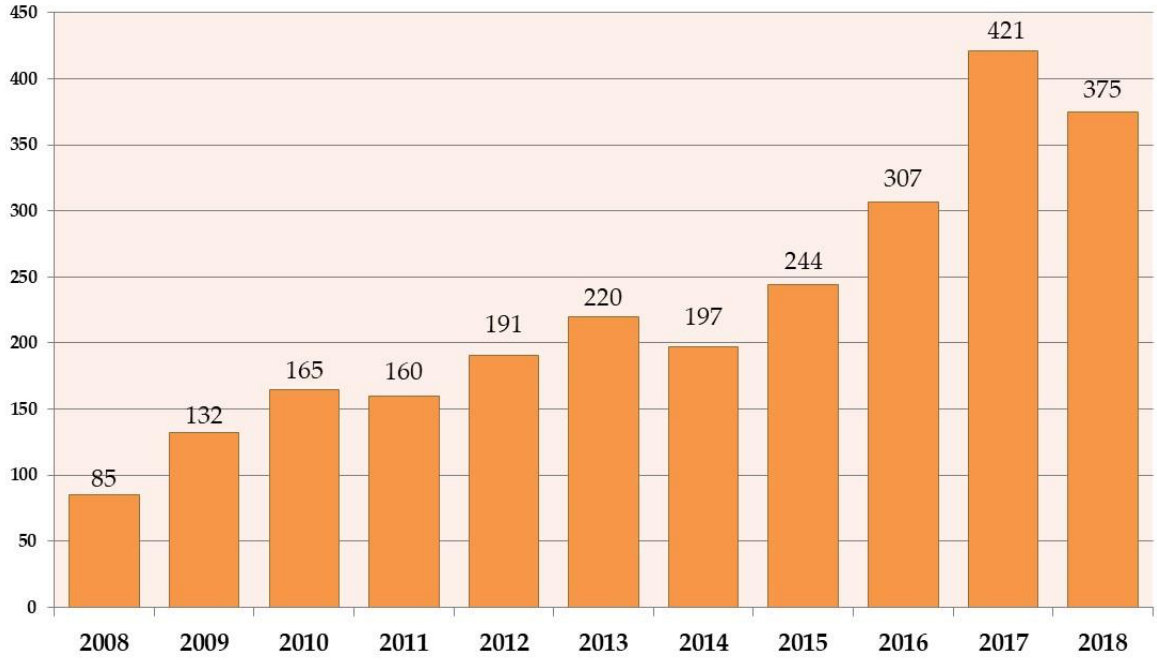
The tribunal may award costs in its discretion or parties may request costs to be taxed by the Registrar of the SIAC pursuant to s. 21 of the IAA for international arbitrations or by the Registrar of the Supreme Court pursuant to s. 39 of the AA for domestic arbitrations.
As a general rule, the majority of tribunals will apply the principle that costs will follow the event, i.e., the prevailing party will get (at least) part of their costs paid by the losing party. The degree to which a successful party would recover its costs will depend on various factors, such as the circumstances of the specific matter and the conduct of the parties in the matter.

19.21 Are there any statistics available on arbitration proceedings in the country?

SIAC's caseload has generally been increasing over the last few years. Their active caseload as of 1 June 2016 is about 600 cases. The table below, obtained from SIAC's website, provides a breakdown of the new cases handled by SIAC from 2005-2015:

206 See s. 31(2), IAA, as well as Art. V of the New York Convention (Second Schedule to the IAA).

Total Number of New Cases Handled by SIAC



The total sum in dispute for all new case filings with SIAC amounted to USD 7.06 billion (SGD 9.65 billion). The total sum in dispute for new SIAC-administered cases amounted to USD 7.00 billion (SGD 9.57 billion). The average value for new cases filed was USD 24.02 million (SGD 32.84 million)*, and the average value for new SIAC-administered cases was USD 26.14 million (SGD 35.74 million). The highest sum in dispute for a single administered case was USD 2.38 billion (SGD 3.25 billion).

In October 2016, the SIAC released a cost and duration study based on actual cases filed in SIAC. The study can be found here:

http://www.siac.org.sg/images/stories/press_release/SIAC%20Releases%20Costs%20and%20Duration%20Study_10%20Oct%202016.pdf

19.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

NEW LAWS

Third-party funding for arbitration

Singapore decided to implement legislation permitting third-party funding within a controlled environment; this legislation came into force on 1 March 2017. As part of the legislative amendments, the torts of champerty and maintenance have been abolished. A legal framework has also been created for the provision of third-party funding in, among other things, international arbitration. The legislation defines a "third-party funding contract" as a contract "by a party or potential party to dispute resolution proceedings with a Third-Party Funder".

The government worked closely with private stakeholders to ensure that the framework is both legally and commercially sound. The legislation is supplemented by the Singapore Institute of Arbitrators (SIArb) Guidelines for Third Party Funders, the Law Society of Singapore's Guidance Note for Lawyers, and the SIAC Practice Note on Arbitrator Conduct in Cases Involving External Funding.

Singapore is currently the only jurisdiction in the Asia-Pacific region (other than Australia) that has implemented specific legislation on third-party funding for arbitration. Hong Kong SAR is widely expected to follow, although the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 has still not been passed by the Legislative Council.

There have been at least two Singapore-seated third-party funded international commercial arbitrations since the new legislative regime came into effect.

SIGNIFICANT COURT JUDGMENTS

There have been a number of court decisions affecting arbitration in Singapore. Selected noteworthy decisions are described below.

Article 34(2)(a)(iii) of the UNCITRAL Model Law empowers a court to set aside an award if the dispute falls outside the scope of the arbitration agreement

Swissbourgh Diamond Mines and others v Kingdom of Lesotho [2019] 1 SLR 263 was the first case where the Singapore courts set aside an investor-State arbitration award on the merits. In the underlying award, an ad hoc international arbitration tribunal constituted under the auspices of the Permanent Court of Arbitration and seated in Singapore had found that the Kingdom of Lesotho had contributed or facilitated the shutting down of the SADC Tribunal, a dispute resolution body established pursuant to the Treaty of the Southern African Development Community, without providing for an alternative forum to determine disputes referred to the SADC Tribunal. The shutting down of the SADC Tribunal caused a pending claim brought by the Appellants against the Kingdom to remain unheard. The PCA Tribunal thus ordered the parties to constitute a new tribunal to hear the part-heard SADC Claim. The Kingdom then applied to the Singapore High Court to set aside the award. The Court of Appeal upheld the High Court's decision to set aside the award as the PCA Tribunal lacked jurisdiction over the parties' dispute. In reaching this conclusion the Court of Appeal found that it had jurisdiction to set aside the award pursuant to Art 34(2)(a)(iii) of the Model Law, which states that an award may be set aside if it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration", even though the Kingdom was contesting the very existence of the PCA Tribunal's jurisdiction to hear and determine the claim referred to it. As such, Art 34(2)(a)(iii) covers situations where the award deals with matters not contemplated by or not falling within the arbitration agreement, and not merely situations where the award decides issues outside the scope of the parties' submissions in the arbitration. The Court of Appeal reasoned as follows (at [75] and [79]):

"When a State enters into an investment treaty that provides for the submission of disputes to arbitration, it effectively makes a unilateral offer to arbitrate. By doing so, the State binds itself to arbitrate a claim that is brought under and in accordance with the terms of that unilateral offer, which is then accepted once an investor initiates arbitration proceedings in accordance with those terms. The relevant terms for this purpose are those set out in the investment treaty.

[…]

Thus, a dispute that is referred to arbitration by an investor who purports to rely on the arbitration clause contained in the investment treaty, but which is found to fall outside the scope of that clause (and accordingly, of the State's offer to arbitrate) should be considered to fall outside the scope of the arbitration agreement and "the terms of the submission to arbitration" under Art 34(2)(a)(iii) because in such a case, the State would not, in fact, have agreed to arbitrate such a dispute."

The Court of Appeal also found that it had the jurisdiction to set aside the award pursuant Article 34(2)(a)(i) of the Model Law (at [82]):

"Article 34(2)(a)(i), in essence, allows the court to set aside an arbitral award where the arbitration agreement is invalid. Returning to the unilateral contract analysis which we have set out earlier…, it may also be said that an investor who purports to commence an arbitration that is found to fall outside the scope of the investment treaty has in fact failed to match the terms of the State's unilateral offer to arbitrate. In such a case, the arbitration agreement would not have been perfected and there would have been no valid contract at all...."

The doctrine of severability applies where only part of an award is tainted by a challenge on a public policy ground

In BAZ v BBA and others and other matters [2018] SGHC 275, the High Court set aside an arbitral award against those among the losing parties who were minors since, as a matter of Singapore public policy, contracts do not generally bind minors. However, the award found the minors jointly and severally liable for the fraudulent misrepresentation that induced the counterparty to enter into the contract in question. As Belinda Ang J held (at [180]):

"The effect of the Award on the Minors is to enforce the SPSSA, which is not a contract falling under any of the exceptions to the general position that contracts do not bind minors. This violates the protection given to minors in contractual relationships under Singapore law. The Award finds them jointly and severally liable for the fraudulent misrepresentation that induced the counterparty to enter the SPSSA. This liability is imposed on the Minors for the fraudulent misrepresentation of their guardian or principal on matters which the Minors had no knowledge of. This has the effect of violating the protection given to a minor under s 35(7) of the Civil Law Act. As stated above, the provision protects a minor even where the minor made a misrepresentation personally. All in all, such an award against the Minors that

saddles them with legal liability for an amount exceeding S$720 million shocks the conscience, and it violates Singapore's most basic notion of justice to find the Minors liable under a contract that was entered into when they were only between three to eight years old at the material time. At the time of the arbitration, they were only between eight and twelve years old."

Considerations of comity militate against the grant of a post-award anti-suit injunction where there has been delay

The Court of Appeal was recently asked in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd [2019]* SGCA 10 to consider whether a post-award anti-suit injunction ought to be granted to restrain an award debtor from pursuing court proceedings in the Maldives seeking to determine the very issues it had lost in an earlier arbitration. While the Court of Appeal found that the Maldives court proceedings breached the underlying arbitration clause and amounted to vexatious and oppressive conduct on the part of the award debtor, it refused to grant the injunction. Owing to the delay in bringing the application for an anti-suit injunction only after the first instance judgments of the Maldives court had been rendered, "considerations of comity" militated against the grant of the injunction (at [78]):

"Comity involves "respect for the operation of different legal systems" and it requires, where possible, the avoidance of wastage of judicial time and costs that would inevitably be occasioned by the abandonment of proceedings or when a party is precluded from relying on the judgment of the rival court. Comity is not based on the need to avoid offending the foreign court, but on the "sound basis that to allow such an approach is not a sensible method of conducting curial business [citing the English Court of Appeal decision of Ecobank Transnational Incorporated Ltd v Tanoh [2016] 1 WLR 2231]."

On the facts, the award creditor *"could and should have simultaneously sought injunctive relief from the Singapore court, and its failure to do so allowed the Maldivian proceedings to reach an advanced stage" (at [118]).*

Minority oppression claims are generally arbitrable

The Singapore Court of Appeal has recently revisited the issue of whether shareholder disputes are arbitrable in L Capital Jones Ltd v Maniach Pte Ltd [2017] 1 SLR 312. It held that that minority oppression claims are generally

arbitrable, unless they raised specific public policy considerations against arbitration. The courts will take a robust case management approach to the problem of disputes straddling arbitration and litigation at the same time, as not all parties and not all reliefs sought fall within the scope of an arbitration agreement. Following the approach of the Court of Appeal's earlier decision in Tomolugen Holdings Ltd v Silica Investors Ltd [2016] 1 SLR 373, it is likely to become increasingly common for shareholder agreements to provide for such disputes to be resolved via arbitration, and that the courts will be prepared to give directions to manage the process.

Minimal curial intervention when staying arbitral proceedings pending the determination of a jurisdictional challenge

In BLY v BLZ [2017] 4 SLR 410, the High Court reaffirmed the principle of minimal curial intervention in relation to the court's statutory power under s 10(9) of the International Arbitration Act to stay the arbitral proceedings pending the determination by the court of a challenge to the tribunal's jurisdiction. Upholding the primacy of the arbitration proceedings, the High Court ruled that there had to be special facts and circumstances before a stay would be granted.

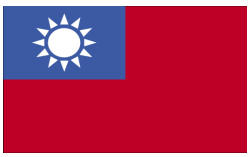
The effect of failing to challenge a tribunal's ruling on jurisdiction

On a related note, in Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited [2018] SGHC 78, the High Court recently decided that, where a party fails to challenge a tribunal's jurisdictional ruling within the 30-day period provided for in Art 16(3) of the Model Law read with s 10(3) of the International Arbitration Act, it would be precluded from relying on that jurisdictional objection in any setting aside proceedings pursuant to Art 34(2)(a)(iii) of the Model Law. This will undoubtedly encourage parties to ensure that all challenges to a tribunal's jurisdiction are determined as soon as possible, so as to prevent an unnecessary waste of time and costs.

Admission of foreign lawyers in arbitration-related disputes before the Singapore courts

In January 2018, the Singapore Court of Appeal granted rights of admission to an Indian senior advocate to argue issues of Indian law in an application to set aside an ICC award, in Re Harish Salve [2018] 1 SLR 345. This is the first time a non-English foreign lawyer has been granted ad hoc rights of audience in the Singapore courts. This reflects a progressive approach to the admission of foreign counsel before Singapore courts, particularly in the exercise of their supervisory powers over Singapore-seated arbitrations involving complex issues of foreign law.

Names of Authors:	**Mr Chan Leng Sun SC and Mr Calvin Liang**
Name of Law Firm:	**Essex Court Chambers Duxton (Singapore Group Practice)**
Brief Profile:	Essex Court Chambers Duxton (Singapore Group Practice) operates on a pure Chambers model in Singapore and the region, with particular expertise in commercial, corporate and financial litigation, arbitration, public law and public international law. The advocates at Essex Court Chambers Duxton advise and act in disputes both in Singapore and internationally. The members have a reputation for excellence, exceptional advocacy and providing client-oriented solutions. Leng Sun is a Senior Counsel and Chartered Arbitrator. He is the Deputy Chairman of the Singapore International Arbitration Centre and a member of the ICC Commission on Arbitration and ADR. He is the Immediate Past President of SIArb and the former Global Head of Arbitration of an international law firm. Calvin acts in white-collar criminal, commercial and regulatory matters. He specialises in conflicts of law, company law and injunctions, especially Mareva and Anton Piller injunctions. He writes in the area of public law and has been favorably cited by the Singapore Court of Appeal.
Telephone No.:	Leng Sun: +65 6817 9168 Calvin: +65 6817 9178
Email:	Leng Sun: LSChan@essexcourt.net Calvin: cliang@essexcourt.net
Website:	https://essexcourtduxton.com/



20. TAIWAN

BY: MR. NATHAN KAISER

20.1 Which laws apply to arbitration in Taiwan?

Arbitration conducted in Taiwan is governed by the Arbitration Law of the Republic of China (the "Arbitration Law").[207] The Law replaced its predecessor, the "Commercial Arbitration Act" of 1961, and rendered the Republic of China (hereinafter Taiwan) arbitration regime more consistent with international standards. The Arbitration Law became effective in 1998, and was last amended in December 2015.

In addition to the Arbitration Law, the Rules on Arbitration Institution, Mediation Procedures and Fees[208] also regulate arbitration conducted in Taiwan. This set of rules sets forth requirements and procedures for the setting up of an arbitration institution and provides a default method for the calculation of arbitration fees, which applies to both institutional and ad hoc arbitration.

20.2 Is the Taiwanese Arbitration Law based on the UNCITRAL Model Law?

The Arbitration Law was drafted with reference to the UNCITRAL Model Law on International Commercial Arbitration, as well as a view to legislation in the U.S., UK, Germany and Japan. Unlike most national arbitration laws, however, Taiwan's Arbitration Law contains detailed arbitrator qualification requirements and requires training of arbitrators, which is not entirely consistent with international norms.

---

207 "仲裁法", available at http://www.arbitration.org.tw/law01-en.php

208 "仲裁機構組織與調解程序及費用規則". The Rules are promulgated jointly by the Executive Yuan and the Judicial Yuan in 1999, last amended on 22 January 2003; an English version of the text available at http://www.arbitration.org.tw/law02-en.php

20.3 Are there different laws applicable for domestic and international arbitration?

No, the Arbitration Act applies to both domestic and international arbitration conducted in Taiwan. For the recognition and enforcement of international/foreign arbitration awards, there are slightly more complicated procedures to be followed, as explained below.

20.4 Has Taiwan acceded to the New York Convention?

No, Taiwan is not a signatory to the New York Convention. The requirements for recognition of foreign judgements and arbitral awards are therefore somewhat different, as explained in detail below.

20.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Yes, there is no restriction for domestic parties regarding the choice of jurisdictions, i.e. including with regard to foreign or domestic arbitration institutions and arbitration rules. However, if a matter cannot be settled in accordance with the law, the parties may not submit the dispute to litigation proceedings, as explained below.

20.6 Does the Taiwan arbitration law contain substantive requirements for arbitration procedures to be followed?

The Arbitration Law only provides general guidelines of arbitration procedures. In principle, the parties can choose the applicable procedural rules. If there is no agreement on the procedural rules and where the Arbitration Law is silent, the arbitral tribunal may adopt the Code of Civil Procedure, mutatis mutandis, or other appropriate rules of procedure.[209] In practice, parties tend to select either CAA Arbitration Rules or other major international procedural rules such as UNCITRAL or ICC arbitration rules.

209 Article 19 of the Arbitration Law

Some general procedural rules addressed in the Arbitration Law include:

- To submit a dispute to arbitration, a party shall provide a written notice to the respondent; unless otherwise agreed, the arbitral proceedings for a dispute shall commence on the date when the written notice of arbitration is received by the respondent.[210]

- The place of arbitration, unless agreed by the parties, shall be determined by the arbitral tribunal.[211]

- The arbitral tribunal shall ensure that each party has a full opportunity to present its case, and it shall conduct necessary investigations; unless otherwise agreed, the arbitral proceedings shall not be made public.[212]

- The arbitral tribunal may summon witnesses or expert witnesses to appear for questioning; in the event that a witness fails to appear without sufficient reason, the arbitral tribunal may apply for a court order compelling the witness to appear.[213]

- If expressly authorized by the parties, the arbitral tribunal may apply the rules of equity.[214]

- The arbitrator shall be independent, impartial and uphold the principle of confidentiality in conducting the arbitration.[215]

In addition, for an arbitration proceeding to be legally valid, it needs to be based on an arbitral agreement between the parties. "Arbitral agreement" is an agreement between the parties, in writing, to submit to arbitration any dispute that has arisen or may arise in connection with a defined legal relationship between them. The definition is worded similarly to Article 7 of the Model Law on International Commercial Arbitration.[216] Article 1

210 Article 18 of the Arbitration Law
211 Article 20 of the Arbitration Law
212 Article 23 of the Arbitration Law
213 Article 26 of the Arbitration Law
214 Article 31 of the Arbitration Law
215 Article 15 of the Arbitration Law
216 See YANG,CHONG-SEN (楊崇森) ET AL., *On Arbitration* (仲裁法新論), pp. 56

therefore limits the scope of arbitrable disputes (i.e. arbitrability) to those which may be settled in accordance with the law, Art. 1 paragraph 2 of the Act. For example, parties may not enter into an agreement to arbitrate criminal matters, domestic violence issues or some family disputes.

20.7 Does a valid arbitration clause bar access to state courts?

Yes. If there is already a valid arbitration agreement and one party brings the dispute before the court, the other party may require the court to suspend the litigation proceeding and order the plaintiff to submit to arbitration within a specified period of time. If the plaintiff fails to submit to arbitration, the court shall dismiss its legal action.[217]

20.8 What are the main arbitration institutions in Taiwan?

Taiwan neither has a so-called "national arbitration center" nor a default appointing authority. An arbitration institution can only be established if it meets the requirements set forth under the Rules on Arbitration Institutions, Mediation Procedures and Fees. Currently there are four registered arbitral institutions in Taiwan, including:

(1) **The Arbitration Association of the Republic of China** ("中華民國仲裁協會" also known as the "Chinese Arbitration Association, Taipei" or the "CAA") is the leading arbitral institution in Taiwan. It is based in Taipei and has two branch offices in Taiwan as well as two liaison offices in China. In addition to arbitration, it provides a wide range of dispute settlement administration services, including mediation, dispute review boards and other alternative dispute resolution proceedings.

(2) The **Taiwan Construction Arbitration Association** ("台灣營建仲裁協會", TCAA), established in 2001, specializes in construction disputes.

(3rd ed. 2008).

217 Article 4 of the Arbitration Law

(3) The **Chinese Construction Industry Arbitration Association** ("中華工程仲裁協會", CCIAA) also specializes in construction disputes.

(4) The **Association of Labor Dispute Arbitration of the Republic of China** ("中華民國勞資爭議仲裁協會") specializes in labor disputes.

20.9 Addresses of major arbitration institutions in Taiwan

The addresses of the above-mentioned arbitration institutions are:

(1) **Arbitration Association of the ROC** (aka Chinese Arbitration Association, CAA)[218]

- Taipei Main Office:
  14F, No. 376, Renai Road, Sec. 4, Taipei 106, Taiwan

- Taichung Branch:
  20F, No. 83, Sec. 4, Wenxin Road, Beitun District, Taichung 406, Taiwan

- Kaohsiung Branch:
  14F, No. 128, Yisin 2nd Road, Kaohsiung 806, Taiwan

- Dongguan Liaison Office:
  4F, Dong-Shun Building, Dong Cheng Boulevard, Dong Cheng District, Dongguan, Guandong Province, PRC

- Xiamen Liaison Office:
  12F, Taipei Investors Building, 860 Xian Yue Road, Xiamen, Fujian Province, PRC

(2) **Taiwan Construction Arbitration Association**[219]
4F, Nos. 141 and 143, Keelung Road, Sec. 2, Taipei 110, Taiwan

(3) **Chinese Construction Industry Arbitration Association**[220]

218 http://www.arbitration.org.tw/english/contact%20us.htm
219 http://www.tcaa.org.tw/ (in Chinese)
220 http://www.cciaa.org.tw/Default.aspx (in Chinese)

8F, No. 25, Nanjing East Road, Sec. 4, Songshan District, Taipei 105, Taiwan

(4) **Association of Labor Dispute Arbitration of the ROC**
11-1F, No. 7, Dunhua S. Rd, Sec. 1 Songshan District, Taipei 105, Taiwan

20.10 Arbitration rules of major arbitration institutions?

Both the CAA and CCIAA have published arbitration rules online. The CCIAA arbitration rules are only available in Chinese.[221] The CAA arbitration rules, which are more widely used in Taiwan, are available in Chinese and English.[222]

20.11 What is/are the Model Clause/s of the arbitration institutions?

The CAA has published its model clause online:[223]

"Any dispute, controversy, difference or claim arising out of, relating to or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration referred to the Chinese Arbitration Association, Taipei in accordance with the Association's arbitration rules. The place of arbitration shall be in Taipei, Taiwan. The language of arbitration shall be _____(e.g. English). The arbitral award shall be final and binding upon both parties."

20.12 How many arbitrators are usually appointed?

Parties are free to agree on the method of appointment of arbitrators and the number of arbitrator(s) as long as a single arbitrator or an odd number of arbitrators is designated and the arbitrators selected meet the qualification requirements listed in Articles 6 to 8 of the Arbitration Law. Article 9 of the Arbitration Law provides that in the absence of an

221 http://www.cciaa.org.tw/law-4
222 http://www.arbitration.org.tw/rule01-en.php
223 http://en.arbitration.org.tw/arbitration_model_clause.htm

appointment of an arbitrator or an agreed method of appointment in an arbitral agreement, three arbitrators shall be appointed. Each party shall appoint one arbitrator and the appointed arbitrators shall then jointly designate a third arbitrator to be the chair of the arbitral tribunal.

Article 5 of the Arbitration Law requires that only a natural person can be appointed as an arbitrator. The Article further provides that *"in the event that a corporate entity or any other organization which is not an arbitration institution is appointed as an arbitrator in an arbitration agreement, it shall be deemed that no arbitrator was appointed"*. In practice, if the parties appoint an arbitral institution as an arbitrator, it is also deemed that no arbitrator was appointed.

In arbitrations administered by a Taiwanese arbitral institution, unless the parties otherwise agree, a similar method of appointment of arbitrators to that laid out in Article 9 of the Arbitration Law applies, the only difference being that if a party fails to nominate an arbitrator or if the two arbitrators fail to nominate the chairperson of the arbitration, the parties shall then ask the arbitration institution to make the appointment on their behalf. The institution shall notify the parties and the appointed arbitrators of all arbitrator appointments in writing.[224] The process of appointing arbitrators and constituting the arbitral tribunal will usually resemble the following:[225]

(1) The claimant submitting the dispute to arbitration chooses an arbitrator and notifies in writing the respondent as well as the appointed arbitrator.

(2) After the respondent has chosen an arbitrator, it in turn notifies in writing the claimant and the appointed arbitrators.

The appointed arbitrators then jointly designate a third arbitrator to be the chair and the three arbitrators together constitute the arbitral tribunal, which shall notify in writing both parties of the final appointment.

---

224 Art 10, Para 1 of Arbitration Law

225 See HU,YUAN-JHEN (胡元禎),An Introduction to Arbitration. FT Law Review, Vol. 159, pp. 71.

20.13 Is there a right to challenge arbitrators, and if so under which conditions?

In principle, pursuant to Article 14 of the Arbitration Law, the appointment of arbitrators made by an arbitral institution or the court shall not be challenged by the parties. Nevertheless, Article 16 of the Arbitration Law provides that the parties may challenge an appointment if the arbitrator does not meet the qualifications agreed by the parties or if the arbitrator has a conflict of interest with one of the parties.[226] A conflict of interest includes:

i) The existence of any of the causes requiring a judge to withdraw from a judicial proceeding in accordance with Article 32 of the Code of Civil Procedure[227];

ii) The existence or history of an employment or agency relationship between the arbitrator and a party;

i) The existence or history of an employment or agency relationship between the arbitrator and an agent of a party or between the arbitrator and a key witness; and,

iv) The existence of any other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator.[228]

In addition, if the appointment falls into any of the circumstances listed in Article 40 of the Arbitration Law, a party may still file a petition with the court to set aside the arbitral award.

In arbitration cases administered by the Chinese Arbitration Association of Taipei, if a party wishes to remove an arbitrator from a panel of more than one arbitrator, the arbitral tribunal shall determine whether to sustain the challenge with the challenged arbitrator refrained from taking part. On the

226 See YANG,CHONG-SEN (楊崇森) ET AL., supra note 1, pp. 167.

227 Article 32 of the Code of Civil Procedure further includes several types of relationship, such as spouse, blood relative within eighth degree, relative by marriage within fifth degree etc.

228 Article 15 of the Arbitration Law

other hand, if a party wishes to remove a sole arbitrator, the request shall be submitted to the court for determination.

20.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

Article 24 of the Arbitration Law only regulates that parties may appoint representatives in writing to appear before the arbitral tribunal to make statements for and on their behalf. There are no further restrictions on the qualification or number of representatives. Most notably, representatives for arbitration do not have to be lawyers, so foreign lawyers (i.e. not locally registered) may represent clients in arbitration proceedings. In practice, parties are often represented by lawyers who specialize in arbitration procedures or are familiar with the matter at hand.

20.15 When and under what conditions can courts intervene in arbitrations?

As discussed above, courts may intervene during the process of arbitration when the selection of arbitrators is challenged. A party may also file injunctions, attachments and other conservatory measures before the court prior to the arbitration proceeding, as described below. In addition, pursuant to Article 28 of the Arbitration Law, the arbitral tribunal, when necessary, may also request assistance from a local court, including exercising its investigation power, during the arbitral proceedings.

After an arbitral award is issued, the parties may also challenge the award by filing a revocation case before the court. A revocation will allow the court to set aside the arbitral award and allow the parties to resolve the dispute through further legal actions. This will be further discussed in detail below.

Finally, the court may also intervene when the award is a foreign arbitral award that requires recognition of the court. It is possible for the counterparty to defend and reject the recognition of foreign arbitral awards, of which the procedure will be discussed below.

20.16 Do arbitrators have powers to grant interim or conservatory relief?

Parties may apply for injunctions, attachments and other interim or conservatory actions to the court, before submitting to arbitration. The applicants need to initiate the arbitration procedure within the time period specified by the court, in order to satisfy the procedural requirements of these interim actions.[229]

However, the Arbitration Law is silent on the powers of arbitrators to grant interim relief. According to Article 19 of the Arbitration Law, where the Law is silent, the arbitral tribunal may adopt the Code of Civil Procedure mutatis mutandis or other rules of procedure which it deems proper. It is therefore possible for the arbitrators to make interlocutory decisions when appropriate, as defined in Article 383 of the Code of Civil Procedure. Article 40 of the CAA Arbitration Rules also states that the arbitral tribunal may make interim or partial awards.

20.17 Arbitral Awards: (i) contents; (ii) deadlines; (iii) other requirements)?

• Formal requirements for arbitral awards:

To the extent that a decision on the dispute may be satisfactorily obtained, the arbitral tribunal shall declare the conclusion of the hearing and, within ten days thereafter, issue an arbitral award addressing the claims and issues raised by the parties. An arbitral award shall contain the following items:[230]

- Name and residence or domicile of the individual parties. For a party that is a corporate entity or another type of organization or institution, its name(s), administrative office(s), principal office(s) or business office(s) address;

- If any, names and domiciles or residences of the statutory agents or

229 Article 39 of the Arbitration Law; Article 529 of the Code of Civil Procedure
230 Article 33 of the Arbitration Law

representatives of the parties;

- If any, names, nationalities and residences or domiciles of the interpreters;
- The main text of the decision, which shall include the arbitral decision on disputes submitted by parties, and the allocation of the arbitration fee;[231]
- The relevant facts and reasons for the arbitral award, unless the parties have agreed that no reasons shall be stated. Because the reasons for the arbitral award are crucial to the subsequent arbitral award enforcement and revocation, if any, it is advised to address relevant reasons in an arbitral award; and
- The date and place of the arbitral award.

The original copy of the award shall be signed by the arbitrator(s) who deliberated on the award. If an arbitrator refuses to or cannot sign the award for any reason, the arbitrator(s) who did sign the award shall state the reason for the missing signature(s). The arbitral tribunal shall deliver a certified copy of the arbitral award to each party. The certified copy of the arbitral award, along with proof of delivery, shall be filed with a court registry at the place of arbitration. In addition, the arbitral tribunal may correct, on its own initiative or upon request, any clerical, computational, or typographic errors, or any other similar obvious mistakes in the award, and shall provide written notification of this correction to the parties as well as the court. The foregoing is likewise applicable to any discrepancy between a certified copy of the arbitral award and the original version thereof.[232]

• Deadlines for issuing arbitral awards:

Unless agreed otherwise, the arbitral tribunal shall issue the arbitral award within six months. This deadline for the final decision may be extended for

231 Article 34, Paragraph 1 of the Rules on Arbitration Institution, Mediation Procedures and Fees
232 Articles 34 and 35 of the Arbitration Law

an additional three months if required.[233] After declaring the conclusion of a hearing procedure, the arbitral tribunal shall deliver its arbitral award within ten days.[234]

- **Other formal requirements for arbitral awards:**

Finally, the deliberations of an arbitral award shall not be made public. If there is more than one arbitrator, the arbitral award shall be decided by a majority vote. When calculating an amount in dispute and none of the opinions of the arbitrators prevail, the highest figure in an opinion shall be averaged with the second-highest figure in another opinion and so forth, until a majority consensus is obtained[235].

In the event that a majority consensus of the arbitrators cannot be reached, the arbitral proceedings shall be deemed terminated[236], unless otherwise agreed to by the parties, and the arbitral tribunal shall notify the parties of the reason(s) for failing to reach a majority consensus. After notification, both parties may turn to other mechanisms for resolving the dispute.

20.18 On what conditions can arbitral awards be appealed or rescinded in Taiwan?

During the arbitration proceedings, any objections raised shall be considered by the arbitral tribunal. The decisions made with respect to these objections shall not be subject to appeal, and the assertion and consideration of an objection shall not suspend the arbitral proceedings.[237]

An arbitral award can, however, be rescinded or revoked before a competent court. Following international norms, the court may never conduct a substantive review and can only set aside an award for one of the following circumstances:[238]

233 Article 21 of the Arbitration Law
234 Article 33 of the Arbitration Law
235 Article 32, Paragraph 3 of the Arbitration Law
236 Article 32, Paragraph 4 of the Arbitration Law
237 Article 29 of the Arbitration Law
238 Article 40 of the Arbitration Law

i). In case of the existence of any circumstances stated in Article 38 of the Arbitration Law.[239]

ii). If the arbitral agreement is nullified, invalid, or has yet to come into effect, or has become invalid prior to the conclusion of the arbitral proceedings; a party to the arbitral agreement was under some incapacity; or the arbitral 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.[240]

ii) If the arbitral tribunal fails to give any party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or if any party is not lawfully represented in the arbitral proceedings.

iv). If the composition of the arbitral tribunal or the arbitral proceedings is contrary to the arbitral agreement or the law.

v). If an arbitrator fails to fulfill the duty of disclosure prescribed in Paragraph 2 of Article 15 of the Arbitration Law and appears to be partial or has been requested to withdraw, but continues to participate, provided that the request for withdrawal has not been dismissed by the court.[241]

vi). If an arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability, partial or has been requested to withdraw, but continues to participate, provided that the request for withdrawal has not been dismissed by the court.

vii). If a party or any representative has committed a criminal offense in relation to the arbitration.

---

239 Article 38 includes: i) the arbitral awards goes beyond the scope of arbitration agreement; ii) the lack of reason in the arbitral award; and iii) the arbitral award requires a party to act contrary to the law.

240 UNCITRAL Model Law, Article 34 (2) (a) (i).

241 Article 15 requires the arbitrators to be independent, impartial and uphold the principle of confidentiality in conducting the arbitration as well as fully disclose any conflicts of interests.

viii). If any evidence or content of any translation upon which the arbitral award relies, has been forged or fraudulently altered or contains any other misrepresentations.

ix). If a judgment of a criminal or civil matter, or an administrative ruling upon which the arbitral award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.

Items (vi) to (viii) above are limited to instances where a final conviction has been rendered, or the criminal proceedings may not have been commenced, or continued for reasons other than insufficient evidence. Item (iv), concerning circumstances contravening the arbitral agreement, and items (v) to (ix), are limited to the extent that the circumstances in question are sufficient to affect the arbitral award. However, a party filing such a suit may only cite procedural flaws in the arbitral process as grounds for action; a party may not file a lawsuit seeking voidance of the arbitral decision if its dispute has to do with factual matters, such as whether the reasons for the decision were correct, or whether the decision was contradictory.

In terms of procedure, an application to revoke an arbitral award may be filed at the district court at the place of arbitration. The Arbitration Law adopted the wording "may" instead of "shall," which leaves room for parties' autonomy to choose other competent courts regulated by the Code of Civil Procedure of the Republic of China (Taiwan).[242] An application to revoke an arbitral award shall be submitted to the court within the thirty-day statutory period after the arbitral award has been issued or delivered. If, however, any cause in the above-mentioned items (vi) to (ix) exists, and if sufficient evidence is offered to show that the failure of a party to apply to the court to revoke an award before the end of the limitation period does not arise from any fault on the part of such party, then the thirty-day statutory period commences to run from the time when the party becomes aware of the cause for revocation.[243]

Finally, the application to revoke an arbitral award shall be barred in any event after five years have elapsed from the date on which the arbitral

242 See YANG, CHONG-SEN (楊崇森) ET AL., supra note 1, pp. 321.
243 Article 41 of the Arbitration Law

award was issued. It is noteworthy that the above-mentioned application period is statutory and not subject to parties' autonomy. In addition, the court may grant an application to stay the enforcement of the arbitral award once the applicant has paid an appropriate and specific security to the court. When setting aside an arbitral award, the court shall, under the same authority, simultaneously revoke any enforcement order which has been issued with respect to the arbitral award.[244] Once an arbitral award has been revoked by a final judgment of a court, a party may bring the dispute to the court unless otherwise agreed by the parties.[245]

20.19 What procedures exist for enforcement of foreign and domestic awards in Taiwan?

• Domestic awards:

In general, an arbitral award shall be binding on the parties and have the same force as the final judgment of a court. The award binds not only both parties but also the following persons with respect to the arbitration:[246]

i). Successors of the parties after the commencement of the arbitration, or those who have taken possession of the contested property of a party or its successors.

ii). Any entity, on whose behalf a party enters into an arbitral proceeding; the successors of said entity after the commencement of arbitration; and, those who have taken possession of the contested property of the said entity or its successors.

In terms of enforcement, an award may not be enforced unless a competent court has granted an enforcement order on the application of a concerned party. It is noteworthy that converting the award into a judgment or court order does not involve a factual investigation.[247] However, the arbitral

244 Article 42 of the Arbitration Law
245 Article 43 of the Arbitration Law
246 Article 37 of the Arbitration Law
247 See also Taiwan Supreme Court 87 Tai-Kang-Tzu No. 266.

award may be enforced without an enforcement order if both parties agreed so in writing and the arbitral award concerns only the following:[248]

i). Payment of a specified sum of money or a certain amount of fungibles or valuable securities;

ii). Delivery of a specified movable property.

With the exception of the circumstances discussed above, an enforcement order is necessary for the enforcement of the award. The court shall nevertheless reject an application for enforcement where:[249]

i). The arbitral award concerns a dispute not contemplated by the terms of the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;

ii). The reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal. It is noteworthy that the omission of the required reasons for the arbitral award is the only factor governing the rejection of an enforcement order application among other items which are required in the arbitral award; and

iii). The arbitral award directs a party to act contrary to the law.

• Foreign awards

As Taiwan is not a signatory to the New York Convention, the requirements for recognition of a foreign judgment are somewhat different from most countries. Articles 47 to 51 of the Arbitration Law govern the recognition and enforcement of foreign arbitral awards. Article 47 defines a "foreign" arbitral award as being an arbitral award which is issued outside the territory of Taiwan or issued pursuant to foreign laws within the territory of Taiwan. The term "foreign laws" in turn is not defined in the Arbitration Law. As a result, a court has even ruled that arbitration

248 Article 37 of the Arbitration Law
249 Article 38 of the Arbitration Law

conducted in Taiwan under arbitration rules of a foreign arbitral institution is considered a foreign arbitral award.

Unlike a domestic award, a foreign arbitral award may be enforceable only after an application for recognition has been granted by the court.[250] A party filing motion with a court for recognition of a foreign arbitral decision must submit the following documents:

i). The original arbitral award or an authenticated copy thereof;

ii). The original arbitral agreement or an authenticated copy thereof;

iii). The full text of the foreign arbitration law and regulation, the rules of the foreign arbitral institution, or the rules of the international arbitral institution which applied to the foreign arbitral award.

If the above-mentioned documents have been issued in a foreign language, Chinese translations of the documents must also be submitted to the court. The word "authenticated" mentioned in items (i) and (ii) means authentication made by the embassies, consulates, representative and liaison offices or any other organizations authorized by the Taiwan government. Copies of the above-mentioned application shall be made, corresponding to the number of respondents, and submitted to the court which shall deliver those copies to the respondents.[251]

When an application is submitted by a party seeking recognition of a foreign arbitral decision, the court must issue a dismissal if such award contains one of the following elements:

i). Where the content of the arbitral award is contrary to public order or good morals of Taiwan.

ii). Under Taiwan law, the matter in dispute cannot be arbitrated or settled through arbitration.

In addition, the court may also issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the country where

250 Article 47 of the Arbitration Law
251 Article 48 of the Arbitration Law

the arbitral award was made, or whose laws govern the arbitral award, does not recognize the arbitral awards of Taiwan.[252]

Apart from the fact that the court can deny recognition of the foreign award, the respondent may also request the court to dismiss the application within twenty days from the date of receipt of the notice of the application, if the counterparty applies to the court for recognition of a foreign arbitral award that concerns any of the following circumstances:[253]

i). The arbitral agreement is invalid as a result of a party's incapacity according to the law chosen by the parties to govern the arbitral agreement.

ii). The arbitral agreement is null and void according to the law chosen to govern said agreement or, in the absence of a law of choice, the law of the country where the arbitral award was made.

iii). A party is not given proper notice of the appointment of an arbitrator, or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process.

iv). The arbitral award is not relevant to the subject of the dispute covered by the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion can be severed from and shall not affect the remainder of the arbitral award.

v). The composition of the arbitral tribunal or the arbitral procedure contravenes the arbitral agreement or, in the absence of an arbitral agreement, the law of the place of the arbitration.

vi) The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

252 Article 49 of the Arbitration Law
253 Article 50 of the Arbitration Law

• Awards from China, Hong Kong and Macau

Due to the special political status of Taiwan, the recognition of arbitral awards from China, Hong Kong and Macau is structured differently with a separate legal basis. The legal frameworks of arbitral systems for the recognition and enforcement of foreign arbitral awards of China, Hong Kong, and Taiwan are either subject to or modeled on the New York Convention, with minor variations on implementation.[254]

***China*:**

Article 74 of the People of Mainland China and Taiwan Areas Relations Act stipulates that an application for a ruling to recognize an arbitral award, civil ruling, or judgment, rendered in China, which is not contrary to the public order or good morals of Taiwan, may be filed with a court. An arbitral award of China may be enforceable after recognition has been granted by the court.[255] The word "may" used above does not compel a court in Taiwan to immediately recognize an award of China. Therefore, the Arbitration Law will still be applicable after notification of an application for recognition of an award of China, and the counterparty should still be able to request the court to dismiss the application on the grounds listed in Article 50 of the Arbitration Law.[256]

However, in accordance with the same law, it shall not apply until any arbitral award rendered in Taiwan may be filed with a court in China and a ruling to recognize it or permit its enforceability in China is effected.[257] After the announcement on 16 May 1998 that the PRC Supreme People's Court had passed the "Regulation of the Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts," Taiwan restored its recognition of China's arbitral and judgment decisions. In other words, since 1998, both judicial bodies have recognized each

254 See Leyda, José Alejandro Carballo, A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Chinese Journal of International Law, Vol. 6, Issue 2, pp. 345-361, 2007. Available at SSRN: http://ssrn.com/abstract=1154962 or DOI: jmm021, at Paragraph 64

255 Article 74, Paragraph 1 of the Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area.

256 See Leyda, José Alejandro Carballo, supra note 34, Paragraph 57.

257 Article 74, Paragraph 3 of the Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area .

other's judicial judgments and arbitral decisions. Generally speaking, the courts nowadays recognize Chinese arbitration awards. To date, around 30 Chinese awards have been successfully applied for recognition and enforcement in Taiwan.

Nevertheless, although Article 19 of the *"Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts"* extends the applicability of the regulation to arbitral awards rendered in Taiwan, any application for the enforcement of a recognized Taiwan arbitral award must still be submitted to a competent intermediate court in accordance with the provisions of the Civil Procedure Law of China. At the same time, Article 4 of the *"Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts"* requires that judgments of Taiwan courts "shall not violate the One-China principle," and since the grounds for the mutual recognition and enforcement of arbitral awards are based on unilateral legislation, recognition and enforcement will still depend on cross-strait politics.[258]

Later developments have seen a stabilization of cross-strait recognitions. In the latest case, the court analyzed two criteria to determine if a court should recognize arbitral awards rendered in mainland China. Firstly, the court acknowledged that a 1998 Taiwanese arbitral award was recognized by the People's Court in PRC China. Secondly, the court believed that recognition of the Chinese award would not offend Taiwan public policy.[259] In 2004, a Taiwanese CAA arbitral award has applied for recognition and enforcement before the Intermediate People's Court of Xiamen, China, and was recognized pursuant to China's Regulation of the Supreme People's Court Regarding the People's Court Recognition of the Civil Judgments of Taiwan Courts.

***Hong Kong and Macau*:**

According to the *"Act Governing Relations with Hong Kong and Macau",* Articles 30 to 34 of the old Commercial Arbitration Act, instead of Articles 47 to 51 of the Arbitration Law, shall apply to the validity, petition for court recognition, and suspension of execution proceedings in cases involving

258 See Leyda, José Alejandro Carballo, supra note 34, Paragraphs 59 and 60.

259 Shihlin District Court 100 Sheng No. 276

civil arbitral awards made in Hong Kong or Macau.[260] However, since the earlier Commercial Arbitration Act had been amended into the then re-named Arbitration Law, it is obvious that the Arbitration Law shall be applicable under this regulation.

Before 1997, Taiwan awards were summarily enforceable in Hong Kong. However, China resumed its sovereignty over Hong Kong on 1 July 1997, which resulted in a legal vacuum in the enforcement of arbitral awards from China and Taiwan until further amendments to the Arbitration Ordinance of Hong Kong took effect in 2000. These substantially restored the status quo ante.[261] Therefore, although the 1998 *"Regulation of the PRC Supreme People's Court Regarding the People's Court Recognition of Civil Judgments of Taiwan Courts"* is not applicable for Hong Kong, Taiwan awards may still be enforced under the "universal" enforcement provision contained in the modified Section 2GG (2) of the Arbitration Ordinance of Hong Kong.[262]

20.20 Can a successful party in the arbitration recover its costs in Taiwan?

Yes. According to Article 34, Paragraph 1 of the *"Rules on Arbitration Institution, Mediation Procedures and Fees"*, the costs and arbitration fees should be allocated and decided together with an arbitral award. However, this does not include any attorneys' fees, unless agreed explicitly in the arbitration agreement of the parties.

20.21 Are there any statistics available on arbitration proceedings in Taiwan

The CAA publishes statistics irregularly. According to the CAA website, between 2000-2013, the average amount of cases CAA handled annually was 177; among them, around 70% of the cases were construction disputes,

260 Article 42, Paragraph 2 of the Act Governing Relations with Hong Kong and Macau.

261 See Morgan, Robert, Enforcement of Chinese Arbitral Awards Complete Once More, but with a Difference. Available at SSRN: http://ssrn.com/abstract=925211, p. 2.

262 See Leyda, José Alejandro Carballo, supra note 34, Paragraph 62.

whereas about 11% were trade disputes and around 7% were service disputes.[263]

20.22 Are there any recent noteworthy developments regarding arbitration in Taiwan? (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

An amendment to Article 47 of the Arbitration Law was proposed by the CAA in May 2015 and passed by the Legislative Yuan in November 2015. This amendment clarifies and strengthens the effect and binding force of foreign arbitral awards in Taiwan.

Before the amendment of Article 47, there was a gap in terms of the binding force for foreign arbitral awards. The old text of Article 47, Paragraph 2 states that a foreign arbitral award, after recognition of the domestic court, shall be enforced. However the old text, when compared with the text of Article 37 for domestic arbitral awards, did not specify that a recognized foreign arbitral award has the legal binding force as a final judgement of the court.[264] This gap provides a room for the counterparty to bring up a new lawsuit before the domestic court and challenge the substance of a foreign arbitral award. This sort of potential different treatment between domestic and foreign arbitral awards was very problematic and hence an amendment was needed for legal certainty.

It is extremely important for a healthy arbitration system to ensure that parties to the dispute all agree to be bound by the arbitral award. The 2015 amendment of the Arbitration Law, albeit relatively minor, has a profound meaning for the Law to create a friendly environment for both domestic and international arbitration in Taiwan.

References:

1. Arbitration Law of R.O.C (Taiwan), translated by the Chinese Arbitration Association, Taipei

263 http://en.arbitration.org.tw/arbitration_case_statistics.htm

264 Article 37 of the Arbitration Law: "The award shall, insofar as relevant, be binding on the parties and have the same force as a final judgment of a court."

2. Code of Civil Procedure of R.O.C. (Taiwan)

3. Court Organic Act of R.O.C. (Taiwan)

4. Code of Civil Procedure of Japan

5. (Abolished) Provisional Act Governing the Judge Selection for Civil Litigation of R.O.C.(Taiwan)

6. UNCITRAL Model Law on International Commercial Arbitration

7. UNCITRAL Notes on Organizing Arbitral Proceedings, 1996

8. The Rules on Arbitration Institution, Mediation Procedures and Fees

9. Chinese Arbitration Association Arbitration Rules

10. Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area (Taiwan)

11. Act Governing Relations with Hong Kong and Macau (Taiwan)

12. Leyda, José Alejandro Carballo, A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan? Chinese Journal of International Law, Vol. 6, Issue 2, pp. 345–361,(2007)

13. Morgan, Robert, Enforcement of Chinese Arbitral Awards Complete Once More - but with a Difference. 30 Hong Kong Law Journal 375 (2000)

14. HU, YUAN-JHEN (胡元禎), An Introduction to Arbitration. FT Law Review, Vol. 159, pp. 69–76, (2008)

15. YANG,CHONG-SEN (楊崇森) ET AL., On Arbitration (仲裁法新論),(2004)

16. LIN,JYUN-YI (林俊益), The Practical Benefit of Arbitration Law (仲裁法之實用權益), (2001)

Name of Authors:	**MR. NATHAN KAISER**
Name of Law Firm:	**Eiger**
Brief Profile:	**Eiger** is a full-service law firm with Asia Pacific and Greater China practice strengths providing counseling and assistance in their corporate, commercial, dispute-resolution and intellectual-property matters. Eiger's clients range from major multinationals and financial heavyweights through to SMEs across a wide range of industries
Telephone No.:	+886 926 181 00
Email:	nkaiser@jcys.com.hk
Website:	https://www.linkedin.com/in/nathankaiser http://www.eigerlaw.com/

21. THAILAND

BY: DR. ANDREAS RESPONDEK
MS. SOMRUETAI WISALAPORN
MS. SAVITREE KUWANGKHADILOK

21.1 Which laws apply to arbitration in Thailand?

The relevant arbitration law is the "Thai Arbitration Act B.E. 2545 (2002)", which came into force on 30 April, 2002 ("Arbitration Act") and was amended by the "Arbitration Act (No.2) B.E. 2562" which became effective on 14. April 2019.

21.2 Is the Thai Arbitration Act based on the UNCITRAL Model Law?

The Arbitration Act is substantially based on the UNCITRAL Model Law with a few differences, such as:

The arbitrators are exempted from liability in performing their duties, except where they act intentionally or with gross negligence causing damages to any party. There are also criminal provisions where an arbitrator can be fined for up to one hundred thousand Baht and/or imprisoned for up to ten years for demanding or accepting bribes (Sec. 23 Arbitration Act).

21.3 Are there different laws applicable for national and international arbitration?

The Arbitration Act applies to both national and international arbitrations, as long as the parties agree on the application of the Thai arbitration law in the arbitration clause or in an arbitration agreement in writing.

There is one noteworthy special feature: Even though Sec. 15 of the Arbitration Act permits a contract between a government entity and a

private enterprise to include an arbitration clause to resolve any disputes, in January 2004 the Cabinet passed a resolution that any contract between the government and a private entity should not include the provision that any dispute arising from the contract should be referred to an arbitration tribunal for settlement. Where there is any problem (or a requirement by another party to include such provision in the contract), the contract should be referred to the Cabinet for approval on a case-by-case basis. The validity of this resolution was extended by another resolution passed by the Thai Cabinet in July 2009 to include all types of contracts made between the government and a private entity, whether or not they are administrative contracts. In other words, unless exempted by the Cabinet, no contracts made between the government and a private entity should provide for arbitration as the method of dispute resolution. Foreign investors are opposed to this Cabinet resolution. In this respect Thai Supreme Court Case no. 7277/2549[265] is also of interest.

21.4 Has Thailand acceded to the New York Convention?

Thailand acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York on 21 December, 1959 without reservation, and the Convention entered into force for Thailand on 20 March, 1960.

21.5 Can Parties agree on foreign arbitration institutions (i) if the parties are domiciled in Thailand, (ii) if one party is domiciled in Thailand and the other party abroad?

The Arbitration Act does not require any party domiciled in Thailand to select Thai arbitration institutions for the arbitration.

---

265 The case dealt with a dispute over an expressway concession agreement between a private consortium and the Rapid Transit Authority (ETA). The arbitral award awarded the consortium THB 6.2 billion. When enforcement of the award was sought, the Thai Attorney-General objected against the enforcement, but was overruled by the Thai Civil Court. Ultimately the Thai Supreme Court overturned the Civil Court's judgment, arguing – inter alia – that the agreement was an administrative contract and that the execution of the contract by the ETA Governor had been undertaken contrary to law.

21.6 Does the Thai arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Act generally allows the parties to agree on the specific rules to govern the arbitration, and provides the substitute provisions in case that the parties are unable to agree. However, there are some mandatory provisions that must be followed:

- The arbitration agreement must be in writing and signed by the parties (including the electronic signature, such as email).
- The arbitral tribunal must be composed of an uneven number of arbitrators.
- The arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration.
- The arbitral award must be in writing and signed by all or a majority member of the arbitral tribunal.

21.7 Does a valid arbitration clause bar access to state courts?

21.7.1 Conflicts of jurisdiction between the courts and the arbitral tribunal: Proceedings started in Thailand

If litigation proceedings are started in court in Thailand in breach of an arbitration agreement, the opposing party may request that the court strike out the case so that the parties can proceed with arbitration. The request must be made no later than the date for filing the statement of defense. If the court considers that there are no grounds for rendering the arbitration agreement void and unenforceable, the court will issue the order to strike out the case.

However, it should be noted that if one of the parties to a dispute files an action in the courts, and if the court determines that it has

jurisdiction, then sthe court will not stay the proceedings merely because an arbitral tribunal has determined that is has jurisdiction over the same dispute. If one of the parties to a court case submits a petition objecting to the court's jurisdiction, and if the court agrees that the dispute should be decided by arbitration, then the court will dismiss the case. (Supreme Court 4750 - 4751/2561)

Furthermore, concerning the jurisdiction of the arbitral tribunal, it should be noted that according to the Arbitration Act, the arbitral tribunal can rule on its own jurisdiction, including:

- The existence or validity of the arbitration agreement.
- The validity of the appointment of the arbitral tribunal.
- The issues of dispute falling within the scope of its authority.

For this purpose, an arbitration clause is considered to be a separate contract, so if the main contract is void, the arbitration clause can nevertheless survive.

The arbitral tribunal can rule on its jurisdiction as a preliminary question or in the award on the merits. However, if the arbitral tribunal rules as a preliminary question that it does have jurisdiction and one party in the arbitration denies that the arbitral tribunal has jurisdiction to determine the dispute(s), this party may apply to the court to decide the matter within 30 days of receiving the ruling on the preliminary issue.

21.7.2 Proceedings started abroad

If the proceedings started overseas in breach of an arbitration agreement, the Thai court will not grant an injunction to restrain the proceedings started abroad.

The objecting party must apply to the overseas court to strike out the proceedings on the basis that they are in breach of the

arbitration agreement. This is due to the fact that Thailand is not a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971, and foreign courts are unlikely to recognize and enforce the Thai court's order granting the injunction.

21.7.3 During Arbitration Proceedings

Regarding the arbitration proceedings, the local courts are not likely to actively intervene in arbitration proceedings. However, a majority of the arbitral tribunal (or a party with the consent of a majority) can request a court to issue a subpoena or an order for submission of any document or materials. If the court believes that this subpoena or court order could have been issued if the action was being conducted in the courts, then it will proceed with the application, applying all relevant provisions of the Civil Procedure Code.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interests either before or during the arbitral proceedings (Sec. 16 Arbitration Act). If the court believes that this provisional relief would have been available if the action was being conducted in the courts, then it will proceed as above. If the court orders provisional relief before the arbitral proceeding have started, then the application must begin the arbitration within 30 days of the date of the order (or such other period that is specified by the court), failing which the court order automatically expires.

21.8 What are the main arbitration institutions in Thailand?

The main arbitration institutions in Thailand are the "Thai Arbitration Institute of the Alternative Dispute Resolution Office" (TAI), the "Office of the Arbitration Tribunal of the Board of Trade Thailand" (OAT) and the "Thailand Arbitration Center" (THAC).

In addition to these three bodies, other organizations such as the Securities and Exchange Commission and the Department of Intellectual Property also operate industry-specific arbitration schemes. The Insurance Department of the Thai Ministry of Commerce has also its own arbitration rules and established an arbitration body. The ICC maintains an office in Bangkok.

21.9 Addresses of major arbitration institutions in Thailand?

- **Thai Arbitration Institute of the Alternative Dispute Resolution Office, Office of the Judiciary (TAI)**

  Criminal Court Building 5th – 6th Floor,
  Rachadaphisaek Road, Chatuchak, Bangkok 10900
  Tel: +66 2 541 2298/9
  Fax: +66 2 512 8432
  E-mail: tai@coj.go.th
  Website: http://www.adro.coj.go.th

- **Office of the Arbitration Tribunal of the Board of Trade of Thailand, Thai Commercial Arbitration Institute**

  150/2 Ratchabophit Road, Wat Ratchabophit,
  Phranakorn, Bangkok 10200
  Tel: +66 2 018 6888 Ext. 4450, 4670, 5400
  Fax: +66 2 226 4525
  E-mail: mailto:legal@thaichamber.org
  Website: http://www.thaichamber.org

- **Thailand Arbitration Center (THAC)**

  26th Floor Bhiraj Tower, Rd., Klong Ton Nua, Vadhana,,
  689 Sukhumvit Road, Khlong Tan, Khlong Toei, Bangkok 10110
  Tel: +66 2 018 1615
  Fax: +66 2 018 1632
  E-mail: info@thac.or.th
  Website: www.thac.or.th

21.10 Arbitration Rules of major arbitration institutions?

The Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary A.D. 2017 which took effect on 30 January, 2017.

http://www.tai-en.coj.go.th/doc/data/tai-en/tai-en_1510115486.pdf

http://www.jla.coj.go.th/doc/data/jla/jla_1499074236.pdf

The Rules of the Thailand Arbitration Center can be accessed under the following link:

https://www.thac.or.th/law_index

21.11 What are the Model Clauses of the arbitration institutions?

For the parties who wish to select The Thai Arbitration Institute ("TAI") to be their arbitration institution, Rule 5 sets out the TAI's recommended arbitration clause as follows:

"Any dispute controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary applicable at the time of submission of the dispute to arbitration and the conduct of the arbitration thereof shall be under the auspices of the Thai Arbitration Institute."

The Thailand Arbitration Center ("THAC") recommends the following model clause:

"Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Thailand Arbitration Center for the time being in force and the conduct of the arbitration thereof shall be under the administration of the Thailand Arbitration Center."

21.12 How many arbitrators are usually appointed?

If the arbitration agreement is silent as to the required number of arbitrators, only one arbitrator shall be appointed.

According to Sec. 18 of the Arbitration Act, unless otherwise agreed by the parties, the procedure for appointing the tribunal (and the procedure for appointing a chairman if the parties have agreed to an even number of arbitrators) is as follows:

- Where the tribunal consists of a sole arbitrator, and the parties are unable to agree on that arbitrator, then either party can apply to the court requesting it to appoint the arbitrator.

- Where the tribunal consists of multiple arbitrators, then each party must appoint an equal number of arbitrators, and those arbitrators jointly appoint an additional arbitrator (the chairman). If either party fails to appoint its arbitrator(s) within 30 days after notification from the other party, or if the party-appointed arbitrators are unable to agree on a chairman within 30 days from the date of their own appointment, then either party can apply to the court requesting it to appoint the arbitrator(s) or the chairman, as the case may be.

Article 14, 15, 16 of The Arbitration Rules, the Thai Arbitration Institute, Office of the Judiciary A.D. 2017 contain detailed regulations regarding the appointment of arbitrators in detail.

"In the absence of an agreement by the parties as to the number of arbitrators, a sole arbitrator shall be appointed."

Also the general rule under THAC Rules (Art. 17) provides for a sole arbitrator.

21.13 Is there a right to challenge arbitrators, and if so under which conditions?

The arbitrators can be challenged if there are circumstances that give rise to "justifiable doubts" as to the arbitrator's impartiality and independence, or the lack of qualifications agreed by the parties. (Sec. 19 Arbitration Act)

The challenge of the appointment of an arbitrator shall, within 15 days after becoming aware of the appointment of the arbitrator or after becoming aware of circumstances that rise to justifiable doubts as to arbitrator's impartiality, independence or lack of agreed-on qualifications. (Sec. 20 Arbitration Act).

21.14 Are there any restrictions as to the parties' representation in arbitration proceedings" (Royal Decree No. 3 BE 2543)?

Whereas foreign nationals may act as arbitrators (subject to compliance with immigration and work permit laws), foreign lawyers may only represent parties to an arbitration:

(i) Where the dispute is not governed by Thai law; or

(ii) Irrespective of the governing law, where there is no need to apply for enforcement of the arbitral award in Thailand.

"Arbitration Act (No.2) B.E. 2562" which became effective on 14. April 2019 addresses only the appointment of foreign arbitrators, but not the representation of parties by foreign counsel.

21.15 When and under what conditions can courts intervene in arbitrations?

The arbitrators, or any party with the approval of the majority of the tribunal, may make an application for the court intervention, when they are of the opinion that a specific procedure can only be carried out by a court

(such as summoning a witness or ordering production of a document). So long as the request is within its jurisdiction, the court shall accept the application.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interest either before or during the arbitral proceedings.

21.16 Do arbitrators have powers to grant interim or conservatory relief?

The parties may file with a competent court an application for provisional measures for the protection of the interests of the party before or during arbitration proceedings. The court may grant such relief if the court believes that this provisional relief would have been available if the action was being conducted in the courts.

Article 39 of the Arbitration Rules, the Thai Arbitration Institute, Office of the Judiciary A.D. 2017 grants the tribunal the right to order interim measures.

21.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- ### Formal requirements for arbitral awards

The award must be in writing and signed by the arbitral tribunal and state the reasons for the decision. The award cannot go beyond the extent of the arbitration agreement or the request of the parties. The date and the place of arbitration shall also be stated in the award. If the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature shall also be stated. And the copies of the award must be sent to each party. (Sec. 37 Arbitration Act).

- ### Deadlines for issuing arbitral awards

The Arbitration Act does not stipulate a time limit for delivery of the award. Institutional Rules (TAI Rules Art. 45) do have a 30 day rule. The THAC Rules provide for a 45 day deadline (THAC Rules Art. 70).

- **Other formal requirements for arbitral awards**

Apart from the aforementioned there are no other formal requirements for arbitral awards.

21.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

An arbitral award is usually not allowed to be appealed. For one of the ultimate purposes for which the arbitration system was designed is to regulate and solve the disputes fast and final. However, the Arbitration Act allows the court to set aside the arbitral awards for certain specific procedural issues.

A party can apply to the court within 90 days of receipt of the award (or after a correction, interpretation or the making of an additional award, as stated in Sec. 39 Arbitration Act) to set aside the award (Sec. 40 Arbitration Act). The grounds for the arbitral awards to be set aside are essentially identical to Article 34 of the Model Law.

The Court will set aside the arbitral award if:

(i) a party who makes the application is able to prove that:

(a) a party to the arbitration agreement lacks legal capacity under the law applicable to the party;
(b) the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in case where there is no such agreement, the law of the Kingdom of Thailand;

(c) a party who makes the application was not delivered advance notice of the appointment of the arbitral tribunal or the

hearing of the arbitral tribunal, or was otherwise unable to present his or her case;

(d) the award deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration could be separated from those not so submitted, only the part of the award which contains decisions on matters not submitted to arbitration may be set aside by the Court; or

(e) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, in the case where there is no such agreement, was in accordance with Arbitration Act;

(ii) if it appears to the Court that:

(a) the award deals with the dispute which shall not be settled by arbitration by the law; or

(b) the recognition or enforcement of the award is contrary to public order or good morals (Sec. 40 Arbitration Act).

21.19 What procedures exist for enforcement of foreign and domestic awards?[266]

Domestic arbitration awards are expressly recognized as binding on the parties, and enforceable in the domestic courts on application by one of the parties. Regarding foreign arbitral awards, according to Sec. 41 of the Arbitration Act, foreign arbitral awards will be recognized and enforced if they are made in accordance with a treaty or international agreement where Thailand is a member and to the extent Thailand agrees to be bound.

266 Respondek, Enforcement of Foreign Arbitral Awards and Foreign Judgments in Thailand; Singapore Law Gazette, November 2015, p. 30 ff (https://www.rf-arbitration.com/upload/document/rechtsanwalt-thailand-enforcement-of-foreign-arbitral-awards.pdf

While Thailand is a party to both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention, no reservations were entered on accession) and the Geneva Protocol on Arbitration Clauses 1923 (Geneva Protocol), foreign arbitration awards given in countries that are signatories to the New York Convention or the Geneva Protocol are recognized and enforceable in Thailand. The procedure for enforcing a foreign award is the same as the procedure for enforcing a domestic award (Sec. 41 Arbitration Act). The grounds for denying enforcement for both domestic and foreign awards are also the same and are essentially like those set out in Art. V of the New York Convention.

The party seeking enforcement, according to Sec. 42 Arbitration Act, must file a petition within three years from the date the award first became enforceable. The party must submit the following documents:

- An original or certified copy of the arbitral award;
- An original or certified copy of the arbitration agreement;
- A certified Thai translation of the award and the arbitration agreement. (The translations of the arbitral award and the arbitration agreement in Thai language made by a translator who has sworn under oath before the Court or official or the person having power to accept the oath, or who has made an oath to, or represented by, the official authorized to certify the translation or by a diplomatic delegate or the Thai consul in the country in which the award or the arbitration agreement was made (Sec. 42 (3) Arbitration Act).

The court can refuse the enforcement of an arbitral award according to Sec. 43, Arbitration Act, if the party against which the enforcement is sought can prove any of the following:

- Any of the grounds for the award to be set aside (see the grounds for appeal);
- That the arbitral award has not yet become binding;
- That the arbitral has been set aside or suspended by a competent court, or under the law of the country where it was issued.

An order or judgment of a Court under the Arbitration Act concerning the recognition and enforcement shall not be appealed, except where:

(1) The recognition or judgment of the award is contrary to public order or good morals;
(2) The order or judgment is contrary to the provisions of law relating to public order or morals;
(3) The order or judgment is not in accordance with the arbitral award;
(4) The judge who has tried the case gave a dissenting opinion in the judgment; or
(5) It is an order on provisional measure under Sec. 16 Arbitration Act.

An appeal against an order or judgment under the Arbitration Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be. (Sec. 45 Arbitration Act)

21.20 Can a successful party in the arbitration recover its costs?

The tribunal's award may include directions with respect to costs, including the tribunal's own charges. The fees and expenses of the arbitral proceedings, and the arbitrators' compensation will be paid according to the arbitral award. However, under the Arbitration Act, a party's legal fees and expenses are not recoverable unless otherwise agreed.

21.21 Are there any statistics available on arbitration proceedings in the country?

No.

21.22 Are there any recent noteworthy developments regarding arbitration in Thailand (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

Foreign arbitrators faced all kinds of regulatory immigration hurdles in arbitration proceedings governed by Thai law and conducted in Thailand. A

new amendment to the Thai Arbitration Act B.E. 2545 (2002) came into force on 14. April 2019 and aims to make appointments and the required official approvals for foreign arbitrators easier.

It remains to be seen how the amendments to the Act will finally be implemented. But the amendments are certainly a positive signal to make Thailand a more attractive place for foreign arbitrators.

In addition, another recent regulatory change concerns the introduction of a special "Smart Visa" program. This visa is a special type of visa designed to attract high skill personnel and investors working or investing in certain target industries as well as highly skill professionals, including foreign arbitrators.

Name of Author:	**DR. ANDREAS RESPONDEK** **MS. SOMRUETAI WISALAPORN** **MS. SAVITREE KUWANGKHADILOK**
Name of Law Firm:	**Respondek & Fan Ltd**
Brief Profile:	**RESPONDEK & FAN** is "breathing" dispute resolution. The firm's founder and Managing Director started his career by challenging the LSBA in 1983 in the Louisiana Supreme Court for not admitting foreign lawyers to the bar exam and won twice. Dr. Andreas Respondek established his own firm in 1998 with offices in Singapore and Bangkok. He is a Chartered Arbitrator (FCIArb), American Attorney at Law and a German Rechtsanwalt. The firm is regularly involved in handling complex commercial, multi-faceted international disputes in multiple jurisdictions across the region under the ICC, HKIAC, SIAC, Swiss Chamber's, TAI and other rules and is also involved in ad hoc arbitrations. Dr. Respondek is regularly appointed as Chairman, Sole Arbitrator, Co-Arbitrator and Counsel and has helped international clients win or resolve a wide variety of disputes before arbitral tribunals around the world.
Telephone No.:	+66 2 635 5498
Fax No.:	+66 2 635 5499
Email:	Andreas.Respondek@rf-arbitration.com
Website:	www.rf-arbitration.com; www.rflegal.com

22. VIETNAM

BY: MR. CHRISTIAN A. BRENDEL
MR. TIM HOLTORF

22.1 Which laws apply to arbitration in Vietnam?

On 17th June 2010, the National Assembly passed the Law on Commercial Arbitration[267] which has come into effect as of 01st January 2011. This law replaces the Commercial Arbitration Ordinance and provides the legal framework for arbitration in Vietnam. In comparison with the Commercial Arbitration Ordinance the Law on Commercial Arbitration provides for a slightly broader scope, especially regarding the involvement of foreigners and foreign arbitration institutions in Vietnam.

Decree 63, issued on 28th July 2011, provides further rules and regulations concerning governmental management and establishment and operation of Arbitration Centers in Vietnam.[268]

22.2 Is the Vietnamese arbitration law based on the UNCITRAL Model Law?

Yes. The Law on Commercial Arbitration is generally based on the UNCITRAL Model Law.

22.3 Are there different laws applicable for domestic and international arbitration?

The Law on Commercial Arbitration applies to both domestic and foreign arbitration, whereby foreign arbitration means arbitration institutions

267 Law No. 54-2010-QH12, Law on Commercial Arbitration.

268 Decree 63-2011-ND-CP, Decree providing detailed regulations and guidelines for implementation of the Law on Commercial Arbitration.

established in accordance with foreign law executing arbitration in Vietnam or overseas.[269]

22.4 Has Vietnam acceded to the New York Convention?

Vietnam acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") in 1995, meaning that Vietnamese courts should respect foreign arbitral awards rendered by a recognized international arbitration institution without a review of the case's merit. This accession, however, was not made without reservations. Vietnam will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state. With regard to awards made in the territory of non-contracting states, Vietnam will apply the Convention only to the extent to which those states grant reciprocal treatment. Moreover, Vietnam will apply the Convention only to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under Vietnamese law. And, last but not least, Vietnam declared that the interpretation of the Convention before Vietnamese courts or competent authorities should be made in accordance with the constitution and the laws of Vietnam.

22.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

In general, the disputing parties may agree on foreign arbitration institutions irrespective of where they are domiciled.

22.6 Does the Vietnamese arbitration law contain substantive requirements for the arbitration procedures to be followed?

A commercial dispute shall be settled by arbitration if the parties to the dispute have agreed in writing (via a clause in a contract or a separate

269 Cl. 11 Art. 3 Law on Commercial Arbitration.

agreement) prior to the dispute, or after it arises, that such dispute would be settled by recourse to arbitration. Emails, telex and fax meet the formal requirement if the intention of the parties to conclude an arbitration agreement is clearly shown.[270] With regard to disputes between Vietnamese parties, Vietnamese law applies, whereas disputes with a foreign element can be solved by recourse to the law as chosen by the parties.[271] Such a dispute does not only comprise disputes with a foreign person or entity but also disputes where the grounds for the matter in dispute arise abroad or where assets involved are located abroad.[272]

22.7 Does a valid arbitration clause bar access to state courts?

In general, yes.

22.8 What are the main arbitration institutions in Vietnam?

The most popular arbitration institution in Vietnam is (still) the Vietnam International Arbitration Center (VIAC) with its head office in Hanoi and a branch in Ho Chi Minh City.[273] In addition to the VIAC there are a number of arbitration institutions such as the Pacific International Arbitration Center (PIAC) in Ho Chi Minh City and the Asian International Commercial Arbitration Center (ACIAC) in Hanoi, Ho Chi Minh City and Vinh City.

22.9 Addresses of major arbitration institutions in Vietnam?

- **Vietnam International Arbitration Center (VIAC)**

  Head office:
  9 Dao Duy Anh Street, Dong Da District, Hanoi, Vietnam
  Tel: +84 24 3574 4001
  Fax: +84 24 3574 3001

270 Art. 16 Law on Commercial Arbitration.
271 Art. 14 Law on Commercial Arbitration.
272 Cl. 2 Art. 663 Civil Code (Law No. 91-2005-QH13).
273 VIAC is closely linked to the Vietnam Chamber of Commerce

Email: info@viac.org.vn
Website: http://www.viac.vn

Branch:
171 Vo Thi Sau Street, District 3, Ho Chi Minh City, Vietnam
Tel: +84 24 3574 4001
Fax: +84 24 3574 3001

- **Pacific International Arbitration Center (PIAC)**

39 Street No. 5, Binh Thoi Area, Ward 8, District 11, Ho Chi Minh City, Vietnam
Tel: +84 28 3503 0761
Fax: +84 28 3962 6500
Email: piac.vnn@gmail.com
Website: http://www.piac.vn

- **Asian International Commercial Arbitration Center (ACIAC)**

Head office:
3th Floor, 37 Le Hong Phong Street, Ba Dinh District, Hanoi, Vietnam
Tel: +84 24 3734 4677
Fax: +84 24 3734 3327
Email: tttmachau@vnn.vn / aciac1994@gmail.com
Website: http://www.aciac.com

Branches:
89 Nguyen Du, District 1, Ho Chi Minh City, Vietnam
Tel: +84 28 3823 4114
Fax: +84 28 3823 5325

68 Ha Huy Tap Street, Vinh City, Nghe An Province, Vietnam
Tel: +84 38 866 889 8

22.10 Arbitration Rules of major arbitration institutions?

- **VIAC**'s Arbitration Rules:

http://eng.viac.vn/quy-tac-to-tung-trong-tai-c122.html

- **PIAC**'s Arbitration Rules: http://en.piac.vn/Default.aspx?tabid=62

- **ACIAC**'s Arbitration Rules: http://aciac.com/?page=quy-tac-to-tung

22.11 What is/are the Model Clause/s of the arbitration institutions?

- **VIAC** recommends:

  "*Any dispute arising out of or in relation with this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre (VIAC) in accordance with its Rules of Arbitration.*"

  or

  "*Any dispute arising out of or in relation with this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry (VIAC) in accordance with its Rules of Arbitration.*"

  Parties may add:

  (a) "*The number of arbitrators shall be* [*one* or *three*]."
  (b) "*The place of arbitration shall be* [city and/or country]."
  (c) "*The governing law of the contract* [*is/shall be*] *the substantive law of* […]."
  (d) "*The language to be used in the arbitral proceedings shall be* […]."

- **PIAC** recommends:

"*Anny dispute arising out of or in relation with this contract shall be finally resolved by the Pacific International Arbitration Centre (PIAC) in accordance with its Rules of Arbitration.*"

Parties may add:

(a) "*The number arbitrators shall be* [*one* or *three*]."
(b) "*Place of arbitration shall be* [city and/or country]."
(c) "*The governing law of the contract* [*is/shall be*] *the substantive law of* […]."
(d) "*The language to be used in the arbitral proceedings shall be* […]."

- **ACIAC** recommends:

"All disputes arising out of or in relation shall be finally settled by the* Asean International Commercial Arbitration Center (ACIAC).*"

22.12 How many arbitrators are usually appointed?

In general, an arbitration tribunal shall consist of three arbitrators. However, the parties may agree on one or more.[274] According to our experience, three arbitrators seem be to the preferred number.

22.13 Is there a right to challenge arbitrators, and if so under which conditions?

Yes. An arbitrator shall reject the arbitration process, and the disputing parties may request the replacement of an arbitrator if:

(a) the arbitrator is a relative or a representative of one of the parties; and/or
(b) the arbitrator has an interest which is related to the dispute; and/or

274 Art. 39 Law on Commercial Arbitration.

(c) there are clear reasons showing that the arbitrator is not impartial or objective; and/or

(d) the arbitrator was a mediator or (legal) representative for either of the parties in this case, unless both parties provide written consent.[275]

22.14 Are there any restrictions as to parties' representation in arbitration proceedings?

The law entitles the disputing parties to authorize a representative and a person to "protect their legal rights and interests"[276] without stating explicit restrictions.

22.15 When and under what conditions can courts intervene in arbitrations?

As a general rule, courts have no jurisdiction over a dispute legally agreed by the parties to be settled by arbitration.

However, there are some exemptions:

- **Appointment of "ad hoc" arbitrator for the respondent**

If the respondent fails to appoint an arbitrator within 30 days as of its receipt of the claimant's petition and if the parties don't have another agreement on the appointment of an arbitrator, the claimant may request the competent court to appoint an arbitrator for the respondent.[277]

In the event of more than one respondent, if the respondents fail to reach an agreement on the appointment of their arbitrator within 30 days as of its receipt of the claimant's petition and if the parties don't have another agreement on the appointment of an arbitrator, either party or the parties

275 Cl. 1 Art. 42 Law on Commercial Arbitration.
276 Cl. 2 Art. 55 Law on Commercial Arbitration.
277 Cl. 1 Art. 41 Law on Commercial Arbitration.

may request the competent court to appoint the arbitrator for the respondents.[278]

- **Appointment of "ad hoc" arbitrator as chairman**

  If the appointed arbitrators fail to appoint an "ad hoc" arbitrator as a chairman within 15 days from their appointment, and unless the parties do not agree otherwise, then the parties may request the competent court to appoint the chairman.[279]

- **Appointment of "ad hoc" sole arbitrator**

  If the parties fail to appoint an ad hoc sole arbitrator within 30 days from the respondent's receipt of the petition, and unless the parties do not agree to request the arbitration institution to appoint the ad hoc sole arbitrator, either party may request the competent court to appoint the ad hoc sole arbitrator.[280]

- **Replacement of "ad hoc" arbitrator**

  If the replacement of an arbitrator is not agreed upon by the remaining arbitrators, or if an arbitrator or the sole arbitrator refuses to handle the settlement of the dispute, the Chief Judge of the competent court shall, within 15 days from the receipt of the request filed by one of the arbitrators or by one of the disputing parties, assign a judge to decide the replacement of such arbitrator.[281]

  In case where an arbitrator cannot continue participating in the arbitration proceedings due to a force majeure event or other objective reasons or is replaced, the selection and appointment of the replaced arbitrator shall be conducted along similar procedures.[282]

- **Jurisdiction and arbitration agreement**

278 Cl. 2 Art. 41 Law on Commercial Arbitration.
279 Cl. 3 Art. 41 Law on Commercial Arbitration.
280 Cl. 4 Art. 41 Law on Commercial Arbitration.
281 Cl. 4 Art. 42 Law on Commercial Arbitration.
282 Cl. 6 Art. 42 Law on Commercial Arbitration.

Any party disagreeing with the arbitration tribunal's decision on the validity and effectiveness of the relevant arbitration agreement or on the tribunal's jurisdiction may, within 5 working days from its receipt of the decision, file a complaint with the competent court to request the court's review of such decision.[283]

- **Collection of evidence**

If the arbitration tribunal or the parties cannot collect evidence by themselves after exhausting all means, a petition may be made to the competent court to request assistance in collecting the evidence.[284]

- **Summoning witness**

If a witness who has been orderly summoned by the arbitration tribunal fails to show up at the arbitration hearing without a good cause and the absence obstructs the settlement of the dispute, the arbitration tribunal may request the competent court to issue a decision to summon the witness to the hearing.[285]

- **Interim/conservatory relief**

The disputing parties may request a court to grant interim/conservatory relief during arbitration proceedings if a party's rights and interests have been infringed or there is a direct risk of infringement.
Within 3 working days after interim relief/conservatory relief is applied for, the chief judge of the competent court shall assign a judge to hear and resolve the application, whereby such decision shall be made within 3 working days. In the same way, applications for amendment, supplement or removal are handled.[286]

- **Setting aside**

283 Cl. 1 Art. 44 Law on Commercial Arbitration.
284 Cl. 5 Art. 46 Law on Commercial Arbitration.
285 Cl. 2 Art. 47 Law on Commercial Arbitration.
286 Art. 53 Law on Commercial Arbitration.

Any party disagreeing with the arbitral award has the right to request a court for the arbitral award to be set aside in certain cases provided for by law.[287]

22.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes. The arbitration tribunal may grant interim/conservatory relief by way of:

(a) Prohibition of changing the status quo of assets in dispute;
(b) Prohibition or the order of certain actions by a disputing party to prevent disadvantage to the arbitration proceedings;
(c) Attachment of assets in dispute;
(d) Preservation, storage, sale or disposal of assets of one or all parties;
(e) Interim payments between the parties; and
(f) Prohibition of transferring rights attached to the assets in dispute.[288]

22.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

• Formal requirements for arbitral awards

The formal requirements for an arbitral award are as follows:

(a) Date and location of issuance of the award;
(b) Names and addresses of the claimant and the respondent;
(c) Full names and addresses of the arbitrator(s);
(d) Brief abstract of the statement of claim and matters in dispute;
(e) Grounds for the issuance of the award, unless the parties agree otherwise;
(f) Result of the dispute resolution;

287 Art. 68 Law on Commercial Arbitration.
288 Cl. 2 Art. 49 Law on Commercial Arbitration.

(g) Time-limit for enforcement;
(h) Allocation of arbitration fees and other relevant fees; and
(i) Signatures of the arbitrator(s).[289]

- **Deadlines for issuing arbitral awards**

The arbitral award shall immediately be issued in the session but not later than 30 days from the end of the final session.[290]

- **Other formal requirements for arbitral awards**

An ad hoc arbitral award may only be enforced after such has been duly registered with the competent court, whereby the registration or non-registration shall not affect the arbitral award's content or validity.[291]

22.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

Any party disagreeing with the arbitral award has the right to apply for the arbitral award to be set aside, i.e. to be rescinded. Competent authority is the provincial court in the place where the domestic arbitral award was issued. The court will establish a trial council consisting of three judges. The time limit for such application is 30 days from the receipt of the arbitral award. Article 68 of the Law on Commercial Arbitration lists the grounds for which an arbitral award can be set aside:

(a) No or an invalid arbitration agreement;
(b) The arbitration tribunal or the arbitration proceedings were inconsistent with the arbitration agreement or the provisions of the Law;
(c) The dispute or parts thereof was/were out of the jurisdiction of the arbitration tribunal;

289 Cl. 1 Art. 61 Law on Commercial Arbitration.
290 Cl. 3 Art. 61 Law on Commercial Arbitration.
291 Cl. 1 Art. 62 Law on Commercial Arbitration.

(d) During the proceedings an arbitrator breached his obligations (bribery, breach of impartiality and objectivity etc.);
(e) The arbitral award is contrary to the interest of the Socialist Republic of Vietnam.

22.19 What procedures exist for enforcement of foreign and domestic awards?

22.19.1 Recognition and Enforcement of foreign arbitral awards in Vietnam

For the recognition and enforcement of foreign arbitral awards in Vietnam the Civil Procedure Code will apply[292], if no international treaty does.

In order to enforce a foreign arbitral award in Vietnam, such must be recognized and approved by the courts of Vietnam. Therefore, a petition must be filed by the person or legal entity seeking enforcement resp. the representative.

- **Competent authority and formal requirements[293]**

Petitions have to be filed within three months from the day the foreign arbitral award became legally effective with the competent Vietnamese court or the Ministry of Justice, if an international treaty to which Vietnam is a member provides for, and shall contain:

(a) Name and address of the person or organization seeking enforcement;
(b) Name and address of the person or organization against whom/which enforcement is sought or the location and specification of the assets in Vietnam which are related to the enforcement;
(c) Brief outline of the case;
(d) The relevant arbitration agreement;

292 Law No. 92-2015-QH13.
293 Art. 451 - 453 Civil Procedure Code.

(e) The arbitral award.

Further documents as specified in the international treaty on the basis of which enforcement is sought (if applicable).

- **Competent court**[294]

If the petition was not filed with the court but with the Ministry of Justice, the latter will forward the file to the competent provincial court (People's Court of provinces or cities under central authorization) within five working days from the receipt of a valid petition.

The place of jurisdiction is either the legal residence or working place of the person against whom enforcement is sought or, in case of an organization the corporate domicile or the locality of the property concerned by the award.

Within five working days the relevant court has to check the file and notify the person or entity against whom/which enforcement is sought as well as the procuracy.
Within two months, provided that no further clarification is required, the court will decide on the commencement of a court meeting and within 20 days after such decision, the court shall open the meeting.

- **Examination**[295]

The scope of the courtly examination comprises the verification of the arbitral award in regard to Vietnamese laws and applicable international treaties.

Arbitral awards shall not be recognized and enforced, if
(a) one of the parties was legally incapable when signing the arbitration agreement;

294 Art. 454, Cl. 1 (b) Art. 37, Cl. 5 Art. 31, Cl. 2 (e) Art. 39; Art. 455 - Art. 457 Civil Procedure Code.
295 Art. 459 Civil Procedure Code.

(b) the arbitration agreement is invalid;
(c) the person or entity against whom/which enforcement is sought was not granted the right to be sufficiently heard during the arbitration proceedings;
(d) the award concerns a subject or parts thereof that was/were not covered by the arbitration agreement;
(e) the foreign arbitration panel or procedure was inconsistent with the arbitration agreement or the applicable law;
(f) the arbitral award is not yet finally binding;
(g) the arbitral award has been revoked or suspended;
(h) the resolved dispute shall not be subject to arbitral proceedings under Vietnamese laws;
(i) the recognition and enforcement is contrary to the basic principles of the laws of Vietnam.

22.19.2 Enforcement of domestic awards

Domestic arbitral awards getting enforced under the Law on Commercial Arbitration, the Civil Procedure Code and the Law on Enforcement of Civil Judgments. The procedure shall be briefly outlined as follows:

If the award debtor neither voluntarily implements the award within the enforcement term set out in the award nor files with the court to request that the award be set aside within 30 days from the receipt of the award, the award creditor may request the enforcement of the award.[296]

22.20 Can a successful party in the arbitration recover its costs?

Yes. Unless otherwise agreed by the disputing parties, stated by procedural rules or allocated by the arbitration tribunal, the losing party shall bear the costs which comprise:

(a) Remuneration, travelling and other expenses of the arbitrator/s;
(b) Costs for additional assistance (expert etc.);

296 Cl. 1 Art. 66 Law on Commercial Arbitration.

(c) Administrative fees;
(d) Costs for ad hoc arbitration;
(e) Further costs for necessary services.[297]

22.21 Are there any statistics available on arbitration proceedings in the Vietnam?

The **VIAC** constantly publishes statistics: http://eng.viac.vn/statistics-c119.html

22.22 Are there any recent noteworthy developments regarding arbitration in Vietnam (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

The Ministry of Justice of Vietnam plans, within the period from 2018 to 2023, to improve the quality of arbitration and to intensify promotion of arbitration as an alternative to conventional court proceedings. Measures to be implemented shall comprise the enhancement of the capacity of arbitration institutions and its arbitrators.

297 Art. 34 Law on Commercial Arbitration.

Name of Author:	**MR. CHRISTIAN A. BRENDEL** **MR. TIM HOLTORF**
Name of Law Firm:	**BRENDEL & ASSOCIATES LAW CO., LTD.**
Brief Profile:	Brendel & Associates is a wholly German owned law firm with offices in Ho Chi Minh City (Head Office), HaNoi (Branch) and DaNang (Branch). The focus of our legal service provision is Vietnamese Corporate, Economic and Labor Law as well as related tax advice. Additional advisory services concerning VAS based accounting issues complete the service package and thus clients can receive experienced and comprehensive support from early market entry to project implementation stage. The majority of our clients stems from Europe and the South East Asian Region and engages in various business sectors such as Logistics, Electronics, Garments, Banking, Finance, Renewable Energy, Heavy Duty Industry etc. Brendel & Associates is devoted to provide custom-tailored services and can thus count on a large number of long-term client-relationships which have been developed starting from 2004 and are carefully maintained. We take pride in assisting our clients in realizing growth and stability in a developing and challenging market by providing reliable as well as practically sensible advice. Our team currently consists of two German lawyers RA Christian A. Brendel and RA Tim Holtorf, and 14 Vietnamese professionals (lawyers, accountants).
Telephone No.:	+84 28 39112008
Fax No.:	+84 28 39112010
Email:	info@brendel-associates.com
Website:	http://www.brendel-associates.com/

BIBLIOGRAPHY

- **Arbitration in Asia, 2nd Edition**
  Michael J. Moser (Editor), Loose Leaf, 2008

- **Arbitration in Asia at full gallop**
  Justin D'Agostino, February 2014, Kluwer Arbitration Blog,
  http://kluwerarbitrationblog.com/blog/2014/02/10/arbitration-in-asia-at-full-gallop

- **Arbitration in Asia: An overview of the CIETAC, HKIAC, SIAC and UNCITRAL Arbitration Rules**
  Ashley M. Howlet, December 2012
  http://www.lexology.com/library/detail.aspx?g=f5d02a0e-3a8b-4b34-bb30-bc7aff0d2d1d

- **Arbitration in Asia: The next generation?**
  Asian Legal Business, July 2014
  http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation

- **Asia Arbitration Handbook**
  Edited by Michael J. Moser and John Choong, 2011 Oxford University Press

- **The Asia Leading Arbitrators' Guide to International Arbitration**
  Michael Pryles and Michael Moser, Juris Publishing, 2007

- **Dispute Resolution in Asia, 3rd Edition**
  Michael Pryles, Kluwer Law International, 2006

- **The DLA Piper Guide to Arbitration in Asia**
  March 2007, 262 pages
  https://files.dlapiper.com/files/Uploads/Documents/1451280_2_HKGROUPS(Guide%20to%20Arbitration%20in%20Asia).PDF

- **Guide to Dispute Resolution in Asia 2010/2011, Herbert Smith Freehills**
  http://www.herbertsmithfreehills.com/-/media/HS/Insights/Guides/PDFs/Asia%20guides/Short%20versions/Guide%20to%20dispute%20resolution%20in%20Asia%2020102011%20final%20Short.PDF

- **International Commercial Arbitration in Asia**
  Philip J. McConnuaghay and Thomas B. Ginsburg, 2nd Edition, 2006

- **International Commercial Arbitration in Asia, 3rd Edition**
  Tom Ginsburg, Shahla F. Ali, 2013

- **International Commercial Arbitration: An Asia-Pacific Perspective**
  Simon Greenberg, Christopher Kee, J. Romesh Weeramanatry, Cambrigde University Press, Melbourne

- **International Commercial Arbitration in Asia and the Choice of Law Determination**
  Michael J. Moser, K.S. Harisankar, JOI 2013, 223
  http://www.academia.edu/5794004/International_Commercial_Arbitration_in_Asia_and_the_Choice_of_Law_Determination

- **International Commercial Arbitration: An Asia-Pacific Perspective**
  Simon Greenberg, Christopher Kee, J. Romesh Weeramanatry, Cambrigde University Press, Melbourne 2011

- **International Commercial Arbitration in Asia-Pacific: A comparison of the Australian and Singapore Systems,**
  Gordon Smith, Andrew Cook, 2011
  http://www.kennedyslaw.com/files/Uploads/Documents/IntArb_February2011.pdf

- **International Arbitration in Asia on the Rise: Cause & Effect**
  Chiann Bao, The Arbitration Brief 4, No. 1 (2014): 31 - 51
  http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1042&context=ab

- **International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared**
  Asian International Arbitration Journal, Vol. 10, No.2, 2014

- **Resolving Disputes in the Asia-Pacific Region**
  Shahla F. Ali, Routledge 2012

RESPONDEK & FAN

RECHTSANWÄLTE • ATTORNEYS AT LAW

SINGAPORE

Respondek & Fan Pte Ltd
1 North Bridge Road
#16-03 High Street Centre
Singapore 179094
Tel: +65 6324 0060
Fax: +65 6324 0223

BANGKOK

Respondek & Fan Ltd
323 Silom Road, United Center, 39th Fl., Suite 3904 B
Bangkok 10500 / Thailand
Tel: +66 2 635 5498
Fax: +66 2 635 5499

www.rf-arbitration.com